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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35021

**PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR A DECLARATORY ORDER**

**REPLY OF AMEREN ENERGY FUELS
AND SERVICES COMPANY**

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May 8, 2007

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SURFACE TRANSPORTATION BOARD**

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On April 26, 2007, Union Pacific Railroad Company ("UP") filed an Emergency Petition for Declaratory Order ("*Petition*") asking the Surface Transportation Board ("STB" or "Board") to issue an order declaring that the Board's decision in STB Ex Parte No. 661, *Rail Fuel Surcharges*, (Served Jan. 26, 2007) ("*FSC Decision*") applies to traffic presently moving under Option 2 of UP's Circular 111. UP alleges that failure of the Board to issue such an order would prevent UP from recovering its incremental fuel costs using a sound fuel surcharge program. *Petition*, at 8 and 9.

On May 4, 2007, Ameren Energy Fuels and Services Company ("AFS") filed a letter with the Board seeking clarification on when the appropriate reply date would be for UP's *Petition* since UP requested expedited handling; replies are normally due 20 days after a petition is filed. In a late-released decision on Friday, May 4, 2007, the Board ruled that all replies to UP's *Petition* would be due on Tuesday, May 8, 2007. AFS hereby files its Reply to UP's *Petition*. AFS is concurrently filing a Motion for a Protective Order.

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I. INTRODUCTION

Ameren Corporation, the parent company of AFS, is a public utility holding company which provides electricity to approximately 2.3 million customers in Missouri and Illinois. Ameren Corporation, through its various operating subsidiaries (collectively "Ameren") has 11 coal-fired plants, the majority of which rely on rail service as the primary mode of transportation for coal. Ameren is the largest shipper in the country of Powder River Basin ("PRB") coal, shipping over 35 million tons annually from the PRB. Ameren also purchases coal from Illinois and other sources which combine to make Ameren the fifth largest purchaser of coal. The transportation costs are more than 60% of Ameren's total fuel costs for its coal-fired generation.

As the Board is aware, Ameren has aggressively sought to establish competitive transportation alternatives at all of its coal-fired plants. In order to achieve this competitive goal, Ameren has built-out or purchased rail lines and invested hundreds of millions of dollars in rail and related infrastructure to expand competitive railroad options at its plants. Ameren has been a leader in investments in shipper build-outs which have been touted by the Board as the best way to achieve greater competition.¹ Ameren's coal-fired, rail-served plants with competitive status that has been achieved by Ameren are as follows.

¹ *Hearing on the Status of Railroad Economic Regulation, Before the House Subcommittee on Railroads, Pipelines, and Hazardous Materials*, 108th Cong. 13 (2004) (statement of Roger Nober, Chairman, Surface Transportation Board).

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Plant Name/Location	Railroad Access	Current Transportation Agreement
Coffeen Power Plant, Coffeen, IL	NS, UP, BNSF ²	UP 111-3221-101
Duck Creek Plant, Canton, IL	UP via KJRY, BNSF ³	Separate agreements with UP and KJRY
E.D Edwards Plant, Bartonville, IL	UP, BNSF via TPW	UP 111-3236-102
Joppa Generating Station, Joppa, IL ⁴	UP, BNSF, CN ⁵	UP 111-3230-106
Labadie Plant, Franklin County, MO	UP, BNSF ⁶	UP 111-4170-108
Meredosia Plant, Morgan County, IL	UP, BNSF via barge	UP 111-3236-102
Meramec Plant, St. Louis County, MO	UP and BNSF via barge	UP 111-4150-107
Newton Power Plant, Jasper County, IL	UP, BNSF via CN, INRR ⁷	UP 111-3236-102
Rush Island Plant, Jefferson County, IL	BNSF, UP via barge	BNSF 90068-002
Sioux Plant, St. Charles County, MO	BNSF, UP via barge	BNSF 90068-001

² Ameren obtained STB authority to construct a build-out at Coffeen which would provide Ameren direct access to BNSF and UP. STB Finance Docket No. 34435, *Ameren Energy Generating Co —Construction and Operation Exemption—In Coffeen and Walshville, IL*, (Served Feb. 17, 2006)

³ Ameren has opposed a proposed lease of the BNSF line to KJRY which, if authorized, would diminish the competition created by Ameren's build-out at the Duck Creek Plant. STB Finance Docket No. 34974, *Keokuk Junction Railway Co d/b/a Peoria & Western Railway—Lease and Operation Exemption—BNSF Railway Company*

⁴ Ameren owns 80% of Electric Energy, Inc., an independent power producer in Joppa, Illinois which owns the Joppa Power Plant

⁵ A build-out to BNSF was authorized in ICC Finance Docket No. 31656, *Joppa And Eastern Railroad Co —Construction Exemption—Joppa, IL*, (Served Dec 17, 1990)

⁶ In order to preserve the competitive options at Labadie, Ameren was required to obtain a clarification from the Board that Labadie was a "2-to-1" shipper entitled to service from an additional rail carrier. See STB Finance Docket No. 32760, *Union Pacific Corp et al—Control and Merger—Southern Pacific Rail Corp et al*, (Served May 31, 2000).

⁷ Ameren completed a private line build-out to the Newton plant in 2000

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In addition to the significant investments that Ameren has made to increase competitive options at its coal-fired plants, Ameren has made substantial investments in unloading facilities, storage and side tracks, turn-outs, wye connections and other rail-related infrastructure in order to improve efficiency and rail service. Most recently, Ameren completed a new track turn-out and a third staging track at Labadie [

] Furthermore, Ameren owns or leases 7,300 rail cars which operate in unit trains of approximately 110-135 cars for coal-service to Ameren's plants. Ameren owns or leases the entire fleet of rail cars used to deliver coal to Ameren's plants and none of the railroads regularly provide rail cars for Ameren's coal movements.

The above information is provided to assist the Board in the discussion below and to provide a better understanding for the Board of the actions that Ameren has taken to improve its reliability for rail service and increase competitive rail options. UP's *Petition* alleges that UP "is in a perilous position" and thus UP requires guidance from the Board. *Petition*, at 3. Yet, UP has created this alleged "perilous situation" since UP has known for some time that the Board has serious doubts as to whether UP's Option 2 agreements memorialize common carrier service. The Board does not have the requisite authority to grant the first part of the relief sought by UP—a broad declaration that every Option 2 arrangement is a common carrier tariff. Not only does the Board not have the ability to make such a broad and unsubstantiated determination.

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Ameren will show that UP and Ameren entered into several private contracts in 2004 for the movement of coal to Ameren's using the Option 2 certificates that reference Circular 111.⁸

Even more troubling than UP's request for a blanket decision declaring UP's transportation agreements as common carrier tariffs, is the fact that UP's *Petition* also impliedly seeks to have the Board declare that UP's new mileage-based fuel surcharge is reasonable. UP asserts that the failure of the Board to issue the requested order would prevent UP from recovering its incremental fuel costs using a sound fuel surcharge program. *Petition*, at 8 and 9. Thus, UP is attempting to bootstrap into its *Petition* that its proposed mileage-based fuel surcharge program is sound. For the reasons set forth below, neither requested declaration can be made by the Board.

II. UP'S PETITION FOR DECLARATORY ORDER SHOULD BE DENIED

As explained in this Section II, Ameren believes that the Board must deny UP's *Petition*. First, Ameren contends that the Board cannot grant the relief sought by UP without exceeding its legal authority. Second, Ameren submits that UP's *Petition* improperly interferes with the Board's pending rulemaking proceeding in *Ex Parte No. 669*. Third, Ameren contends that the *Petition* must be denied as to its own traffic because the evidence credibly shows that Ameren entered into several private contracts with UP for transportation service.

⁸ The UP *Petition* also seems to attempt to circumvent the issues raised in Board's Notice of Proposed Rulemaking in STB Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, 2007 STB Lexis 138 (Served March 29, 2007) ("*Ex Parte No. 669*").

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A. The STB Cannot Issue a Global Declaration regarding the Applicability of its *FSC Decision* to Option 2 Arrangements without Exceeding its Legal Authority.

The Board cannot lawfully issue a declaratory ruling on the applicability of its *FSC Decision* to Option 2 arrangements because in so doing it would necessarily exceed its legal authority. In order to declare that the *FSC Decision* applies to *any* Option 2 arrangement, the Board must first establish its jurisdiction over that arrangement, i.e. whether or not it constitutes a private contract under 49 U.S.C. § 10709. However, under well-settled precedent, the STB lacks authority to decide questions of contract existence. Courts, rather than the agency are empowered to determine whether a rail carrier and a shipper have entered into a private contract. By suggesting that the *KCPL* decision⁹ constitutes the Board's decision that *all* Option 2 arrangements are subject to its jurisdiction, UP glosses over the implications of this threshold jurisdictional issue. The mere fact that UP and a single customer agree that their individual relationship is non-contractual does not establish (1) that *all other* Option 2 arrangements are not contracts and (2) that the Board therefore has global jurisdiction to apply its *FSC Decision*. On the contrary, the threshold question of contract existence must be resolved by the courts on case-by-case basis. Accordingly, the Board cannot issue the declaration that UP seeks because the necessary, underlying jurisdictional question is beyond its authority. For this reason, as fully explained below, the Board must deny UP's *Petition*.

Pursuant to 49 U.S.C. § 10709(c), the Board lacks jurisdiction over a private rail transportation contract between a railroad and a shipper. The law is clear and unambiguous on this point.

⁹ STB Docket No. 42095, *Kansas City Power & Light v. Union Pacific Railroad Co.*, 2007 STB Lexis 137 (Served March 29, 2007) ("*KCPL*")

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A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

49 U.S.C. § 10709(c)(1) and (2). See *Dow Chemical Co. v. Union Pacific Railroad*, 8 F Supp 2d 940, 941 (S.D. Tex. 1998) (“It is clear that the purpose of § 10709 is to allow parties the ability to alter federal mandates, or to avoid federal control and oversight over rail contracts.”) Well-settled precedent also establishes that federal law deprives the agency of authority over questions concerning the *existence* of contracts—a jurisdictional issue that must be resolved before the Board could declare that its *FSC Decision* applies to each Option 2 arrangement. For example, in *Kansas Power & Light Co. v. Burlington Northern Railroad Co.*, 740 F.2d 780 (10th Cir. 1984), (“*Kansas Power*”) the court considered whether a series of communications between a shipper and a carrier constituted a binding contract under Kansas law. Before finding that a contract did exist, the court noted, “[t]he courts, not the ICC, in cases such as this, [are] the appropriate forum for determining the existence of an enforceable contract.” *Id.* at 785.

Indeed, the issue as to whether the Board’s predecessor had authority to adjudicate the existence of a private contract arose before the Sixth Circuit and the D.C. Circuit shortly after the *Staggers Rail Act of 1980*¹⁰ affirmatively established the right to contract. Both circuits squarely rejected the proposition that the ICC had authority to decide questions of contract existence. In *Cleveland Cliffs Iron Co. v. I.C.C.*, 664 F.2d 568, 591 (6th Cir. 1981), the Sixth Circuit stated,

¹⁰ Pub. L. No. 96-448, 94 Stat. 1895 (1980)

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The Commission also appears to imply that it has authority under subsection 10713(j) to entertain and decide questions concerning the existence and validity of contracts in terms of the common law of contracts. This is the first indication to this court that the Commission intended to undertake such a purely judicial task, and we are unable to find support in the Staggers Rail Act or prior law for it.

The following year, the D.C. Circuit reached the same conclusion, stating “[t]he courts to which the Staggers Act has committed contract questions are adequately equipped to determine whether alleged agreements are in fact binding legal contracts and whether, in equity, relief from an agreement would be appropriate” *Burlington Northern Railroad Co. v. I C C*, 679 F.2d 934, 942 (D C Cir. 1982) See *Western Resources, Inc v Union Pacific Railroad Co*, 2002 U S Dist Lexis 12422,*14 (D Kan. June 26, 2002) (“[W]here there is a reasonable possibility that a contract exists, the STB will defer action pending judicial decision regarding the existence of the contract.”)

In light of the Sixth Circuit and D.C. Circuit opinions, the Board’s predecessor acknowledged its inability to decide questions concerning contract existence In *Toledo Edison Co v Norfolk & Western Railway Co*, 367 I.C.C. 869, n 4 (1983), the Commission observed, “complainant’s contentions address the arguable validity of the asserted agreement This is an issue for a court to decide Our inquiry is confined to resolving whether there is a reasonable possibility that an agreement was made between the parties.” [emphasis added]¹¹ The Commission explained that in the context of a rate reasonableness case, if a party makes a

¹¹ According to the Board’s analysis of Option 2 in *Ex Parte No 669*, there is plainly a reasonable possibility that UP’s pricing mechanism constitutes a contract See *KCPL*, at *9 (“The carrier in this proceeding has crafted a hybrid pricing model that appears to have all of the characteristics of a rail transportation contract but avoids some important consequences of entering into such a contract by its choice of label ”)

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credible showing as to the existence of a contract, then the agency must defer further action to allow for the commencement of a court proceeding. *Id.* at 872-873. The agency reiterated that it must do so because "that issue [the existence of a contract] has been delegated to the courts by the contract provisions of the Staggers Act." *Id.* at 873. See 1 C C Docket No. 39060, *Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. § 11501*, Slip op. at 3 (Served March 2, 1983). Given the foregoing precedent, the Board cannot issue the global declaration sought by UP because, as a threshold matter, the Board lacks jurisdiction to decide—as must be done in each case—whether the relationship under Option 2 is a binding contract.¹²

Moreover, as might be expected, the issue of whether a shipper and a railroad have entered into a contract has been presented and resolved in court many times. See *Kansas Power*, 740 F.2d 780, *Consolidated Rail Corp. v. Canada Malting Co.*, 2000 U.S. Dist. Lexis 1273 (E.D. Penn. February 7, 2000) ("Canada Malting"), and *Iowa Power and Light Co. v. Burlington Northern Railroad Co.*, 1983 U.S. Dist. Lexis 11443 (S.D. Iowa November 22, 1983) ("Iowa

¹² But see STB Docket No. 42095, *Kansas City Power & Light v. Union Pacific Railroad Co.*, 2007 STB Lexis 137 (Served March 29, 2007). At n.4 of its decision, the Board appeared to signal its disagreement with the overwhelming precedent that clearly establishes that it lacks jurisdiction over questions of contract existence. Other than a cursory citation to an inapposite case—for the basic proposition that the Board has primary authority to determine its own jurisdiction—the Board did not analyze the foregoing precedent. The irrelevant decision cited by the Board, *Burlington Northern, Inc. v. Chicago and North Western Transportation Co.*, 649 F.2d 556 (8th Cir. 1981), arose out of contracts between two railroads, concerning construction and operation of a rail line, rather than a contract between a carrier and a shipper for transportation services. The Board plainly has jurisdiction over rail line construction and operation pursuant to 49 U.S.C. § 10901, but does not have jurisdiction over private carrier-shipper contracts pursuant to 49 U.S.C. § 10709. Thus, it is unclear why the Board believed the cited case is germane and how the case overruled three separate and subsequent opinions from the D.C. Circuit, the Sixth Circuit, and the Tenth Circuit that deny agency jurisdiction over questions concerning contract existence.

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Power”) Such cases are decided under state law upon their facts, including evidence of the parties’ intentions and their actions. For example, in *Canada Maltng*, the court considered whether a private contract, or a tariff should apply to the movement of certain shipments of malt. After considering the intent of the parties, the sufficiency of the contract terms, and the adequacy of consideration, the court determined that a private contract existed and governed the transportation. Accordingly, there is no reason for the Board to eschew settled precedent and the practices of its predecessor to usurp a question that courts must, and, in fact, do routinely decide

B. The STB Cannot Issue A Global Declaration Regarding The Applicability Of Its FSC Decision To All Option 2 Arrangements Because Ameren’s Option 2 Arrangements Are Contracts.

As shown above, the Board does not have the requisite legal authority to make a blanket declaration that all Option 2 arrangements are not contracts, which is a necessary prerequisite to grant UP’s *Petition*. Without waiving any of Ameren’s legal rights or submitting to the Board’s jurisdiction, Ameren asserts that UP’s *Petition* must fail as to Ameren because its agreements with UP are contracts. Transportation contracts, such as the agreements between Ameren and UP, have been generally identified as “volume shipments which require the shipper to ship a minimum tonnage or trailers or containers of a specified size over a stated period of time.” 4 GOODS IN TRANSIT §21.07 (2007). Some commonly accepted terms that differentiate contract rates from tariff rates include: a volume requirement in exchange for a rate lower than the tariff rate, penalty for failure to meet the volume commitment, or service-related carrier commitment (for such services as transporting coal from a mine or source to a coal-fired plant). *Id.* [

] See Exhibits A

- E Moreover, all of these terms were present in Ameren’s applicable prior transportation

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agreements with UP. *See* Exhibit F (comparison of terms included in prior and current UP-Ameren agreements) For example, the [

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As is universally accepted, a contract is formed by mutual assent evidenced by an offer and acceptance typically with a bargained for consideration ¹³ Furthermore, a contract offer often contains a period of time within which the offeree must accept the offer *Id* at § 36. Even a cursory review of the facts surrounding the negotiation of the Ameren Option 2 agreements shows that there was an offer, counter-offers, acceptance and bargained for consideration As UP itself has stated, “[t]he parties’ intent is crucial because it is the only definitive way to distinguish between common carrier rates and contract rates ” *Union Pacific’s Brief in Response to Order to Show Cause*, STB Finance Docket No 42095, at 3 (filed Sept 26, 2006). Contrary to UP’s assertions elsewhere, the mutual intent of the parties to form contracts for Ameren’s movements is documented.

In Ameren’s case, UP’s and Ameren’s intent is memorialized in the contemporary exchanges between them, as they negotiated the coal transportation agreements and in a subsequent document provided by UP to Ameren with respect [

¹³ *E g* , THE RESTATEMENT (SECOND) OF CONTRACTS §§ 17-69 (1980).

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] Sec Exhibit G, (stating that

[

] Exhibit G. [

] Exhibit H. [

|

Moreover, UP's attempt to now categorize the agreements with Ameren as anything other than contractual agreements is undermined by |

] Exhibit I

Plainly, this evidence demonstrates a "reasonable possibility" that Ameren's agreements with UP are contracts. Thus, the Board cannot grant UP's requested relief.

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It is also worth noting that for the Board to find that the UP/Ameren agreements are common carrier rates, the Board must also declare that Ameren, a shipper with competitive options, chose a tariff rate under which it has no relief in the courts and little relief at the STB because of the lack of market dominance. As the Board recognized, in this “highly concentrated industry” such a pricing mechanism would “create an environment where collusive activities in the form of anticompetitive price signaling could occur.” *Ex Parte No. 669*, slip op. at 4-5.

C. UP’s Request Undermines the Proceeding in *Ex Parte No. 669*.

Additionally, the Board should reject UP’s *Petition* because it undermines its pending rulemaking proceeding in *Ex Parte No. 669* to develop guidance for interpreting the term “contract” with regard to 49 U.S.C. § 10709. In the Notice of Proposed Rulemaking (“NPRM”), the Board commented at length on the *KCPL* case, expressing “serious concerns” over hybrid pricing mechanisms such as Option 2. *Id.* at 2. The Board also expressed its view that the Option 2 arrangement in that case “could be viewed as a rail transportation contract.” *Id.* at 3. Despite the Board’s concerns, and its particular misgivings about Option 2, UP desires a global determination that all Option 2 arrangements are non-contractual, as a necessary predicate for a declaration that they are subject to the *FSC Decision*. This request renders the rulemaking a hollow exercise because it would have the Board issue a comprehensive ruling on the troubling contract vs. common carriage question without the public comment and guidance that the Board presently seeks to develop. While Ameren believes that the Board lacks authority to make a global determination as the status of Option 2 arrangements because, as explained above, the underlying question of contract existence is committed to the courts, Ameren believes that such a

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ruling would be particularly inappropriate given the *Ex Parte No 669* proceeding. Accordingly, the Board should deny UP's *Petition* due to its pending rulemaking

III. UP'S PETITION WRONGLY ASSUMES THAT ITS PROPOSED MILEAGE-BASED PROGRAM COMPLIES WITH THE BOARD'S *FSC Decision*.

In this Section III, Ameren contends that UP's proposed mileage-based fuel surcharge program fails to comply with the standard set forth in the Board's *FSC Decision*. Although UP does not directly raise the legality of its mileage-based fuel surcharge program for Circular 111 customers, as discussed above, UP impliedly seeks to have the Board find that UP's new mileage-based fuel surcharge is a reasonable fuel surcharge program. However, Ameren submits that the program fails to comply with the standards set forth in the *FSC Decision*.

In its primary holding, the Board ruled that a fuel surcharge program must have a "reasonable nexus to fuel consumption." *Decision*, at 9. It stated that "if a carrier chooses to use a fuel surcharge program, it must be based upon the attributes of a movement that directly affect the amount of fuel consumed." *Id*. Additionally, the Board held that a program that calculates a fuel surcharge as a percentage of the rate constitutes an unreasonable practice. *Id* at 6. In so holding, the Board observed, "[w]e believe that imposing rate increases in this manner, when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, is a misleading and ultimately unreasonable practice." *Id* at 7. Ameren contends that UP's proposed mileage-based program is similarly misleading, and, as such, constitutes an unreasonable practice.

As UP notes in its *Petition*, it proposed a mileage based program that would go into effect for its Circular 111 traffic when the Department of Energy ("DOE") Highway Diesel Fuel monthly average price exceeds \$1.349 per gallon. Historical data available on the DOE website

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indicates that the monthly average price has been above \$1.349 per gallon for nearly five years¹⁴ For example, in the year 2004, the price ranged between \$1.55 per gallon, at the low end, to \$2.14 per gallon, at the high end.¹⁵ In 2005, the *lowest* monthly average price was \$1.95 per gallon.¹⁶ Because UP's surcharge will apply from the instant that a shipper enters into an Option 2 Commitment Certificate, and substantially increase the price, it can hardly be considered a means of recovering "incremental" increases in the cost of fuel. UP's use of the term "fuel surcharge" is mislabeling and is an unreasonable practice.

Ameren also questions UP's supposed need for uniform application of its mileage-based surcharge program, which supposedly bolsters its request for a blanket declaration as to the applicability of the *FSC Decision*. First, Ameren notes that the *FSC Decision* did not require a railroad to implement the same fuel surcharge program for every customer or customer group. On the contrary, the Board expressly afforded "individual carriers the flexibility to devise fuel surcharge practices that work best for them." *FSC Decision*, at 10. Second, Ameren finds highly suspect UP's claim that it requires uniformity in order to recover fully its incremental fuel costs, given that UP apparently administered no less than 41 separate programs before the Board-ordered restructuring.¹⁷ UP does not make the claim that the variation in its previous regime caused it to under-recover its incremental costs. On the contrary, UP states openly that it developed its new program to produce "the same level of fuel cost recovery on average as UP's prior, rate based programs." *Petition*, at 5. Since variety apparently was never before an

¹⁴ <http://tonto.eia.doe.gov/dnav/pet/hist/ldr001M.htm>

¹⁵ <http://tonto.eia.doe.gov/dnav/pet/hist/ldr001M.htm>

¹⁶ <http://tonto.eia.doe.gov/dnav/pet/hist/ldr001M.htm>

¹⁷ UP Comments in *Ex Parte No. 661 (Sub-No. 1)* dated April 2, 2007 at page 5

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impediment to satisfactory recovery, UP's newly-minted need for uniformity rings hollow, and fails to support its request for a declaratory judgment as the applicability of the *FSC Decision*

Ameren recognizes, as does the Board, that the railroads should be allowed to recover incremental increases in the price of fuel from customers that are benefiting from their transportation service. However, the Board's decision makes clear that railroads are not allowed to turn such increases into a profit center by double-dipping, by calculating the charge as a percentage of the base rate, or by some other means. *FSC Decision*, at 7. During the fuel surcharge proceeding, the Board received ample evidence that the railroads were over-recovering increases in fuel costs. For example, in comments filed on April 27, 2006, the American Chemistry Council presented analysis that three of the five U.S. Class I railroads over-recovered approximately \$900 million, in aggregate, during 2005.¹⁸ Accordingly, after invalidating existing practices, the Board established the "reasonable nexus" standard so that fuel surcharges would directly reflect increases in fuel prices as related to the characteristics of a movement. *Decision*, at 9. In its single-minded effort to replicate the revenue results of its prior rate-based programs, UP ignores the evidence as to railroads' over-recovery. Indeed, UP's *Petition* gives the distinct impression that its primary concern in revising its program was not the Board's reasonable nexus standard, but rather preservation of its bottom-line.

In this regard, Ameren notes that UP has not implemented its new program with a high-degree of transparency. UP's press releases and other public notices shed little light on the underlying mechanics of its surcharge program, in particular its method of incorporating various factors, such as mileage, speed, weight, geography, etc., or its reasons for excluding such

¹⁸ American Chemistry Council Comments in *Ex Parte No. 661*, dated April 27, 2006 at Attachment A, page 12

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factors¹⁹ Its *Petition* mentions a development process, but provides no substance behind its mileage-based revision, instead asserting that “UP expended considerable time and resources” to comply with the Board’s mandate *Petition*, at 4 As such, Ameren notes that it has relied upon outside consultants to provide data used to determine whether UP’s surcharges bear a reasonable nexus to fuel consumption As explained below, Ameren believes that they do not. In fact, the Board should consider revisiting its fuel surcharge decision to require further transparency

Finally, Ameren rejects UP’s assertion that Ameren’s opposition to both its rate-based and mileage-based surcharge is ironic *Petition*, at n.2. Ameren’s current protest is not remotely inconsistent with its past protest. Like many shippers, Ameren believed that the railroads’ rate-based programs bore little relation to actual fuel costs for particular movements, and allowed substantial over-recovery of incremental increases in fuel prices This opposition was vindicated when the Board ruled that such programs were unreasonable practices and unlawful. Ameren’s opposition to UP’s proposed mileage-based program stands on at least three grounds First, Ameren contends that it has enforceable private transportation contracts that UP cannot unilaterally modify Second, Ameren is not satisfied that UP’s proposed mileage-based program meets the reasonable nexus standard established by the Board Third, Ameren believes that UP’s mileage based surcharge, just like its rate-based surcharge, allows substantial over-recovery of UP’s incremental costs of fuel in relation to its movements for Ameren Plainly, there is nothing inconsistent (or ironic) in Ameren’s opposition

¹⁹ See Letter from Jack Koraleski to Circular 111 customers, dated March 21, 2007 and available on UP’s website at <http://www.uprr.com/customers/updates/2007/0321.shtml> (“March 21 letter”)

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IV. UP'S APPLICATION OF ITS PROPOSED MILEAGE-BASED FUEL SURCHARGE IS UNREASONABLE

In this Section IV, Ameren illustrates that UP's proposed application of its mileage-based fuel surcharge to Ameren is unreasonable.²⁰ The data shows that UP's new fuel surcharge has even less of a reasonable nexus to actual incremental fuel costs than UP's percentage based fuel surcharge mechanism. Moreover, the data shows that, with respect to a current transportation agreement that Ameren is negotiating with UP for a future move to Coffeen, UP's mileage-based fuel surcharge has no reasonable nexus to the actual incremental fuel costs associated with the movement

A. UP's Attempt to Apply Its Mileage-Based Fuel Surcharge to Ameren's Contracts is Unreasonable

As UP states in its *Petition*, UP's March 21 letter was addressed "To our Circular 111 customers" and stated that UP proposed to change the mechanism that UP would use to apply fuel surcharges to certain traffic. As shown above, Ameren entered into contracts with UP, after negotiating for UP's service in 2004. These agreements memorialized various provisions discussed by the parties including [

] In light of these facts, it was not immediately apparent to Ameren that UP sought to change the fuel surcharge mechanism in Ameren's agreements, notwithstanding the specific "reciprocal benefit" that

²⁰ The concerns addressed herein regarding the unreasonableness of UP's fuel surcharge practices are limited to practices by UP since UP has raised the issue in its *Petition*. However, the lack of a reasonable nexus to actual incremental fuel costs is not limited to only UP's fuel surcharge programs. Likewise, the contract versus common carrier debate is not limited to actions only by UP. The real issue is the high concentration within the industry as the Board recognized in *Ex Parte No. 669*.

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bound UP to not change the fuel surcharge during the term of the agreement. Furthermore, UP has changed its fuel surcharge mechanism in Circular 111 since the signing of the various agreements with Ameren, yet UP had not previously attempted to disavow its stated agreement to hold the fuel surcharge recovery constant during the term of the applicable agreement with Ameren.

Ameren began immediately reviewing the UP announcement to determine what if any impact the announcement would hypothetically have on Ameren's existing movements and, more importantly, what impact Ameren could expect for future negotiations with UP. As stated in UP's March 21 letter, the UP mileage would be based upon rail miles contained in ALK Technologies' PC*MILER which UP stated would not be available on UP's web site until April 10.

Soon after receiving the March 21 letter, Ameren began evaluating UP's proposed program based on available data and noted that UP's proposed mileage-based program indicated that Ameren might face significant increases in the future. As shown on the attached excel spreadsheet, even though UP has made no showing that its fuel costs have changed for Ameren's movements, UP's proposed change to its fuel surcharge mechanism could have meant a nearly [] increase to Ameren's transportation costs per year.²¹ See Exhibit J. Thus, Ameren called its UP contact on April 11, 2007 to discuss UP's email and how it might impact

²¹ As stated above, if despite the facts, the STB were to declare that Ameren's transportation agreements with UP or all Option 2 agreements are common carrier tariffs, Ameren reserves the right to challenge such determination in appropriate court of law and/or bring a unreasonable practices complaint at the Board to challenge UP's fuel surcharge mechanism. Ameren offers the specific data regarding UP's fuel surcharge mechanisms to illustrate to the Board why the Board's *FSC Decision* did not go far enough and more transparency is needed with respect to fuel surcharges.

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Ameren²² A conference call was then set up with several UP representatives on April 13 during which time Ameren stated its position that the proposed change did not apply to Ameren. As discussed during the conference call, Ameren followed up the discussion with a letter on April 16, 2007, which stated Ameren's position regarding the UP/Ameren agreements [

] UP never responded to the April 16 letter from Ameren. Exhibit K. During the next ten days in which Ameren believed the UP was considering Ameren's settlement proposals, UP instead drafted and then filed its *Petition*.

B. UP's Mileage-Based Fuel Surcharge Is Unreasonable Because UP's Actual Incremental Fuel Costs Are Already Recovered Under The Fuel Surcharge Mechanism In Ameren's Contracts

The above illustration regarding the increased cost to Ameren if UP's proposed new fuel surcharge mechanism applied to Ameren's contracts is even more telling when one considers UP's actual fuel costs for the Ameren movements and the proposed rate increases that UP intends to implement for the next generation of rate quotes for Coffeen.²³ In anticipation of the next generation of rate quotes, Ameren engaged the services of a reputable outside expert consultant to evaluate the specific costs associated with coal movements by rail for Ameren's

²² UP's statement that it was more than three weeks before UP received objections regarding its proposed new fuel surcharge is disingenuous. *Petition*, at 5

²³ [

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plants²⁴ The preliminary assessment regarding Ameren's coal movements included an estimate of the number of gallons of diesel fuel consumed on a round-trip basis for service to each of Ameren's plants.

As shown in Table 1 in attached Exhibit L, under the current UP/Ameren contracts, UP was [REDACTED]

that UP's fuel cost basis included in the rates is \$1.35 per gallon.²⁶ For example, Table 1 shows that the mileage for the movement to the Labadie Plant is 993 miles. [

] Thus, assuming a current fuel cost of \$2.70 per gallon compared to a UP fuel cost basis of \$1.35 per gallon, UP's incremental fuel costs is estimated to be [

1

One issue that shippers raised repeatedly in *Ex Parte No 661* was that there was a need for more transparency in fuel surcharges, particularly with respect to actual fuel cost basis that is

²⁴ Ameren is still following up on the preliminary assessments made by one outside consultant and has engaged additional consultants but because of the shortened timeframe provided to respond to UP's *Petition*, Ameren has not finished its complete assessment of the preliminary data showing over-recovery of fuel costs for Ameren's movements

²⁵ The HDF average for April 2007 was \$2.83, March 2007 was \$2.67 and February 2007 was \$2.49 so \$2.70 is an appropriate example

²⁶ Ameren uses a \$1.35 fuel cost basis for UP in Table 1 since UP uses \$1.35 as the cost basis for triggering the fuel surcharge under all of Ameren's contracts and the new proposed fuel surcharge mechanism.

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used when rates are established. The over-recovery of the incremental fuel costs are even more significantly skewed if a fuel cost basis for the base rates is more appropriately determined by the actual cost of fuel around the time that the rates were established. As stated above, the HDF monthly average for the cost of diesel fuel has not been below \$1.35 per gallon since August 2002.²⁷ Yet, UP apparently claims that its base rates are established using this cost basis from 2002 since UP's fuel surcharges are established based upon this cost basis.

C. Any Attempt To Impose UP's Mileage-Based Fuel Surcharge On Future Ameren Agreements Is Unreasonable

The above examples are even more compelling for Ameren's [

]

As shown in Table 1 of Exhibit L under the [

²⁷ <http://tonto.eia.doe.gov/dnav/pet/hist/ldr001m.htm>

²⁸ [

]

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]

UP's *Petition* provides concrete evidence that UP's new fuel surcharge mechanism was not designed to recover incremental fuel costs. Instead, UP admits that its "new fuel surcharge programs were designed to produce the same level of fuel cost recovery on average as UP's prior, rate-based programs." *Petition*, at 5. Thus, UP admits that its fuel surcharge programs are revenue based, not cost based.

Likewise, UP's claim that [

] the Board specifically found that the term "fuel surcharge" suggests a "charge to recover increased fuel costs associated with the movement to which it is applied" and it cannot be used as a broader revenue enhancement measure. *FSC Decision*, at 7. [

] As the Board's Chairman recently stated, "nothing in [the Board's fuel surcharge] rulemaking requires railroads to raise the rates."²⁹

Even assuming that UP was not contractually bound to its current fuel surcharge methodology for Ameren, as shown in Exhibit J, [

and would be in direct violation of the *FSC*

Decision. Moreover, for UP to now assert [

] is self-serving and contrary to business and economic logic. Any

²⁹ *Rails may delay surcharge changes*, COAL TRANSPORTATION, April 19, 2007, at 2.

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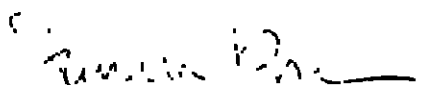
fuel surcharge mechanism employed by UP must have a reasonable nexus to actual costs, thus, any attempt to recover more than the actual incremental costs is unreasonable and should not be condoned by the Board

V. CONCLUSION

For the foregoing reasons, UP's Petition for Declaratory Order must be denied

Respectfully submitted,

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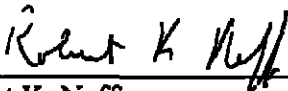
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ATTORNEYS FOR AMEREN ENERGY
FUELS AND SERVICES COMPANY

VERIFICATION

I, Robert K. Neff, Vice President, Coal Supply of Ameren Energy Fuels and Services Company, declare under penalty of perjury that facts set forth in the foregoing Reply to Petition for Declaratory Order are true and correct to the best of my knowledge, information and belief. Further, to the extent that any facts set forth in the foregoing Reply to Petition for Declaratory Order have been received from outside experts, I certify that the facts came from experts that are knowledgeable and qualified to give such information and I have no reason to not believe that such information is credible. Further, I certify that I am qualified and authorized to file this testimony

Executed this 7th day of May, 2007.



Robert K. Neff

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CERTIFICATE OF SERVICE

This is to certify that on this 8th day of May, 2007, I caused the foregoing Public Version of the Reply of Ameren Energy Fuels and Services Company to be served upon all known parties of record in this proceeding by first-class mail or a more expeditious method.


Michael H. Higgins

A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35021

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FOR A DECLARATORY ORDER**

**REPLY OF AMEREN ENERGY FUELS
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**HIGHLY CONFIDENTIAL
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