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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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REGULATIONS GOVERNING FEES)	Ex Parte No. 542 (Sub-No. 18)
FOR SERVICES)	
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**COMMENTS OF
WESTERN COAL TRAFFIC LEAGUE
AMERICAN PUBLIC POWER ASSOCIATION
and
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

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AMERICAN PUBLIC POWER ASSOCIATION
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION**

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Their Attorneys

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The Western Coal Traffic League (“WCTL”), the American Public Power Association (“APPA”), and the National Rural Electric Cooperative Association (“NRECA”) (collectively, “Coal Shippers”) submit the following comments in response to the Board’s Notice of Proposed Rulemaking (“NPRM”) served in the above-captioned proceeding on February 15, 2011.

SUMMARY

Coal Shippers strongly support the Board’s proposal to cap formal complaint filing fees at \$350.00 (\$150.00 for small rate cases). Ever since the Board first proposed adopting unprecedented new complaint case filing fees in its *1996 User Fee Decision*,¹ the fees have generated significant controversy and substantial opposition, eventually leading Congress to pass annual appropriation riders in each of the last several

¹ *Regulations Governing Fees for Service Performed in Connection with Licensing & Related Services – 1996 Update*, 1 S.T.B. 179 (1996) (“*1996 User Fee Decision*”).

years mandating that these fees be capped at \$350.00. The reason why these complaint filing fees continue to generate wide-spread opposition is simple – substantial complaint filing fees create barriers to agency access and send the wrong message to the public that the Board is unreceptive to hearing complaints from consumers. Coal Shippers applaud the agency for its NPRM, and request that the Board adopt the fee changes proposed therein as soon as possible.

IDENTITY AND INTEREST

WCTL is a voluntary association, whose membership is comprised exclusively of organizations that purchase and ship coal from origins west of the Mississippi River. WCTL members collectively consume more than 170 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.² WCTL has actively participated in previous proceedings conducted by the Board and its predecessor considering agency user fees.

APPA is the national service organization representing the interests of over 2,000 municipal and other state- and locally-owned electric utilities in 49 states (all but Hawaii). Collectively, public power utilities deliver electricity to one of every seven

² WCTL's members are: Ameren Energy Fuels & Services, Arizona Electric Power Cooperative, Inc., CLECO Corporation, Austin Energy (City of Austin, Texas), CPS Energy, Entergy Services, Inc., Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Farmers Electric Cooperative, Western Fuels Association, Inc., Wisconsin Public Service Corporation, and Xcel Energy.

electric consumers (approximately 46 million people), serving some of the nation's largest cities, but also many of its smallest towns. Over 40% of public power utilities generate power from coal.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. The vast majority of NRECA members are not-for-profit, consumer-owned cooperatives. NRECA's members also include approximately 66 generation and transmission ("G&T") cooperatives. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

Many of the individual Coal Shipper members have been parties to formal complaint cases (*e.g.*, maximum-rate complaint cases and unreasonable practice cases) before the Board and its predecessor, and others may be in the future. Accordingly, Coal Shippers and their members have a strong interest in the Board's proposal to cap formal complaint filing fees.

I.

COMMENTS

The Board's NPRM proposes to cap four (4) formal complaint items in the Board's filing fee schedule (at 49 C.F.R. § 1002.2(f)), including:

Fee Item	Fee Description	Current Fee	Proposed Fee
56(i)	A formal complaint filed under the coal rate guidelines (Stand-Alone Cost Methodology) alleging unlawful rates and/or practices of rail carriers under 49 U.S.C. 10704(c)(1)	\$350*	\$350
56(ii)	A formal complaint involving rail maximum rates filed under the Simplified-SAC Methodology	\$350*	\$350
56(iii)	A formal complaint involving rail maximum rates filed under the Three Benchmark Methodology	\$150	\$150
56(iv)	All other formal complaints (except competitive access complaints**)	\$20,600	\$350

* Fee capped by Congress pursuant to Pub. L. No. 111-8, Sec. 193.

** Competitive access complaints are currently established at \$150 under Fee Item 56(v).

Coal Shippers agree fully that the Board's formal complaint filing fees should be capped by rule.

A. RECENT CONGRESSIONAL MANDATES TO CAP COMPLAINT FILING FEES SUPPORT THE BOARD'S NPRM

For over 100 years, between the inception of the Interstate Commerce Commission ("ICC") in 1887 and 1996, the ICC/STB imposed no or nominal user fees for the processing of formal complaints. It was not until the ICC's *1984 User Fee Decision*³ that any user fee was imposed on the filing of formal complaints, and even then

³ *Regulations Governing Fees for Services Performed in Connection with Licensing & Related Services*, 1 I.C.C.2d 60 (1984), modified 1 I.C.C.2d 194 (1984) ("*1984 User Fee Decision*").

the fees were capped at \$500 based on a determination that higher formal complaint fees would have a “chilling effect” on the filing of complaints by consumers. *Id.*, 1 I.C.C.2d at 198. The basis for the ICC’s decision to substantially cap fees was that the combination of the filing fee, *together* with the cost of bringing an adjudication, would have a chilling effect on the filing of complaints. *Id.*

Fifteen years ago, the Board abruptly changed course in its approach to formal complaint filing fees. In its *1996 User Fee Decision*, the Board decided to uncap complaint filing fees and charge \$233,200 for cases filed under the *Coal Rate Guidelines* (“coal rate cases”) and charge \$23,100 for other formal complaints to cover the STB’s full costs of processing these complaint cases. *1996 User Fee Decision*, 1 S.T.B. at 197-98. When implementing this new fee program in 1996, not a single stakeholder supported the Board’s action,⁴ and it generated a firestorm of opposition. For example; Senator Kent Conrad asserted:

These fees . . . indicate that sometimes people completely take leave of their senses here in Washington when they have responsibility over an administrative function. If there was ever an example of an agency going off a cliff with respect to a proposal, these fees by the Surface Transportation Board are a perfect example.

142 Cong. Rec. S9144 (daily ed. July 30, 1996). A number of other Senators urged the STB to reject the filing fee increases as “nothing short of absurd,” and “effectively mak[ing] the STB irrelevant in terms of providing shippers and consumers with a forum

⁴ *1996 User Fee Decision*, 1 S.T.B. at 195 (48 commenting parties opposed the Board’s proposed full-cost complaint filing fee proposal).

to seek relief.” See Joint Senate Letter from Senators John D. Rockefeller, Byron L. Dorgan, Paul Wellstone, Ernest F. Hollings, Max Baucus, and Carl Levin to Linda Morgan, Chairwoman, Surface Transportation Board (May 6, 1996).

Recognizing the severity of the impacts of such dramatic fee increases, and the strong opposition by shipper-stakeholders and Congress, the Board decided to cap these fees at \$1,000. *1996 User Fee Decision*, 1 S.T.B. at 198 n.6. However, the Board quickly allowed these fee items to escalate. The fees were initially raised to 10% of agency processing costs,⁵ but the fees continued to be escalated as part of the Board’s annual user fee schedule updates. By 2007, complaint filing fees reached 50% of estimated total processing costs, with coal rate case filing fees raised to \$178,200, and other formal complaint filing fees raised to \$17,600.⁶ Over this time period, the filing fees established by the Board for coal rate cases and other formal complaints were as follows:

⁵ *Regulations Governing Fees for Services Performed in Connection with Licensing & Related Services – 1997 Update*, 2 S.T.B. 1, 3 (1997).

⁶ *Regulations Governing Fees for Services Performed in Connection with Licensing & Related Services – 2007 Update*, STB Ex Parte No. 542 (Sub-No. 14) (STB served Apr. 2, 2007) at 5.

Year	Complaint filing fee for coal rate cases	Complaint filing fee for other formal complaints
1997	\$ 23,300	\$ 2,300
1998	\$ 27,000	\$ 2,600
1999	\$ 54,500	\$ 5,400
2000	\$ 55,000	\$ 5,400
2001	\$ 57,500	\$ 5,700
2002	\$ 61,400	\$ 6,000
2003	\$ 62,100	\$ 6,100
2004	\$ 66,600	\$ 6,600
2005	\$102,000	\$10,100
2006	\$140,600	\$13,900
2007	\$178,200	\$17,600

Disturbed by these excessive and escalating fees, in 2007 Congress first put a partial stop to the filing fee increases by passing legislation mandating that STB rate complaint filing fees may not “exceed[] the amount authorized for district court civil suit filing fees under section 1914 of title 28, United States Code.” Consolidated Appropriations Act, Pub. L. No. 110-161, 121 Stat. 1844 (2007). In response to Congress’s fee cap mandate, the Board capped coal rate case filing fees at \$350 for 2008. *See Regulations Governing Fees for Services Performed in Connection with Licensing & Related Services – 2007 Update*, STB Ex Parte No. 542 (Sub-No. 14) (STB served Jan. 25, 2008).⁷ Each year since 2007, Congress has continued to enact appropriations legislation riders mandating that rate case filing fees be capped at the federal district court complaint filing fee level of \$350, and in each year since then, the Board has published new user fee schedules implementing the Congressional fee cap mandates.

⁷ Without Congress’s intervention, coal rate case filing fees would have reached \$209,000 in 2008. *See Regulations Governing Fees for Services Performed in Connection with Licensing & Related Services – 2008 Update*, STB Ex Parte No. 542 (Sub-No. 15) (STB served June 18, 2008) at 3 n.5.

Clearly Congress has spoken loud and clear on this matter: the Board should cap complaint filing fees.

B. THE REASONS SET FORTH BY THE BOARD AND OTHER COMPELLING PUBLIC INTEREST FACTORS WARRANT CAPPING COMPLAINT FILING FEES

The Board's NPRM states that "three sound public policy considerations" warrant its proposed user fee changes. First, the Board states that, because the ICCTA⁸ eliminated the Board's authority to initiate investigations of alleged illegal or unreasonable rates or practices, "the filing of a complaint by shippers . . . is the Board's only mechanism for investigating and addressing potential rate violations or other unlawful practices." *NPRM* at 2. Second, the Board states that it is possible that high fees "may be having a chilling effect on shippers . . . seeking to bring a complaint to the Board" and capping such fees would "minimize any chilling effect of high fees, and encourage outside parties to bring potential regulatory violations before the Board for adjudication." *Id.*

Finally, the Board states that its proposed fee changes "should result in better management of the Board's docket and use of Board resources" because the relatively high fees for unreasonable practice complaints, compared to the low fees for declaratory orders (currently set at \$1,000 to \$1,400), "appears to have led parties to seek broad declarations by the Board rather than asking the Board to resolve individual

⁸ Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995).

complaints” even though an individual complaint may have been the preferable option to address the particular situation. *Id.*

Coal Shippers agree that these factors fully warrant the Board’s proposed complaint filing fee caps. A crucial element of Rail Transportation Policy is “to maintain reasonable rates where there is an absence of effective competition” (49 U.S.C. § 10101(6)) and under the law, rates on market dominant traffic “must be reasonable.” *Id.* at § 10701(d)(1). Additionally, Title 49 of the United States Code gives authority to the STB to evaluate and prescribe railroad common carrier practices. Specifically, under 49 U.S.C. § 10702, rail carriers are required to “establish reasonable . . . rules and practices on matters related to . . . transportation.” Often a common carrier rail customer’s only redress for unreasonable rates or practices is to seek relief from the Board by filing a complaint because, as recognized in the NPRM, as part of the ICCTA, “Congress eliminated authority previously held by the ICC to initiate investigations of alleged illegal or unreasonable rates or practices.” NPRM at 2.⁹

Also, the chilling effect of the Board’s prior exorbitant filing fees is well documented. For example, in a 1999 study, the General Accounting Office (now the Government Accountability Office), found that the STB’s complaint filing fees and the costs of adjudicating rate cases were “significant barriers that kept [shippers] from filing . . . rate complaints.” *Railroad Regulation, Current Issues Associated with the Rate*

⁹ The STB is the only place for shippers to turn to seek redress from most unlawful common carrier railroad actions. *See* 49 U.S.C. § 10501(b) (the Board’s jurisdiction over transportation of rail carriers and remedies with respect to rules, practices, services, routes, and facilities of such carriers is “exclusive”).

Relief Process (GAO/RCED-99-46) (Feb. 1999) at 48-49. In 1996, the editor of a leading transportation trade publication bluntly commented on this chilling effect as follows:

[t]o mandate the use of this agency with one hand and to impose exorbitant fees for that use with the other, is characteristic of the worst kind of monopoly. To point to the agency as a forum for relief while denying access to that forum through excessive charges is the height of hypocrisy.

Jean V. Murphy, *Absurdity*, *Traffic World*, Apr. 15, 1996, at 6. Further, while the Board has continued to publicly support informal resolution of adjudications before the agency, the Board's general policy has been to refuse to refund filing fees of settled or withdrawn complaints in cases where a complaint has been accepted, even if no substantive attention has been paid to the matter by Board staff.¹⁰

A number of additional public interest factors warrant the Board's proposed fee caps, including:

- Coal rate and unreasonable practice cases continue to constitute a form of "enforcement and consumer protection" and such "self-help [actions] should be encouraged."¹¹
- Most of the complainants in coal rate cases are electric utilities, and many of these complainants are public or non-profit entities. The utilities' customers ultimately pay for excessive rates as part of their monthly electric bills (as well as paying the cost of litigating maximum rate cases). The

¹⁰ See, e.g., *Ariz. Pub. Serv. Co. & PacifiCorp v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42077 (STB served Dec. 31, 2003) (STB denies request for refund of \$61,400 rate case filing fee by shipper, even where complaint was withdrawn at very early stages of case, and prior to the Board entering a procedural schedule).

¹¹ See *1984 User Fee Decision*, 1 I.C.C.2d at 85 (ICC caps complaint filing fees "since complaints are a form of enforcement and consumer protection").

interest of utility ratepayer consumers supports the capping of complaint filing fees.

- Maximum coal rate cases already are extremely expensive to adjudicate due to the complex expert and legal testimony needed to present such cases under the *Coal Rate Guidelines*.
- Unlike many entities subject to user fees (including at other agencies), complainant coal shippers obtain from the STB no license or other government grant or benefit that permits them to engage in for-profit business activities. Shippers' complaints, by contrast, simply seek to enforce their statutory rights to reasonable rail rates or practices.¹²
- STB adjudication of maximum rate cases or unreasonable practice cases is akin to a court's adjudication of a case before it. Courts have been loathe to charge any amount other than a nominal filing fee on grounds that adjudicative justice should not be for sale. Courts are not subject to the Independent Offices Appropriations Act,¹³ but the STB should consider the same policy implications in performing its adjudicatory functions.

The STB's proposal is fully supported by the Board's stated factors for capping complaint filing fees, together with the above additional important public interest factors.

¹² For example, the Federal Maritime Commission charges a formal complaint filing fee of \$221.00. *See* 49 C.F.R. § 502.62(g).

¹³ 31 U.S.C. § 9701.

CONCLUSION

Coal Shippers request that the Board promptly adopt its NPRM proposal and cap complaint filing fees.

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