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Surface Transportation Board
395 E. Street, S.W.
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(*via email*)

re: Docket Nos.: NOR 38302S & NOR 38376S

Notice of Proposed Settlement Agreement, U.S. DOE & DOD v. BNSF

The Western Interstate Energy Board appreciates the opportunity to comment on the Notice of Proposed Settlement Agreement in the cases of US DOE and US DOD v. Baltimore & Ohio Railroad Company Et. Al. (Docket No. NOR 38302S) and Aberdeen & Rockfish Railroad Company Et. Al. (Docket No. NOR 38376S). Our comments begin with an introduction to the Western Interstate Energy Board (WIEB) and the role that its High-Level Radioactive Waste Committee has in addressing spent fuel and high-level waste transportation issues. Next, we reference the 2006 study by the National Academies, and point out that its recommendations regarding dedicated trains now reflect a national interest, not just a longstanding legal issue. From this perspective, we detail our more specific concerns regarding how application of the proposed Settlement Agreement could be inconsistent with the national interest in full use of dedicated trains for SNF/HLW shipment. We request your consideration of these important concerns as the legal issues are resolved.

The Western Interstate Energy Board

WIEB is an organization of 12 western states and three western Canadian provinces, which are associate members. The governor of each state/province appoints a member to the Board. The legal basis of the Board is the Western

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Interstate Nuclear Compact (P.L. 91-461), which states that the purpose of the Board is to provide the instruments and framework for cooperative state efforts to "enhance the economy of the West and contribute to the well-being of the region's people." The Board seeks to achieve this purpose through cooperative efforts among member states/provinces and with the federal government in the energy field. The Board serves as the energy arm of the Western Governors' Association.

Much of the work of the Board is conducted through committees. Committee members are appointed by Board representatives and often have expertise on a particular issue. The WIEB High-Level Radioactive Waste Committee is composed of nuclear waste transportation experts appointed by the Governors of eleven Western States. The Committee works with the U.S. Department of Energy to develop a safe and publicly acceptable system for transporting spent nuclear fuel (SNF) and high-level radioactive waste (HLW), and it has been active on this topic since the mid-1980s. The HLW Committee's primary management directives come from a series of Western Governors' Resolutions dating back to 1985, which express the Governors' goal of "safe and uneventful transport of nuclear waste."

The National Academies' Assessment of SNF/HLW Transportation

The most authoritative assessment of SNF/HLW transportation issues is the 2006 study by the National Academies Committee on Transportation of Radioactive Waste, "Going the Distance?: The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States," which found that "*there are clear operational, safety, security, communications, planning, programmatic, and public preference advantages that favor dedicated trains.* The committee strongly endorses DOE's decision to transport spent fuel and high-level waste . . . using dedicated trains" (pg. 18 *emphasis added*). The National Academies then formally recommended that "*DOE should fully implement its dedicated train decision* before commencing large-quantity shipment of spent fuel and high-level waste . . ." (pg. 19 *emphases added*).

The WIEB HLW Committee Concern: In application, the Settlement Agreement could be inconsistent with the national interest in full use of dedicated trains for SNF/HLW shipment.

Our concern is that some provisions of the proposed Settlement Agreement could be applied to thwart the realization of the operational, safety, security, communications, planning, programmatic, and public preference advantages of dedicated trains recommended by the National Academies. In more direct terms, these advantages include the following:

1. A four-cask dedicated train removes from increasingly congested public highways 24 heavy-haul truck shipments of pressurized water reactor assemblies, or about 30 heavy-haul truck shipments of boiling water reactor assemblies.
2. Because of the above factors, dedicated trains increase the efficiency and effectiveness of escorts, which are needed for both security and emergency response. These efficiencies are essential if escort services are to be consistently provided over a decades-long shipment campaign.
3. Due to limited stops, travel time for a dedicated train shipment is significantly reduced, which reduces "radioactive shine" impacts in corridor communities, and increases efficiency in the deployment of government-supplied equipment (i.e., casks, rail-cars, buffer cars, and escort cars).
4. Combined with adjustments of the "queue" for federal government acceptance of SNF, dedicated trains can greatly increase the efficiency and effectiveness of SNF removal at origin sites.

What is at stake in the use of dedicated trains is not just safety and efficiency, however, but *the ability of the federal government to conduct the crucial transportation component of an integrated national program for nuclear waste storage and disposal*. Successful implementation of SNF/HLW transport must address risk perceptions in hundreds of corridor communities, and what the National Academies call "social and institutional challenges"—essentially, the suspicion (often warranted) that best business practice is not occurring due to incompetence, expediency and/or self-interest among the responsible parties. To address these social and institutional challenges, federal program managers must convince residents of affected corridor communities that SNF/HLW transportation system design incorporates best business practices, including full and effective use of dedicated trains.

The federal government has made substantial investment in the "best business practice" of dedicated trains, including the development of advanced rail-cars that reduce derail risks while enabling dedicated trains to travel at speeds consistent with other rail traffic, and the commitment to provide the casks, the buffer and rail cars, and the escort car and crews. If the application of the Settlement Agreement now prevents or unduly complicates full implementation of DOE's dedicated train decision, the federal government will be unable to convince affected parties that the SNF/HLW program consistently incorporates best business practices, and the transportation component of a reformulated national nuclear waste program --and therefore the national interest—will be jeopardized.

Specific WIEB Concerns

The application of the rail industry's common carrier obligations should serve rather than thwart the national interest in the full use of dedicated trains for SNF/HLW shipment. Consistent with the national interest, railroads should fully

cooperate with the federal government in providing requested dedicated train service. Specific concerns include the following:

1. **The Settlement Agreement could be used to thwart provision of dedicated train service as near as possible to origin sites.**

   This concern is raised by Section 6D (Track and Facility Limitations, pg. 18), which addresses what happens if BNSF "believes" that a proposed Covered Movement could damage its track or facilities, or if BNSF "believes" it will incur additional operating costs. This section does not address the process or criteria by which BNSF arrives at its beliefs; it, therefore, raises the concern that BNSF might not use fully-substantiated beliefs to thwart otherwise desirable dedicated train service or to charge excessive Extra Service costs.

   The railroads should fully cooperate in the make-up of dedicated trains, if not at the origin site, then at the nearest feasible railhead. However, under the Settlement Agreement this cooperation is not assured. This concern is raised by Section 5A (pg.10), which says that all origins and destinations "shall be established and normally used interchange points for hazardous materials." Why must the origin or destination for a dedicated train be an "established and normally used interchange point?" Why could an origin not be any location where a dedicated train can be safely loaded and moved therefrom to Class 1 rail lines, whether or not such location is already "established and normally used?" Or, as stated in Section 4C (Car Placement and Handling, pg. 7), any location "in the clear of adjacent tracks and rail switch points while in a yard or siding?"

2. **The Settlement Agreement could be used to improperly deny or disrupt dedicated train service on the grounds that it impedes other freight traffic or to reroute dedicated trains in order to reserve better track for regular freight shipments**.

   These concerns are raised by Section 4B (Routing and Diversion, pg. 6), which says that "BNSF will control selection of routes internal to its system consistent with subparagraph 4F" (Practices, pg. 8). Subparagraph 4F references a 50 mph speed restriction, wayside defective bearing detectors, and other Association of American Railroads (AAR) procedures and practices for hazmat shipment. Does not regular freight traffic move at speeds greater than 50 mph? Does not general freight that includes hazmat move at speeds greater than 50 mph? If dedicated trains use state-of-the-art railcars developed by the federal government to reduce derail risk, why should their speed limitation be lower than those for general freight traffic? Under the Settlement Agreement the railroad could deny or frustrate dedicated train service using such equipment on the grounds that it impedes other freight traffic.

The concern is also raised by another provision in Section 4B (Routing and Diversion, pg. 7), which says that "BNSF will control selection of routes internal to its system . . . ." However, Section 4I (Regulations and Safety, pg. 9) says that "BNSF will comply with all applicable regulations and requirements of the DOT, FRA" and other governmental entities such as NRC. Our understanding is that, under PHMSA, the rail industry proposes routes for hazmat shipments based on a set of 27 factors and an FRA-approved route selection model; FRA then reviews and approves such routes. Does Section 4B permit BNSF to depart from the FRA approved route, as it applies to the BNSF system? Does it permit the railroad to reroute a dedicated train in order to reserve its better track for regular freight shipment? PHMSA applies to general hazmat shipment by rail, almost all of which uses mixed freight. The routing of dedicated trains using advanced rail cars should use the most expeditious route available, using the best available track; PHMSA rules applicable to hazmat shipment in mixed freight should not be used to frustrate such routing.

3. **The Settlement Agreement could be used to prevent efficient deployment of government-supplied equipment, including efforts (by railroads and corridor states) to limit stops, both in delivery and in return shipment.**

   This concern is raised by Section 4D (Equipment Utilization, pg. 7), which says that the BNSF will route (Government-purchased) empty cask, cask cars and buffer cars to a Government-designated location, and that it will use "commercially-reasonable efforts" to prevent "unusual delays." Would not such shipments constitute an (unloaded) dedicated train --one not subject to the delays expected in standard commercial freight practice?

   The concern is also raised by Section 12 (Buffer Cars, pg. 23), which says that, to a shipment of empty casks, cask cars and buffer cars, "BNSF may elect to add . . . cars carrying dry freight." May BNSF elect to do this if the shipment thereby involves extra stops, different routing and/or additional travel time? May BNSF elect to make return shipments "mixed freight" rather than "dedicated trains?" In dedicated trains, the federal government will provide the casks, the buffer and rail cars, and the escort car and crews; the Settlement Agreement should not be used to frustrate the interest of the federal government in the efficient deployment of expensive dedicated train equipment.

4. **The Settlement Agreement could be used to improperly charge for "Extra Services" to frustrate dedicated train shipments.**

   This concern is raised by Section 6B (Extra Services, pg. 13) which defines "extra services" as anything beyond "basic services," and then says that "BNSF will not unreasonably withhold Extra Services" provided: (a) the

Government pays extra (even if the services provide capability useful to BNSF in other shipments), and (b) the Extra Service would not disrupt normal operations, as assessed by BNSF. Is it clear how BNSF might conclude that a dedicated train shipment disrupts its normal operations? Is it clear how BNSF would take into account the weights of Covered Movements? Extra services should be used to enable but not to frustrate full railroad cooperation in provision of requested dedicated train service.

BNSF's obligations under the Settlement Agreement should be clarified to ensure maximum cooperation with the federal government in achieving the national interest in full use of dedicated trains for SNF/HLW transport.

We will appreciate the attention of the Surface Transportation Board and the parties in resolution of these and other potential constraints on the full use of dedicated trains in SNF/HLW transport, and we will be interested to consider the reply comments of STB and the parties.

Sincerely,

Ken Niles, Chair,
WIEB High Level Radioactive Waste Committee

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Certificate of Service

I hereby certify that I have served all parties of record in this proceeding with Western Interstate Energy Board's Motion to Participate and Comments by United States Mail.

James M Williams

Jim Williams

Western Interstate Energy Board

Date: Nov. 30, 2012