

222857

**VanNess
Feldman**
ATTORNEYS AT LAW

A PROFESSIONAL CORPORATION
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20007-3877
(202) 298-1800 Telephone
(202) 338-2416 Facsimile

Seattle, Washington
(206) 623-8372

Michael F. McBride
(202) 298-1988
mfm@vnf.com

July 10, 2008

VIA ELECTRONIC MAIL

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, N.W.
Washington, DC 20423-0001

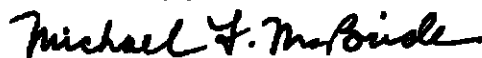
Re: STB Ex Parte No. 677 (Sub-No. 1), Common Carrier Obligation of
Railroads—Transportation of Hazardous Materials

Dear Secretary Quinlan:

Enclosed for filing in the above-referenced proceeding is the "Testimony of Michael F. McBride on behalf of Edison Electric Institute." Edison Electric Institute hereby requests 15 minutes to present its oral testimony at the hearings to be held July 22, 2008, as it did in its Notice of Intent filed herein on June 5, 2008.

We understand that this submission is sufficient to satisfy the Board's filing requirements, and that service on a service list is not required. Please advise if any of that is not correct. Thank you for your cooperation.

Very truly yours,



Michael F. McBride

Attorney for Edison Electric Institute

SURFACE TRANSPORTATION BOARD

Ex Parte No. 677 (Sub-No. 1)

COMMON CARRIER OBLIGATION OF RAILROADS— TRANSPORTATION OF HAZARDOUS MATERIALS

TESTIMONY OF MICHAEL F. McBRIDE ON BEHALF OF EDISON ELECTRIC INSTITUTE

Pursuant to the Notice of Public Hearing ("Notice") in this proceeding, Edison Electric Institute ("EEI") hereby submits the Testimony of Michael F. McBride on the common carrier obligation of railroads with respect to hazardous materials.

Interest of EEI

EEI is the association of U.S. shareholder-owned electric companies. Its members serve 95% of the ultimate customers in the shareholder-owned segment of the industry, and represent approximately 70% of the U.S. electric power industry. It also has as Affiliate members more than 65 International electric companies and, as Associate members, more than 170 industry suppliers and related organizations. Those EEI members who provide electric transmission and distribution service generally have an obligation to serve all who request their service, although the term "common carrier" is not typically used in the electric industry.

As the Board knows, the electric industry depends on the Nation's railroads to transport approximately 70% of the coal used to generate electricity. Coal is used to generate approximately 50% of the Nation's electricity. Therefore, railroad service is vital to assuring that sufficient electricity is generated to meet the Nation's ever-growing demand for it.

The investor-owned electric utility industry also relies on the Nation's railroads to transport other materials, such as anhydrous ammonia, chlorine, and radioactive materials, needed for the safe, reliable and environmentally acceptable operation of coal-fired or nuclear power plants. Anhydrous ammonia is used to provide legally required pollution control at coal-fired power plants; chlorine is used, among other purposes, to keep intake pipes clear at nuclear power plants; and nuclear plants generate spent nuclear fuel and radioactive waste as byproducts of their operations. Coal-fired and nuclear power plants are absolutely essential to this Nation's economy and well-being.

Of particular importance to EEI and its member companies, insofar as the issues in this proceeding are concerned, is that (1) there is an adequate rail transportation network in the United States, and (2) that railroads continue to be required to carry safely various hazardous materials (such as anhydrous ammonia, chlorine, and radioactive materials) needed for the safe, reliable and environmentally acceptable operation of coal-fired and other types of power plants (such as nuclear facilities).

Summary of Testimony

The electricity industry depends on the Nation's railroads to transport approximately 70 percent of the coal used to generate electricity. EEI member companies and other electricity

generators also rely on the railroads to transport safely other vital commodities, such as the chemicals (especially anhydrous ammonia) used to operate pollution control equipment at those coal-fired power plants, chlorine to maintain nuclear facilities, and radioactive materials such as spent nuclear fuel (to the extent that the Department of Energy is not the shipper). Although coal traffic is a source of great profit for the railroads, it will not be possible to maintain the level of coal used at electricity generating stations unless railroads also transport anhydrous ammonia. And, railroads will continue to have to carry chlorine and radioactive materials to permit the continued operation of nuclear power plants.

Accordingly, it is of particular importance to EEI and its member companies (and their customers) that (1) there is an adequate rail transportation network in the United States, and (2) that railroads continue to be required to carry various hazardous materials that are necessary to operate pollution control equipment or that are used with respect to other aspects of the operations of coal-fired and nuclear power plants.

EEI and its members believe that the ICC, in the 1970s and 1980s, correctly determined that the railroads are common carriers of spent nuclear fuel and high-level radioactive waste, and that the railroads may not impose unnecessary and wasteful rates and terms of service on such transportation. EEI and its members were pleased that the ICC's decisions were upheld by the U.S. Court of Appeals in both the Sixth and the D.C. Circuits, and that the Supreme Court declined to hear the railroads' petitions for review of those decisions. Those decisions remain good law today. Nothing has changed to justify a change in those holdings.

Of particular importance to this proceeding is that, in the 1970s, the ICC found that the rail mode was many times safer than trucks to move radioactive and other hazardous materials.

That is still true. Moreover, as a practical matter, many hazardous materials either cannot be transported by truck or are not transported by truck for various economic and safety reasons. Therefore, it is not only in the public interest to require railroads to carry these vital materials for EEI member companies and the rest of American industry – it is absolutely necessary that they do so.

If there is to be any change in the railroads' common carrier obligation (or any cap on liability, as the railroads have proposed, or permission to refuse to carry certain commodities), neither the Board nor the railroads are empowered to take such actions. Rather, Congress would need to do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations and the STB has no authority to preempt State liability law.

The Price-Anderson Act of 1957, as amended, is not simply a limit on liability. It is premised upon extensive governmental regulation of the safety of nuclear facility construction and operation. And it requires joint industry participation in insurance pools and purchase of large amount of commercial hazard insurance and waiver of various defenses to claims and expedited claims procedures. Under Price-Anderson, the financial impact of a serious accident at an individual plant would be spread across the entire nuclear industry. The nuclear industry has voluntarily taken measures to improve its safety record, by creating, among other actions, a safety "watchdog," called the Institute of Nuclear Power Operations ("INPO"), that rigorously oversees the safety of commercial nuclear power plants. EEI is not aware of any proposal from the railroads that fully captures these essential elements.

Safe Transportation Requires Railroads to Carry Hazardous Materials

It is especially significant to this proceeding that, in the 1970s, the ICC held that railroads are and must remain common carriers of spent nuclear fuel and high-level radioactive waste despite any risks associated with carrying those commodities,¹ and that it found that, when it issued a Final Environmental Impact Statement with respect to then-pending litigation over the transportation of radioactive materials, the rail mode was found to be several times safer than trucks to move radioactive and other hazardous materials.² Those circumstances are unchanged today, as all parties appear to agree. Moreover, many hazardous materials such as anhydrous ammonia and spent nuclear fuel are generally not transported by truck for various economic and safety reasons unless absolutely necessary. In nearly all instances, there is simply no practical alternative to rail transportation. Therefore, it is not only in the public interest to require railroads to carry these vital materials safely for EEI member companies and the rest of American industry – it is absolutely necessary that they do so.

The Common Carrier Obligation

Railroads are obliged, with only a very few exceptions, to provide transportation for *all* commodities tendered to them in conformance with all applicable governmental regulations.³

¹ *Akron, Canton & Youngstown R.R. v ICC*, 611 F.2d 1162 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980) (“*Akron, Canton*”), *aff’g U.S. Energy Research & Dev. Admin. v. Akron, Canton & Youngstown R.R., et al.*, 359 I.C.C. 639 (1979).

² *See generally, Conrail v. ICC*, 646 F.2d 642, 650-53 (D.C. Cir.) (“*Conrail v. ICC*”), *cert. denied*, 454 U.S. 1047 (1981), *aff’g Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980). Mr. McBride was one of the counsel for the electric utility complainants in *Akron, Canton* and *Conrail v. ICC* and in the ICC proceedings that led to those cases.

³ *Akron, Canton, supra*, 611 F.2d 1166-67; *see also Classification Ratings of Chemicals, Conrail, April 30, 1986*, 3 I.C.C.2d 331, 1986 WL 320853 (I.C.C.). EEI submitted extensive written Testimony, and a Supplemental Written Submission on the Common Carrier Obligation of Railroads, on April 17, 2008 in

The only exceptions are for historical and practical reasons, having nothing to do with safety, for such things as money, gold and silverware, and circuses.⁴ As Norfolk Southern's Form 10-K for fiscal year ending December 31, 2007 candidly states (at p. K13, included in NS's 2007 Annual Report): "NS, as a common carrier by rail, must offer to transport hazardous materials, regardless of risk."⁵

Because rail transportation is generally much safer than truck transportation, it is essential to the public interest that railroads continue to be required to carry all commodities (other than the few exceptions stated *supra*), especially hazardous materials. As the Board is well-aware, railroads are regulated by the STB when acting as common carriers, not when acting as contract or private carriers. Moreover, STB rate regulation is available only when (a) the railroad is acting as a common carrier, (b) there is no effective transportation competition (*i.e.*, where there is market dominance) and (c) the railroad is charging very high rates. But in such circumstances, STB regulation is vital, because the shipper has no option but to transport his or her commodities at the rate set by the railroad or the STB.

The common carrier obligation of railroads is also enforced through the Board's unreasonable practice jurisdiction. Shippers and other entities may seek to invoke the STB's unreasonable practice regulation without a showing of market dominance. The Board's ability to

Ex Parte No. 677, *Common Carrier Obligation of Railroads*. To avoid repetition, and in the interests of brevity, that Testimony and Supplemental Written Submission (which included an extensive discussion of the law and history of the common carrier obligation) are incorporated herein by reference.

⁴ *Akron, Canton, supra*, at 1169.

⁵ See also, Canadian National's 2007 Annual Report (at 53): (CN, "as a common carrier, ... has a duty to transport" "hazardous materials such as chlorine and anhydrous ammonia, commodities that are essential to the public health and welfare"); CSX's Form 10-K for the period through December 28, 2007 (at 8): "CSXT, as a common carrier by rail, is required by law to transport hazardous materials...."); and UP's

fashion a reasonable solution to service problems may be constrained by practicalities and fairness to other shippers as well as the complainant.

The Board is well-aware that, at times in recent years, railroad service problems have gotten worse, due first to merger-related problems and then due to capacity constraints and operational deficiencies. (The quality of the railroads' service had declined somewhat in recent months, based on shipper surveys and information from EEI's members. The rail systems are still prone to delays. Also, there is also a growing threat to stockpile shortages of coal at electric generating stations, especially in the East, due at least in part to growing world demand for U.S. coal, which may result in some plants that currently burn eastern coal switching to PRB coal later this year. The recent floods in the Midwest have caused delays for railroads to transport coal to power plants, but as of now, there do not seem to be serious shortages of coal as a result of the floods. However, EEI is concerned about potential stockpile shortages that may develop if the impacts of the flooding are not quickly resolved, so that normal rail and barge deliveries may resume.) Given the current state of the fossil fuel market, generators will seek to maximize output from coal units, which explains the importance to the electric industry of full restoration of rail service in the Midwest.

While the Board's ability to address some service problems may, as a practical matter (if not as a legal matter) be limited,⁶ and the best solution to resolve railroad-shipper issues is a commercial one (*if both parties are being reasonable*), it is vital that the STB remain an effective regulator, to encourage commercial resolutions of rate and service disputes. The only way that the STB can remain an effective regulator is to preserve, and to provide clear guidance and

2007 Form 10-K (at 7): "Federal laws require railroads, including us, to transport hazardous materials regardless of risk or potential exposure of loss.").

parameters with respect to, the railroads' common carrier obligation, without diluting the effectiveness of that obligation and without exempting vital commodities that are dependent on the railroad mode from that obligation.

If the railroad industry believes that a limit on liability for shipments of hazardous materials is appropriate, it must seek that change from Congress, not the STB. However, it is important to recognize that the Price-Anderson Act, as amended, is not simply a limit on the liability of those involved with nuclear power plants and transportation of nuclear materials (including railroads). As we explain below, it is part of a comprehensive regulatory, safety, insurance and waiver of defenses approach intended to assure safety of nuclear facilities and expedite compensation if accidents occur. Railroads do not have authority to impose limits on tort liability in their tariffs, nor may they ask the Board to adopt such limits which preempt State law.⁷ Tort liability is the province of the courts, or the Congress and the State legislatures.

If there is to be any change in the railroads' common carrier obligation (including any cap on liability, as the railroads have proposed, or a refusal to carry certain commodities), neither the Board nor the railroads are empowered to take such actions. Rather, Congress would need to do so, because the existing statutes require railroads to carry all hazardous commodities tendered in conformance with all applicable governmental regulations.

⁶ See, e.g., *DeBruce Grain Co. v. Union Pacific R.R.*, 2 S.T.B. 773 (1997).

⁷ The Board, as an agency of the United States, is a creature of statute. As such, it has only such authority as Congress has given it. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995)(same). Congress has not given the STB authority to limit the tort liability of railroads.

The Price-Anderson Act Must Be Viewed Within the Context of Comprehensive System of Nuclear Reactor Regulation.⁸

Background on the Existing System of Nuclear Reactor Regulation.

Because the Board's Notice raised the subject of the Price-Anderson Act of 1957, as amended,⁹ this Testimony discusses *infra* the Price-Anderson Act, which must be viewed in the context of the overall federal and industry approach to assuring safety of nuclear facilities.

Any analysis of the Price-Anderson Act must take into account that the federal government, through the Nuclear Regulatory Commission ("NRC"), has an extensive and stringent regulatory program (almost certainly, the most extensive and stringent such safety-related regulatory program) to license and supervise the construction and operation of nuclear facilities. NRC standards are voluminous and exacting. NRC licensing actions and approvals take years, with considerable public participation. Moreover, the NRC has permanent inspectors stationed at commercial nuclear reactors, and maintains an ongoing and rigorous program of license conditions, mandatory licensee reporting, inspections, NRC Staff reports, and, if necessary, investigations, all to assure the safe operation of licensed nuclear facilities. The Price-Anderson Act's liability provisions, along with its waiver of defenses in the event of an "extraordinary nuclear occurrence" and assumption of all liabilities by commercial nuclear licensees (instead of their contractors and subcontractors, absent special circumstances) (the so-called "channeling" of liability to those in the best position to prevent accidents and incidents, and which also simplifies the provision of insurance to the industry), were paired with an

⁸ For a useful overview of the Price-Anderson Act, as amended, see James R. Curtiss, et al., *Nuclear Power*, in 2 *Energy Law and Transactions* § 54.15 (Daniel J. Muchow & William A. Mogel, eds., 2007); see also, "Nuclear Regulation: NRC's Liability Insurance Requirements for Nuclear Power Plants Owned by Limited Liability Companies," GAO Report 04-654 (May 2004).

unprecedented and uniquely comprehensive federal regulatory regime intended to achieve safe operation, from the beginning of the commercial nuclear industry.

Taking nothing away from the Federal Railroad Administration ("FRA"), which of course regulates the safety of the railroad industry, the NRC, with the very substantial resources committed to it by the federal government (along with substantial annual payments from NRC licensees), is considered by nearly all accounts the most comprehensive regulator of any American industry. Many doubt that the Price-Anderson Act would exist in the absence of the NRC's comprehensive regulatory program.

In that context, the Price-Anderson Act provides assurance of coverage for almost any conceivable nuclear incident, through a combination of primary commercial insurance required of each licensee, and required pooled secondary insurance by all operating commercial nuclear reactors, for an incident involving any such reactor. At this time, the required coverage is over \$10 billion. While there is, above the required amount of primary and secondary commercial insurance, a limit on liability for the commercial nuclear licensees and their contractors and subcontractors, the federal government has stated its intention to provide for reimbursement for any additional damages incurred. Moreover, the required amount of insurance is so high that liability for public claims for the only covered public incident to date (the Three Mile Island-Unit 2 ("TMI-2") accident in 1979) was only a small fraction of the liability limits.

The Price-Anderson Act.

Congress enacted the Atomic Energy Act of 1954 to create a comprehensive regulatory program to permit private industry to develop and apply atomic energy for peaceful uses, such as

⁹ 42 U.S.C. § 2210 (with pertinent definitions in *id.*, § 2014).

generating electricity from privately owned nuclear power plants. Soon thereafter, government and industry experts identified a major impediment to accomplishing the Act's objective: the potential for payment of damages resulting from a nuclear accident and the lack of adequate available insurance.

Faced with these concerns, Congress enacted the Price-Anderson Act in 1957, and it has been periodically reenacted since. Its twin goals were then, as now, (1) to ensure that adequate funds would be available to the public to satisfy liability claims in a catastrophic nuclear accident; and (2) to permit private-sector participation in nuclear energy by removing the threat of potentially enormous liability in the event of such an accident.¹⁰

Under the Price-Anderson Act, each existing operator of a large commercial nuclear power plant licensed by the NRC must maintain an amount of primary financial protection against public liability claims equal to the maximum amount of liability insurance available at reasonable cost and on reasonable terms from private sources (the "primary insurance amount"). As of this writing, the primary insurance amount is \$300 million. One pool, American Nuclear Insurers ("ANI"), writes the entire primary layer of nuclear liability insurance.¹¹ Each of the 103 large commercial nuclear reactor licensees also must participate in a secondary insurance pool, under which a deferred (retrospective) premium of not more than \$95.8 million, plus any

¹⁰ "Statement Submitted by the United States Nuclear Regulatory Commission to the Subcommittee on Transportation, Infrastructure and Nuclear Safety, Committee on Environment and Public Works, United States Senate, Concerning Price-Anderson Act Renewal," presented by William F. Kane, Deputy Executive Director for Reactor Programs (January 23, 2003) at 1 ("2003 NRC Statement"). The NRC's 2003 Statement explained that Price-Anderson coverage for NRC licensees is granted for the lifetime of the covered facilities and does not "expire" even if the Price-Anderson Act is not reenacted. As the NRC's 2003 Statement explained, pending re-enactment, "Thus, in any event, Price-Anderson coverage with respect to already licensed nuclear power reactors will continue and will afford prompt and reasonable compensation for any liability claims resulting from an accident at those facilities." *Id.* at 2.

surcharge assessed under Section 170o(1)(E) (payable at a rate not to exceed \$15 million per year) for each nuclear reactor would become payable following a major nuclear accident (the "secondary insurance amount"). 10 C.F.R. § 1401.11(4).¹²

Public liability arising from nuclear incidents is limited to the amount of primary and secondary insurance. Primary and secondary insurance covers not only licensees but also any other person who may become liable.¹³ *Id.*, §§ 140.91, art. II, 140.92, art I., ¶ 6. In sum, in the case of large power reactors, and taking into account the total amount of required primary and secondary commercial insurance, the liability limit is at present over \$10 billion.¹⁴

Pursuant to the Act, the NRC requires that the insurance policies and indemnity agreements provide that, after any accident found to have caused substantial offsite damage, the licensees and other persons responsible will waive any defense as to conduct or fault, including negligence and contributory negligence, any defense of governmental or charitable immunity, and any defense based on a statute of limitation, if suit is instituted within three years from the

¹¹ ANI is a joint underwriting association of 50 insurance companies that provides insurance coverage to commercial nuclear power plants.

¹² These amounts are subject to periodic updating by the NRC.

¹³ Contractors and subcontractors of commercial nuclear licensees are indemnified for any liability in the event of a covered incident or accident, absent special circumstances.

¹⁴ The NRC's 2003 Statement explained (at 2) that "Government indemnification was phased out in 1982 when the potential pool and available insurance reached" a predetermined amount. The NRC also explained (*id.* at 5) that "the United States government has not paid a penny for claims against nuclear power plant licensees. In the event a serious accident were to occur, over \$10 billion will be available to pay compensation for any personal injury or offsite property damage. The money will come from insurance policies bought by the industry and from retrospective premiums that will be paid by the industry." Then, addressing the hypothetical situation of claims in excess of the insurance made available by the industry, the NRC explained (*id.*): "If those funds are inadequate, Congress will be called upon to decide what action is needed to provide assistance to those harmed. We believe the public is protected by the broad base of prompt funding. The Price-Anderson Act further aids the public by establishing important procedural reforms for claims arising from nuclear accidents. It channels liability to the licensee, establishes a single federal forum for all claims, eliminates the need to prove fault, requires waivers of other significant defenses, makes prompt settlements possible, and, if litigation is needed,

date the claimant knew or should have known of his/her injury. If a statute of limitations under state law provides a longer period, there is no defense to be waived, such statute is not affected, and claims are governed thereby.

The Act authorizes the Commission to enter into agreements with other indemnitors (*e.g.*, insurers) to establish procedures for the prompt settlement of claims. It also authorizes immediate assistance payments following a nuclear incident. Upon petition of the NRC or any other interested party, the United States District Court having jurisdiction over the situs of a nuclear incident must determine whether the damages from the incident may exceed the limits of liability. Payments in excess of 15% of the limit of the liability, in a case where it is found that damages may exceed the limit, must be consistent with a plan of distribution, including provision for possible latent injury claims, which is to be approved by the court.

Further, the Price-Anderson Act provides for the preparation and submission to the Congress of compensation plans in the event that damages from a nuclear incident are found to be likely to exceed the applicable limit on liability. Under the Act, the President is required, within 90 days after any determination by a court pursuant to Subsection 170(o) that public liability is likely to exceed the limit, to submit information to the Congress concerning estimates of the aggregate dollar value of personal injuries and property damage; recommendations of additional sources of funds to pay claims in excess of the limit, including possible revenue measures and the sector of the economy on which such revenue measures might be imposed; one or more compensation plans that, singly or in combination, would provide compensation for all valid claims; recommendations as to the relief to be provided, including any recommendations

establishes legal management processes to assure fairness and equity in the distribution of damage awards."

for setting aside of funds that may be needed to provide compensation for latent illness; and any additional legislation needed to implement such plans.¹⁵

To summarize, the Price-Anderson Act as amended requires those licensed to operate large commercial nuclear power reactors to maintain the maximum amount of primary commercial liability insurance available and also to contribute retrospective premiums to provide a pooled second layer of insurance to pay liability claims if the first layer should prove insufficient. Again, the current level of primary insurance is \$300 million. As noted above, for a nuclear incident occurring after the 1988 amendments and the 1998 inflation adjustment, retrospective premiums could be as large as \$95.8 million for each licensed facility, subject to indexing and a potential five percent surcharge. Retrospective premiums are payable at a rate of \$15 million/year. All of this results in over \$10 billion in liability coverage at comparatively modest cost – without the need to pre-fund the entire amount or build up reserves for the second layer.

Power reactor licensees purchase the “Facility Form” of nuclear energy liability policy as primary insurance. The nuclear insurance pool ANI also administers the secondary layer of financial protection to provide the retrospective layer of insurance. This insurance pool also provide contingent liability coverage for a modest advance premium for licensees defaulting in payment of retrospective premiums of up to \$30 million for one incident, and up to a total of \$60 million per year. The NRC is also obligated to cover licensee defaults in deferred premium payments, has related borrowing authority, and retains its right (as do the insurers) to receive reimbursement for such advances from the licensee involved.

¹⁵ The NRC may request additional funds from Congress if claims for an incident exceed the approximately \$10 billion currently available in primary and secondary insurance. GAO Report 04-654

The Price-Anderson Act has rarely been used. Only one incident, the TMI-2 accident in 1979, triggered public claims payable under the Act. Those claims were all paid, and the total paid was far below the amount of commercial insurance available. Curtiss, *supra*, at pp. 54-101 to 54-102. Other claims made under the Price-Anderson Act are typically made by nuclear plant employees (*id.* at p. 54-102), but the railroads are subject to FELA, the statute applicable to railroad employee work-related injury claims, so that aspect of the Price-Anderson Act may not be relevant here.

The Atomic Energy Act of 1954, as amended,¹⁶ including the Price-Anderson Act, has been extraordinarily successful. It achieved its purpose of encouraging the safe development of the commercial nuclear industry. There has never been an incident that even approached, let alone exceeded, the amount of insurance coverage available.

The Institute of Nuclear Power Operations

INPO is an organization created by the commercial nuclear power industry to act as a “watch dog” over the operations and status of commercial nuclear power reactors. Created in the wake of the TMI-2 accident in 1979, INPO has acted as a second overseer, in addition to the NRC, to ensure that commercial nuclear reactor operations are conducted safely. Public reports are regularly issued, based on INPO inspections, for each of the 103 operating reactors.¹⁷ Performance is graded in accordance with INPO’s performance standards, and the NRC is notified about the performance of each licensee and about all of INPO’s inspections and reports.

(May 2004) at 1.

¹⁶ 42 U.S.C. § 2011, *et seq.*

¹⁷ There are 104 commercial nuclear power plants licensed to operate in the United States, but one plant, Browns Ferry Unit 1, was shut down in 1985 and remains idle. GAO Report 04-654 (May 2004) at 1.

INPO, with the strong support of the senior managements of every commercial nuclear licensee, has played an extraordinarily important role in encouraging safe operations of commercial nuclear power plants. It is an industry model that would be useful for the railroad industry to emulate. It would especially be useful if railroad safety performance were graded, and the results of a railroad safety "watchdog" group such as INPO were to publish its reports and inspections (or at least provide them to the federal government) so that there would be every incentive to reduce accidents and incidents, as there has been in the nuclear industry.

The comprehensive safety regulation of the NRC, together with the complementary and substantial oversight of INPO, as well as the involvement of the senior managements of the nuclear licensees in INPO, and the public liability of the commercial reactor licensees for nuclear incidents and accidents (if they should ever occur), all act to create powerful incentives on nuclear licensees to operate safely.

INPO thus serves to complement the NRC's vital role in regulating and inspecting commercial nuclear reactors by performing its own inspections and publishing its own reports. Those inspections and reports act to encourage the entire nuclear industry to resolve potential safety problems at any commercial nuclear facility. The desire of the nuclear industry to continue to provide much-needed electricity (and to be able to expand), together with the potential liability of the other commercial nuclear reactor licensees for covered incidents and accidents at any such licensed facility, encourages all such licensees to support and defend the actions of INPO.

Incentives to Operate Safely

The commercial nuclear industry has a tremendous incentive to operate safely, and does operate in an extraordinarily safe manner, for all of the reasons discussed above. The proof is the fact that no member of the public has ever died as a result of operations or a nuclear accident at a commercial nuclear power plant.¹⁸

The Railroad Industry Vis-à-vis the Price-Anderson Act

The Price-Anderson Act precedent would confirm that the railroads are solely responsible for the safety of rail operations. After all, the railroads, not their customers, are solely responsible for the safe operation of their facilities. It would require the railroads to establish and create large insurance pools to cover potentially extremely high liability costs and through the pool concept would have railroads insure each other in the event of extremely large liabilities. It would demand a high level of government regulation to assure safe operations and would back this up with an intensive self-regulatory mechanism from the industry.¹⁹ It would exempt shippers from liability.

The railroad industry's safety record has improved since the 1970s, but it could still be better. Maintaining insurance or indemnification obligations for such accidents or incidents

¹⁸ Although some may suggest that the fact that the Price-Anderson Act has a limit on liability demonstrates that the reactor licensees do not have complete liability for all damages occurring as a result of a nuclear incident, the fact is that the liability limits have never been applicable to any such incident, because the relatively small amount of damages arising from such an incident (including the Three Mile Island accident) have been far below those limits.

¹⁹ The STB does not have safety-related authority over the railroads. Rather, DOT and other agencies, depending on the circumstances, have such authority. *Boston & Maine Corp. v. STB*, 364 F.3d 318, 321 (D.C. Cir. 2004); *Akron, Canton, supra*; *Conrail v. ICC, supra*. Interestingly, Canadian Pacific Railway Company appears to agree. See letter from CP to the STB, filed June 11, 2008 in STB Finance Docket

reinforces such incentives, because safe operations are rewarded with lower insurance premiums and lesser indemnification risks. Generally, the costs of such insurance or indemnification are ultimately borne by customers (especially captive customers), in any event. That is especially true for railroads, because the Interstate Commerce Act allows railroads to charge "any rate" unless they have market dominance and unless the STB prescribes a maximum reasonable rate (or, as in the case of fuel surcharges, the Board finds the charges to be unreasonable practices). In practice, the STB has never prescribed a rate that did not permit a railroad to recover all of the costs of the transportation at issue, so there is simply no plausible argument that it is unfair to require the railroads to bear the liability for their own actions and to be responsible for the insurance premiums associated with their operations.

As stated above, it is critical to understand that the nuclear licensees who operate the reactors, not their customers, are directly responsible for payment of the premiums for the primary and secondary commercial insurance that is available (but generally may recover them if rates are cost-based). Applying the Price-Anderson Act by analogy, therefore, the railroads, who of course operate their systems on their own without any shared control by customers or any other entities, should retain the liability for their actions, rather than attempt to shift the liability to their customers (because the customers have no ability to prevent transportation accidents once they tender their shipments in compliance with all applicable governmental regulations). Moreover, under the Price-Anderson Act, nuclear licensees are the only potentially liable entities for covered incidents and accidents. That potential and undiluted liability imposes a great incentive to operate safely and in accordance with all required governmental regulations. The

No. 35081, *Canadian Pacific Railway Company, et al.—Control – Dakota, Minnesota & Eastern Railway Co.* (arguing that other federal agencies, not the STB, have primary jurisdiction over rail safety matters).

same incentives will continue to apply to the railroads if they retain liability for their own transportation incidents and accidents.

Accordingly, if the railroad industry wants Congress to adopt a regime for it akin to the Price-Anderson Act, despite the fact that the railroad industry is an existing industry that did not need such legislation to come into existence, the analogy would work only if the railroads, not their customers, provided all the required commercial insurance available to them that might be triggered in the event of a covered incident.

To delve deeper, let us look at how the insurance provisions would apply to the railroads by analogy. There are 103 operating commercial nuclear power plants in the United States, the licensee for each of which is required (under NRC regulations implementing the Price-Anderson Act) to provide \$300 million in primary commercial liability insurance and \$95.8 million of secondary insurance for each covered incident for any reactor licensee in the pool. 10 C.F.R. § 140.11(4). Taking into account the \$300 million in commercial insurance for each covered incident, and \$95.8 million/covered incident in retrospective premiums from each commercial nuclear reactor licensee multiplied by 103 operating reactors, the cumulative liability protection available per covered incident is over \$10 billion.²⁰

In contrast, there are only 7 Class I railroads operating in the United States, and many of the smaller Class II and Class III railroads are not sufficiently capitalized to provide a large amount of insurance for a railroad transportation accident. Accordingly (and assuming only the Class I railroads were required to provide the necessary insurance), in addition to the required

²⁰ \$300 million in commercial insurance available for each reactor licensee, plus \$9,867,400,000 (103 reactors x \$95.8 million=\$9,867,400,000) in required secondary commercial insurance, equals \$10,167,400,000 available for every covered incident.

primary insurance for each Class I railroad, each of the Class I railroads would have to agree to provide a relatively large amount of secondary insurance – perhaps \$600 to \$700 million -- to satisfy the public that damages associated with the \$5-6 billion “nightmare scenario” of which the railroads are concerned.²¹

Similarly, let us look at safety regulation. Enforcement of the Price-Anderson Act is performed by the NRC. It is not clear that the STB, with its mission being the economic regulation of the railroads, would be the proper agency to enforce any Price-Anderson-like statute enacted with respect to the railroads, or rather whether FRA or another governmental agency with the mission of regulating the safety of railroad transportation would be assigned the enforcement of the statute. If the analogy to the Price-Anderson Act is followed, however, EEI would suggest by analogy that the agency with safety jurisdiction – the FRA – is the appropriate agency to enforce compliance with any such statute.

Other Matters as to Which the Board Requested Comments

In the Notice (at 2), the Board presented a series of questions that it wanted addressed. To the extent EEI is able to do so, the answers follow.

1. What constitutes a reasonable request for service involving the movement of TIH?

²¹ Based on the testimony of Norfolk Southern Railway Company at the April 24-25, 2008 hearing in Ex Parte No. 677, there is available to each Class I railroad at least a face amount of commercial hazard insurance in excess of \$1 billion per covered event. Accordingly, if that is assumed to be the maximum amount of primary commercial insurance available to each Class I railroad, to provide the additional \$4-5 billion in insurance that the Class I railroads testified may be needed for their “nightmare scenario,” each of the seven Class I railroads would have to provide secondary commercial insurance of approximately \$600-700 million/covered incident to provide sufficient insurance for any such covered

The Board stated that "Parties are also invited to comment on what constitutes a reasonable request for service involving the movement of TIH..." The law is clear on this point, as EEI explained in its Supplemental Written Submission filed on April 17, 2008. See EEI April 17, 2008 Testimony at 19-20. Railroads may not refuse to carry *any* commodity on the ground that it is alleged to be too dangerous to carry, regardless of its hazardous nature, if it is tendered in conformance with all applicable governmental regulations.²² DOT and other specialized federal agencies, such as the NRC, have the expertise on their staffs to administer the statutory safety mandates, regulations, and policies of those agencies.²³ The STB does not have such staff expertise, so far as EEI is aware.

At the same time, the STB has held that "In order to be found to have violated the common carrier obligation at 49 U.S.C. § 11101(a), a carrier must have failed to provide service upon reasonable request....It has been held that a reasonable request is one that is specific as to the volume, commodity, and time of shipment."²⁴

Accordingly, if a TIH shipper is specific as to the volume, commodity, and time of shipment, a railroad has an "absolute" duty to carry the TIH material.²⁵

incident. Although that may seem to be a large amount, it is largely a function of the relatively small number of Class I railroads, as compared to the number of commercial nuclear reactor licensees.

²² *Conrail v. ICC*, *supra*, 646 F.2d at 647-53; *Akron, Canton*, *supra*, 611 F.2d at 1169-70.

²³ See, e.g., DOT's pending notice of proposed rulemaking, *Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials*, 73 Fed. Reg. 17,818, 17,825 (col. 1) (April 1, 2008)(citing *Conrail v. ICC* and *Akron, Canton* with approval).

²⁴ *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Auth., d/b/a Northwestern Pacific Railroad*, Finance Docket No. 34337 (served July 27, 2005).

²⁵ *Akron, Canton*, *supra*, 611 F.2d at 1169.

2. Are There Unique Costs Associated with the Transportation of Hazardous Materials? Generally speaking, the answer to this question is "no." The reason is that the *additional* (as opposed to "unique") costs associated with hazardous materials are simply the same *types* of costs that railroads incur carrying other commodities as well. Rail transportation of hazardous commodities may entail higher insurance premiums compared to non-hazardous commodities (such as coal), at least on a per-ton or per-ton-mile basis. However, the Board's URCS costing system includes the premiums for commercial risk insurance. If URCS does not adequately reflect those costs, or attribute them to the proper movements, the Board should make the appropriate adjustments to URCS, rather than relieve the railroads of their common carrier obligation.²⁶

While the transportation of essential hazardous commodities undoubtedly involves risks, these risks must be seen in perspective. Manufacturers, distributors and end-users of these commodities also face risks, as do carriers of other modes. So far as EEI is aware, these participants in the supply chain generally carry insurance against these risks.

There are other reasons for caution in considering claims that insurance premiums are unique costs. For one thing, railroads presumably carry extensive liability insurance to cover all their risks, and may supplement this with umbrella coverage, as many corporations do.

Moreover, railroad witnesses prefer to speak about hypothetical scenarios in which they are blameless. However, placing some risk on railroads, particularly for their own negligence,

²⁶ If the premiums are allegedly not accurately accounted for or allocated by URCS, that is a different subject than the question that the Board asked. Such an issue should be addressed in a separate proceeding involving necessary updating or reallocation of URCS costs; URCS is a costing *system* and cannot be adjusted on an *ad hoc* basis to accommodate allegedly inadequate cost-allocation for only one reason.

presumably results in improved safety, security and care for shipments of hazardous materials in general and TIH commodities in particular. Relieving railroads of, or insulating them financially from, all risks would disserve public policy. As explained above, the nuclear regulation model fundamentally emphasizes safety and the prevention of accidents causing harm. If an accident occurs, it preserves significant exposure for licensees.

In addition, recent judicial decisions, including the Supreme Court's decision limiting punitive damages as to the Exxon-Valdez oil spill,²⁷ appear to indicate a trend to limiting abusive tort litigation, moderating the risks associated with necessary practices that cannot be made risk-free.

Finally, the FRA, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and other governmental bodies have worked hard to clarify requirements and best practices for handling and transporting various commodities. Compliance with these standards should operate as a defense to tort actions, or even to prevent them from being brought in the first place.²⁸

There are risks associated with hazardous commodities, and those risks may in certain circumstances exceed risks associated with non-hazardous commodities, though even rail transportation for non-hazardous commodities can and does lead to personal injury or property damage, which may in many years exceed claims arising from hazmat service. However, insurance is generally available and the premiums for reasonable coverage are affordable, particularly as railroads attain revenue adequacy.

²⁷ *Exxon Shipping Co. v. Baker*, 76 U.S.L.W. 4603 (U.S. June 25, 2008).

²⁸ *Cf. Lundeen v. Canadian Pacific Railway Co.*, ___ F.3d ___, No. 07-1656 (8th Cir., July 2, 2008) (upholding State tort actions against railroads if not in compliance with applicable federal regulations).

The Board should, therefore, be skeptical of claims that these risks give rise to unique costs, or justify relaxation or evasion of the common carrier obligation, either through outright refusals of service or astronomical pricing, or through attempts to shift all risks to shippers or receivers through take-it-or-leave-it indemnification provisions.

3. How Do Railroads Recover Those Costs? Railroads recover their costs by demand-based pricing. As railroad witnesses testified at the April 24-25, 2008 hearing, their rates generally are not based on costs, but on demand elasticities. It seems obvious that railroads set rates on hazardous materials (which traffic is typically captive to them) far above the full costs of carrying the commodity, so there should simply be no concern on the part of the Board about whether railroads are recovering all of the costs of carrying hazardous materials. In any event, given how railroads set their rates, the Board need not adopt changes in policy or procedure to assure that railroads will recover the costs of transportation of hazardous materials; the current, largely deregulated marketplace already permits that.²⁹

A more serious concern is whether the railroads can and will use their pricing freedom to accomplish indirectly what the Act forbids them to do directly. It is not difficult to imagine railroads imposing freight rates or hazardous materials surcharges on selected hazardous commodities that are so high as to amount to an effective embargo of those commodities.

Alternatively, the railroads might impose tariff rates or charges on, for example, anhydrous ammonia bound for use in anti-pollution equipment at EEI members' generating

²⁹ Hypothetically, a railroad could face competition for the transportation of hazardous materials. But, assuming so, it presumably follows that the railroad will still price far above its actual costs. Why? Because the railroads have clearly stated that they do not wish to transport such materials. Accordingly, it would be irrational to set rates for the transportation of hazardous materials at levels below full cost.

stations, and then offer shippers the alternative of lower rates in contracts that require shippers to assume all liability, including liability for the railroad's own negligence.

EEI does not oppose recovery in rail rates of reasonable and prudently incurred insurance premiums. However, the railroads have imposed excessive costs on shippers based on allegations of unacceptable risks. See, e.g., *Akron, Canton and Conrail v. ICC, supra*, in which the Defendant railroads sought to impose rates producing R/VC ratios exceeding 3000%.

The Board's rate regulation procedures may or may not provide effective recourse if the railroads use pricing to evade their common carrier obligation as to hazardous materials, or to shift all liability exposure to shippers or receivers. Therefore, to the extent that challenges to the level of rail rates and charges are ineffective against abuses, other remedies, including injunctive relief³⁰ and the Board's unreasonable practice jurisdiction, may need to be invoked.³¹

4. The Efforts of Various Federal Agencies, Including the Federal Railroad Administration and the Pipeline and Hazardous Materials Safety Administration, to Address the Transportation of Hazardous Materials. EEI is generally aware that FRA apparently has exercised greater oversight of the railroads' safety performances in recent years, following various widely reported derailments and other accidents. However, EEI does not have specific information that would further aid the Board in addressing this question.

As for PHMSA, EEI is aware that PHMSA's pending proposed rule regarding enhanced railroad tank car standards. EEI is also aware that AAR, ACC, the American Short Line and

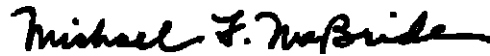
³⁰ E.g., *Railroad Salvage & Restoration, Inc., et al., Petition for Investigation and or Emergency Relief Under 49 U.S.C. 721 (b)(4)—Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Co.*, STB Docket No. 42107 (served June 30, 2008).

Regional Railroad Association, The Chlorine Institute, and perhaps other industry groups, have concerns about PHMSA's proposed rule, and may propose alternatives. Beyond such awareness, however, EEI is not in a position to aid the Board with respect to PHMSA's activities.

Conclusion

EEI is pleased to be able to be of assistance to the Board in providing information herein about the matters set forth in the Board's Notice.

Respectfully submitted,



Michael F. McBride
Van Ness Feldman, PC
1050 Thomas Jefferson Street, NW
Washington, DC 20007
(202)298-1800 (Telephone)
(202)338-2416 (Facsimile)
mfm@vnf.com

July 10, 2008

Attorney for Edison Electric Institute

³¹ E.g., Ex Parte No. 661 (Sub-No. 1), *Rail Fuel Surcharges* (served August 14, 2007).