

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 575 (Sub-No. 1)

DISCLOSURE OF RAIL INTERCHANGE COMMITMENTS

COMMENTS OF AMEREN ENERGY FUELS AND SERVICES COMPANY

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INTRODUCTION

In its October 30, 2007 Notice of Proposed Rulemaking (“NPR”),¹ the Surface Transportation Board (“STB” or “Board”) announced that it was requesting comments on proposed rules to address the reasonableness of interchange commitments²—defined by the Board as provisions in rail line sale or lease agreements “that may limit future interchange with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement or other means.”³ Specifically, the Board invited interested persons to comment on two proposed rules: The first rule is a disclosure requirement that would oblige railroads seeking exemption for sale or lease agreements to identify any provision in their agreements that restricts interchange traffic with third-party connecting carriers. In addition, the railroad must file a confidential, complete set of the

¹ *Disclosure of Rail Interchange Commitments*, STB Ex Parte No. 575 (Sub-No. 1) (STB served Oct. 30, 2007), the Board also served on the same day a decision in the root proceeding, *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, STB Ex Parte No. 575 (STB served Oct. 30, 2007) (“Decision”).

² Ameren will also use the term “interchange commitment” rather than “paper barrier” to be consistent with the Board’s NPR.

³ *Disclosure of Rail Interchange Commitments*, STB Ex Parte No. 575 (Sub-No. 1), slip op. at 8 (STB served Oct. 30, 2007).

documents relevant to the interchange commitment with the Board which would make such documents available to shippers or other affected parties, subject to a protective order, upon a showing of need. The second proposed rule is a discovery procedure that would provide parties to a proceeding involving the reasonableness of interchange commitments with access to a confidential, complete version of the agreement upon Board approval.

COMMENTS OF AMEREN ENERGY FUELS AND SERVICES COMPANY

Ameren Energy Fuels and Services Company (“AFS”), on behalf of its generation affiliates, AmerenUE, Ameren Energy Generating Company, Ameren Energy Resources Generating Company, and its 80% owned affiliate Electric Energy, Inc., and its parent company, Ameren Corporation (hereinafter collectively referred to as “Ameren”), hereby submits Comments to the Board in response to the Board’s Decision of October 30, 2007 and its NPR that put forward disclosure requirements and procedures to facilitate the Board’s regulatory review of potential future interchange commitments. Part I briefly repeats the identity and interest of Ameren in this proceeding. Part II discusses the Board’s Decision to address interchange agreements on a case-by-case basis that are not in the public interest. Part III discusses the Board’s proposed new disclosure requirements and discovery procedures.

I. IDENTITY AND INTEREST OF AMEREN ENERGY FUELS AND SERVICES COMPANY

AFS is a subsidiary of Ameren Corporation, a public utility holding company that provides electricity to approximately 2.3 million customers in Missouri and Illinois. Ameren has 11 coal-fired plants, of which, 10 plants rely on rail service as the primary mode of transportation for coal. Ameren purchases approximately 40 million tons of coal annually for all of its coal-fired plants. Of these 40 million tons of coal, 10 million tons are purchased for one of Ameren’s

plants—the Labadie Plant located in Franklin County, Missouri (the “Labadie Plant”)—which is impacted by a restrictive interchange commitment. A more thorough description of Ameren’s identity and interest in these proceedings is contained in Ameren’s prior comments filed in the root docket.

II. THE BOARD TOOK A CORRECT FIRST STEP FORWARD TO ADDRESS INTERCHANGE COMMITMENTS THAT ARE CONTRARY TO THE PUBLIC INTEREST

Ameren applauds the Board’s decision to take a first step toward exercising its authority to address unreasonable interchange commitments. As the Board rightly acknowledged, an “interchange commitment may be contrary to the public interest because it is unduly restrictive or unwarranted under the circumstances.”⁴ This observation comports well with Ameren’s own experience with interchange commitments.

As discussed in Ameren’s prior comments, the practical effect of the prohibitions included in Union Pacific Railroad’s line sale and related agreements to the Missouri Central Railroad (“MCRR”) was to prohibit MCRR’s service to Ameren’s Labadie Plant in perpetuity notwithstanding that MCRR has a physical connection to Labadie which has been in place since the plant was built. Ameren believes that the Board’s Decision in the root docket establishes the basic foundation that restrictions such as those imposed upon MCRR may be challenged and will be viewed with scrutiny by the Board. Ameren is disappointed nonetheless, with the Board’s reluctance to impose a sunset provision or rebuttable presumption for the harmful interchange commitments that were first formally challenged over nine years ago. So, while Ameren applauds the steps by the Board to acknowledge that certain interchange commitments are not in the public interest, Ameren implores the Board to not back down on its commitment to review

⁴ *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League*, STB Ex Parte No. 575, slip op. at 7 (STB served Oct. 30, 2007).

the potential harm of such agreements with a higher level of scrutiny and be willing to strike down either existing agreements when challenged by a shipper or prohibit proposed future agreements via the new rules in the NPR.

III. THE BOARD'S PROPOSED DISCLOSURE REQUIREMENTS ARE A STEP TOWARD PROTECTING SHIPPERS FROM UNREASONABLE INTERCHANGE COMMITMENTS

Ameren's first-hand experience with interchange commitments also guides its support for the Board's proposed disclosure requirements. Because of the unique circumstances surrounding Ameren's last minute financing of the MCRR, Ameren gained knowledge of the restrictive provisions imposed on the MCRR in the sale agreement. However, shippers typically are unaware of the extent to which paper barriers impact their competitive situation, and in some instances, shippers may be unaware of such restrictions altogether. For this reason, Ameren supports the Board's proposed disclosure rules which require parties to a proposed interchange commitment to identify any provisions that limit future interchange with third-party carriers, provide for confidential disclosure of related documents, and provide shippers and other interested parties with access to the confidential documents.

Likewise, Ameren welcomes the Board's proposed rule that provides parties to a proceeding involving the reasonableness of interchange commitments with access to a confidential, complete version of the agreement, subject to a protective order. These reasonable methods of information collection are clearly necessary for proper performance of the Board's functions.⁵ Furthermore, the new rules have negligible or no increased paperwork burden on the carriers or noncarriers seeking regulatory authority from the Board since the rules do not require

⁵ Ameren also sent a letter to the Office of Management and Budget in support of the Board's proposed rules. A copy is attached as Exhibit A to these Comments.

the parties to create any new documents or provide any information that they will not already have readily in hand when they enter into the proposed agreement.

However, the Board should not stop at this first step. The NPR allows the primary paperwork burden to rest upon the shipper or party wishing to challenge the interchange commitment because that party is responsible for drafting and filing an appropriate motion and protective order and establish the party's need to obtain the relevant documents. In addition, by not establishing a sunset provision or rebuttable presumption that existing and future interchange commitments are presumed anti-competitive, the burden of preserving and promoting competition in the rail industry remains with the shipper or other interested party.⁶ Ameren believes such a position is inconsistent with the Board's governing statute and that the Board should do more to promote and preserve competition surrounding transactions that include interchange commitments and elsewhere in the industry.

CONCLUSION

For the foregoing reasons, Ameren Energy Fuels and Services Company respectfully requests that the Surface Transportation Board continue in its commitment to impose a higher level of scrutiny on interchange commitments and be willing to strike down existing or proposed agreements that contain interchange restrictions. In addition to the proposed rules in the NPR, the Board should establish a sunset provision or rebuttable presumption for interchange commitments and ease the burden placed upon the shipper or interested party that currently

⁶ At the very least, the Board should establish a presumption that interchange commitments are subject to disclosure by removing any provision for the showing of "need" for the information in the NPR. The documents will be subject to a protective order and confidentiality undertaking(s) which will presumably be similar to those used in other proceedings so the protective order will sufficiently protect the parties without placing an additional burden upon the shipper or interested party.

exists in order to obtain a copy of the agreement and to challenge the interchange commitment. Finally, the Board should continue to take steps to “remove barriers” to rail service and ensure “effective competition among rail carriers” with respect to interchange commitments and elsewhere in the industry as directed in the Board’s statute to preserve and promote competition.

Respectfully submitted,



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Attention: Desk Officer for STB
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Office of Management and Budget
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EXHIBIT A

Received
12/7/07

Elizabeth L. Branch
202-395-4266

RE: STB Ex Parte No. 575 (Sub-No. 1) *Disclosure of Rail Interchange Commitments*

To Whom It May Concern:

On October 30, 2007, the Surface Transportation Board ("STB") served a decision proposing new rules for any future rail transaction with a proposed interchange commitment¹ and new discovery rules for the disclosure of existing interchange commitments. Ameren supports the STB's proposed rules and believes that the de minimus additional requirements under the proposed rules should be supported by the Office of Management and Budget ("OMB") pursuant to OMB's directives under the Paperwork Reduction Act, 44 U.S.C. 3507(d) and OMB regulations at 5 CFR 1320.11.

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Ameren has actively participated in the STB's proceedings on interchange commitments, including Ex Parte No. 575, and the STB's actions on interchange commitments are vital to the future competitive environment for rail transportation and reliability of coal used by Ameren and other utilities for electric generation. The STB's new rules would only increase the paperwork burden of the railroads in a very minimal way and the importance of the proposed rules greatly outweigh any negligible increased burden.

Sincerely,

Robert K. Neff
Vice President, Coal Supply

¹ The STB has adopted the rail industry's terminology of "interchange commitments" in place of the term "paper barrier" which has been widely used to describe the restrictions that are placed in various sale and lease transactions between railroads.