BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC 20423

In the Matter of: **Review of Rail Access and Competition Issues— Renewed Petition of the Western Coal Traffic League**	**STB Ex Parte No. 575**

COMMENTS OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION

Arkansas Electric Cooperative Corporation ("AECC") respectfully submits its comments to the Surface Transportation Board in support of adoption of rules and policies governing the use of "paper barriers" to interchange in railroad line sale transactions subject to approval of the Surface Transportation Board.

I. STATEMENT OF INTEREST

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 400,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC's generation assets are its ownership interests in the White Bluff and Independence coal-fired generation plants, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. AECC has a 35 percent interest in each of these plants. Entergy is the majority owner and also the operator of these plants.

The Independence plant is located on a line of the Missouri and Northern Arkansas Railroad Company, Inc. ("MNA"), a subsidiary of RailAmerica, Inc. (formerly known as RailTex, Inc.). MNA operates on this line by virtue of pair of agreements dated December 11, 1992 between MNA and Missouri Pacific Railroad Company ("MP", then a subsidiary of UP)[1] entailing lease and purchase of track in Missouri, Arkansas and Kansas.[2] MNA can interchange traffic not only with UP, but also with BNSF (at Ft. Scott, Kansas, and at Lamar, Carthage, Springfield and Aurora, Missouri)[3] and with The Kansas City Southern Railway Company ("KCS"). However, the agreements with MNA contain "paper barriers" that preclude MNA from participating in—and AECC and Entergy from enjoying—competitive rail service to the Independence plant.

AECC and Entergy Arkansas, Inc., jointly filed comments on May 2, 2005 in response to the Western Coal Traffic League ("WCTL") Renewed Petition and described the UP/MNA agreements and the impact of the paper barriers on the operation of the Independence plant.[4] AECC appreciates the Board's action in reopening this proceeding to further consider policies governing the use of paper barriers in railroad line sale transactions.

II. COMMENTS

The Board specifically invites comments on six (6) issues: (a) the Board's statutory authority to address pre-existing paper barriers; (b) identification and description of existing paper barriers so that the Board can determine the extent of the problem; (c) identification and quantification of problems experienced by shippers as a result of paper barriers; (d) the short and long term economic impacts of paper barriers; (e) the effectiveness of the existing AAR/ASLRRA agreement on paper barriers; and (f) information about the RIA, including the most recent version, amendment history, interpretations, proceedings, handbooks, etc. AECC's incorporates its May 2, 2005 comments herein,[5] and its comments on the issues identified by the Board follow.

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[1] Prior to 1982, Missouri Pacific ("MP") was a separate Class I railroad. UP acquired control of MP in a transaction that also included the Western Pacific Railroad (ICC Finance Docket No. 30000). MP operated as a subsidiary of UP until 1997, when it was merged into UP.

[2] *See* Exhibit 10.18 to RailTex, Inc. SEC Form S-1 (filed Nov. 19, 1993).

[3] In addition, BNSF has trackage rights on certain UP lines in Arkansas that were granted in the UP/SP merger and intersect the MNA line at Diaz. However, those rights are for overhead traffic only except for new facilities and transloads.

[4] A copy of the UP/MNA paper barrier provision also may be found at Attachment 3 to the WCTL Renewed Petition.

[5] A copy of the AECC/Entergy May 2, 2005 Comments is associated herewith as Exhibit 1.

A. The Board's statutory authority to address pre-existing paper barriers:

The Rail Transportation Policy set forth at 49 U.S.C. § 10101 identifies the policy of the United States Government in regulating the railroad industry as, *inter alia,* (1) allowing, "to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (4) . . . ensur[ing] the development and continuation of a sound rail transportation system with effective competition among rail carriers ... to meet the needs of the public and the national defense; (5) . . . foster[ing] sound economic conditions in transportation and to ensure effective competition . . .; [and] (12) . . . prohibit[ing] predatory pricing and practices [and] avoid[ing] undue concentrations of market power . . ." These policies set the framework for the substantive regulation of the railroad industry.

The substantive regulatory scheme enforced by the Board includes requirements that railroads observe reasonable practices, 49 U.S.C. § 10702, and provide reasonable, proper and equal facilities to provide for the interchange of traffic with other rail carriers, *id.* at § 10742. Moreover, in approving transactions involving line sales between carriers, the applicable standards involve both the public interest and the anticompetitive effects of the transaction, *id.* at § 11324. The public policy under the antitrust laws, which would apply in the absence of the preemption found at 49 U.S.C. § 11321, prohibits parties selling assets from exercising continuing control over the use of those assets such as the type of conditions embraced in paper barriers. *See, e.g., Blackburn v. Sweeney,* 53 F.3rd 825 (7th Cir. 1995). While the Board's jurisdiction over line sales is exclusive, the statute provides for participation by the Attorney General of the United States, thereby further evidencing Congressional intent that antitrust policies should be considered in evaluating rail line purchase transactions between and among railroad common carriers.

The Rail Transportation Policy and the substantive body of regulatory law as set forth above grant the Board power to control railroad use of paper barriers. The practices and interchange jurisdiction give the Board power to review and as appropriate void existing paper barriers, and the transaction approval process gives the Board the power to reject transactions unduly burdened with paper barriers.[6] The policy proposed by WCTL at Appendix B to its

[6] There is no constitutional barrier to the Board reviewing and disallowing paper barriers. The Constitutional prohibition against interfering with contract rights applies solely to states. *See* U.S. Constitution, Article I, Section 10.

Renewed Petition would establish a reasonable balance both as to time and economic considerations for judging which paper barriers are unreasonable and should be disallowed.

B. Identification and description of existing paper barriers:

Customarily, shippers are not informed of the substantive terms of paper barriers. Rather, shippers are informed that a particular routing is not available due to contractual restrictions. AECC learned of the terms of the UP/MNA paper barrier only through inclusion of those terms in a filing with the Securities and Exchange Commission by RailTex, Inc., the parent of MNA.[7] AECC urges the Board to utilize its jurisdiction over railroad common carriers to require the Class I railroads to submit the paper barriers they have imposed on line sale transactions to the Board for scrutiny.

C. Identification and quantification of problems experienced by shippers as a result of paper barriers:

As a result of MNA's paper barriers, the Independence plant has experienced at least three distinct categories of transportation problems. These encompass rates, service and alternative fuel sources. Each of these is discussed below.

(i) Rates:

The MNA paper barriers increase rates by obstructing alternative routings that would provide a degree of intramodal competition where little, if any, currently exists. Absent the ability to use MNA, coal moving to Independence from BNSF today would need to be trucked from a suitable point on BNSF's main line that traverses northern Arkansas, or from a suitable point on the trackage rights acquired by BNSF in the UP/SP merger. Regardless of the location, the volume of the movement and the distances involved undermine the viability of truck-based options.

Similarly, buildout options might provide a theoretical cap on rail pricing for this movement, but the distances and costs are extreme. For example, a hypothetical buildout to reach BNSF in the vicinity of Black Rock – Portia might be 35-40 miles in length, and easily could cost $90 million or more given topographic and wetland issues. A hypothetical buildout to the former SP (SSW) line in the vicinity of Waldenburg – McDaniel might be comparatively

[7] As noted earlier, a copy of the UP/MNA paper barrier provision may be found at Attachment 3 to the WCTL Renewed Petition.

shorter (30 miles), but still would be an expensive ($70+ million) project facing major challenges and uncertainties.

Given the impracticality of these alternatives, the lack of available BNSF-MNA routings has a significant impact on rates. While MNA may not be able to move PRB unit trains as efficiently as a Class I railroad, it is understood to have a full capability to move 286,000 lb. GWR cars. Moreover, the mileage of BNSF-MNA routes to the plant is somewhat shorter than UP's single-line mileage (via Diaz, AR). If not for the paper barriers, MNA could provide viable intramodal competition for this movement.

The impact of paper barriers on rates for the Independence movement cannot be observed or measured directly.[8] However, a reasonable lower bound estimate of the impact can be made using a small number of simplifying assumptions. Given the lack of viable transportation alternatives, the rate applicable to the Independence movement with paper barriers in place can be approximated by the rate that could be anticipated from an STB rate reasonableness proceeding. While the establishment of an exact rate in such proceedings is a complex process, the prescribed rate will never be lower than the statutory threshold of 180 percent of the incumbent carrier's variable costs. Using the variable cost determination from the TMPA/Gibbons Creek case,[9] this suggests that the rate applicable to the Independence movement viewed in isolation is no less than $13.24/ton.[10]

Without paper barriers, the rate for this movement would be set on the basis of competitive forces.[11] Until recently, competitive rates of 7.5-8.0 mills were readily observable for movements of this size. Even if MNA's operating costs for PRB coal trains are assumed to be 1/3 higher than the costs of Class I main line operations, a competitive rate under $10.00 per

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[8] Rail transportation contracts for Independence and White Bluff movements have been commingled, so separate rates for the two plants – one of which benefits from dual rail service – cannot be discerned.

[9] This case involved PRB unit trains largely analogous to those used in service to Independence, and found variable costs equivalent to $0.0057 per revenue ton-mile. See Surface Transportation Board, Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company*, Decision served March 21, 2003.

[10] Calculated as 0.0057 mills per ton-mile (variable cost net of railcar costs) x 1290 miles. Depending upon the economic performance of the "stand-alone" railroad in such a case, the prescribed rate could be considerably higher.

[11] Some may argue that Independence is in any event sole served and that MNA may price its service to reflect the "one lump theory." The "one lump theory," however, assumes perfect pricing information. With confidential Rule 11 contracts and rebate contracts, perfect pricing information is not available. Moreover, under the Board's "Bottleneck" policies, if MNA were to price excessively, with a Rule 11 contract from the carrier serving the producing mine AECC and Entergy could challenge MNA's bottleneck rate before the Board.

ton reasonably could be anticipated.[12] While recent developments may have acted to perturb both costs and competitive rates, it is reasonable to estimate that the long-term "paper barrier premium" for coal moving to Independence is at least $3.25/ton, and likely considerably more.

(ii) Service

The MNA paper barriers make it essentially impossible to rely on another carrier to supply PRB coal for Independence when service problems occur on UP. The Joint Line throughput problems that began in May 2005 caused railroad-induced burn restrictions to be imposed at Independence for the third time in twelve years. While the Joint Line situation had adverse effects on both UP and BNSF throughput capabilities, the MNA paper barriers made it impossible for Independence to receive BNSF-originated PRB coal during the lengthy time when only UP was operating under Force Majeure. During this time, Independence was deprived of any opportunity to mitigate the 15-20 percent delivery shortfall experienced by UP. As a result, the plant was operated with significant burn restrictions, and lost output was replaced with higher-cost generation.

(iii) Alternative Sources

In response to the PRB throughput restrictions, efforts have been made to diversify fuel supply to the Independence plant. This has entailed the consideration of a wide range of possible alternative sources of coal. Many of these sources are served by railroads other than UP. Inherently, the MNA paper barriers impede reliance on such sources.

For example, there are numerous former mining properties in the portion of western Missouri served by MNA, particularly in Bates, Vernon, Barton and Jasper counties. However, the paper barriers allow UP to preempt MNA and provide exclusive service to Independence for the nominal payment to MNA of $60,000 per year;[13] and UP
doesn't directly serve the mines, so neither carrier is in a position to offer single-line service from this source as MNA-predecessor MP could and would have done.

Similarly, in southeastern Kansas, eastern Oklahoma, eastern Texas and northwestern Louisiana there are many active or potential sources of substitute coal/lignite. While some of

[12] This is generous in that in Ex Parte No.589, *Calculation of Variable Costs in Rate Complaint Proceedings Involving Non-Class I Railroads* (Decision served Mar. 28, 2003), the Board determined to estimate variable costs for Class II and III railroads using Class I railroad regional average costs with appropriate adjustments made on a case-by-case basis.

[13] *Id.*, Lease Agreement at § 3.01,

these are served by UP, many others would be most effectively served by KCS or BNSF. In the presence of a PRB throughput restriction, the Independence plant would benefit from an interline movement involving those carriers, but such a movement essentially is precluded by the paper barriers.

In the case of Colorado/Utah coal, UP has cooperated in the movement of limited amounts of substitute coal, and AECC is appreciative of their efforts. However, the paper barriers prevent Independence from receiving western bituminous coal via the Utah Railway-BNSF routing established in the Central Corridor conditions imposed in the UP/SP merger. While MNA-predecessor MP could have received western bituminous coal from two independent sources (DRGW or Utah-UP), and the Board ostensibly enabled BNSF to step into UP's shoes in working with Utah Railway to move Utah coal, the MNA paper barriers prevent Independence from receiving volume movements of such coal from BNSF, even when UP's ability to perform is compromised.

In addition to these and other specific potential movements, AECC believes that paper barriers generally inhibit MNA from taking aggressive competitive actions that might be contrary to UP's interests. While the former MP would have aggressively pursued movements associated with alternative sources, the paper barriers inhibit MNA's willingness, as well as its ability, to participate in "source competition" of this type.

While the Board in the recent merger rules proceeding highlighted the importance of preserving source competition,[14] paper barriers frustrate this objective, and in the process prevent MNA from responding effectively to changing market circumstances.

D. Short and long term economic impacts of paper barriers:

The problems identified in section C above manifest many of the significant economic impacts associated with paper barriers, which are discussed in further detail below. It is emphasized that this discussion relates only to AECC's experiences with paper barriers at the Independence plant. It is not intended to provide a comprehensive list of the economic impacts that may result from paper barriers in other situations.

1. Increased delivered fuel price: The rate "premium" resulting from paper barriers increases the delivered price of fuel. This raises the costs of electricity generation,

[14] Ex Parte No. 582 (Sub-No.1), *Major Rail Consolidation Procedures* (served June 11, 2001).

diminishing the welfare of customers (especially those of low income), undermining the competitiveness of existing Arkansas industries, and impeding the attraction/development of new industries.

2. Resource misallocation – alternative fuels: The inability to rely on a carrier other than UP to supply PRB coal necessitates the inefficient use of alternative fuels. This occurs in the short term when service disruptions on UP rise to a level that necessitates a burn restriction, and in the longer term as a strategic response to the demonstrated risk posed by reliance solely on UP to deliver PRB coal.
3. Resource misallocation – transportation of alternative fuels: The inability or unwillingness of UP to transport alternative fuels during a service disruption necessitates reliance on comparatively inefficient truck or barge options.
4. Resource misallocation – stockpiles: The demonstrated risk of relying solely upon UP to deliver PRB coal makes it rational for Independence, in the longer term, to build and maintain excessive stockpiles—to the extent UP can deliver such increased supplies in light of its current capacity situation.
5. Foreclosure of efficient rail routings: At the northern end of MNA, there are notable grades against southbounds loads between Kansas City and Ore, Missouri. These grades tend to validate UP's preference to route loaded coal trains destined for Independence via its (more circuitous) line through eastern Oklahoma rather than via MNA. However, BNSF has multiple options to interchange with MNA south of the area affected by those grades. The paper barriers prevent use of these comparatively more efficient routings (e.g., BNSF-Lamar-MNA).
6. Under-utilization of interstate rail network: To the extent that paper barriers contribute to increased use of natural gas and/or use of modes other than rail to transport coal, they are driving volume from the interstate rail network. By definition, that volume is being lost at least in part from shortlines that are subject to paper barriers. This undermines the long-term survival prospects for this type of low-density line.
7. Disruption of domestic energy markets: To the extent that paper barriers cause coal users to consume large quantities of natural gas in response to unanticipated coal delivery problems, domestic energy markets are disrupted. This negatively impacts

both industrial and residential users of natural gas as the increased demand by utilities puts upward pressure on natural gas prices.

8. Economic development – To the extent that paper barriers inhibit the movement of substitute coal, economic development in the regions that would be supplying that substitute coal is suppressed.
9. Competition vs. regulation: To the extent that paper barriers suppress market forces, they leave shippers with no option but to rely on rate regulation and other regulatory proceedings to obtain reasonable price/service options for their transportation requirements. Congress has recognized the importance of market forces and the economic inefficiency of regulation as a means to achieve this goal.

Overall, paper barriers create a variety of adverse economic consequences, as efficient allocations of resources are frustrated, and inefficient actions are encouraged. Instead of being able to use a KCS-Joplin-MNA rail movement to Independence, use of lignite requires trucking long distances from northwestern Louisiana, and imported coal must be barged from the Gulf Coast (to White Bluff, from which PRB coal is then diverted to Independence). Instead of an MNA single-line movement from a reactivated mine in western Missouri, AECC and Entergy are left to pursue development of nearby mines that would not use rail service at all. The losses of source competition compound the higher delivered fuel costs that result from paper barriers, and go hand in hand with losses of rail traffic. Such losses are especially important in the context of the low traffic densities that typify the shortlines to which paper barrier issues generally apply. While paper barriers may make a short-term contribution to the revenues of the "parent" carrier, they ultimately are detrimental to the integrity of the interstate transportation network, and have other adverse economic consequences.

E. Effectiveness of the existing AAR/ASLRRA agreement on paper barriers, and

F. Information about the RIA, including the most recent version, amendment history, interpretations, proceedings, handbooks, etc.:

The Reply of the Albany & Eastern Railroad Company in Support of Renewed Petition for Rulemaking speaks volumes about the effectiveness of the Railroad Industry Agreement ("RIA") between the Association of American Railroads and the American Shortline and Regional Railroad Association. The remedial provisions of that agreement are extremely limited, having no application to existing traffic movement situations, and in any event are subject to control of the Class I railroad involved. Any further information about the RIA should be obtained from the parties—direct or beneficial—to that agreement.

WHEREFORE, THE PREMISES CONSIDERED, Arkansas Electric Cooperative Corporation respectfully urges the Surface Transportation Board to adopt the rules and policies proposed by the Western Coal Traffic League in its Renewed Petition.

Respectfully submitted,

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March 8, 2006

Exhibit 1

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC 20423

In the Matter of:	)	
	)	STB Ex Parte No. 575
Review of Rail Access and Competition Issues	)	

**COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION
AND ENTERGY ARKANSAS, INC.
IN SUPPORT OF RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE FOR RULEMAKING
TO ELIMINATE UNREASONABLE "PAPER BARRIERS" TO INTERCHANGE**

Arkansas Electric Cooperative Corporation ("AECC") and Entergy Arkansas, Inc. ("Entergy", and together with AECC, "Utilities") respectfully submit their joint comments to the Surface Transportation Board in support of the Renewed Petition of The Western Coal Traffic League for rulemaking to eliminate unreasonable "paper barriers" to interchange.[1]

I. STATEMENT OF INTEREST

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 400,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC's generation assets are its ownership interests in the White Bluff and Independence coal-fired generation plants, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. AECC has a 35 percent interest in each of these plants. Entergy is the majority owner and also the operator of these plants.

[1] Renewed Petition submitted March 21, 2005.

Entergy is a public utility subsidiary of Entergy Corporation, an investor owned registered public utility holding company. Entergy and the other public utility subsidiaries of Entergy Corporation serve more than 2,000,000 customers located in Arkansas, Louisiana, Mississippi, and Texas. Entergy is the majority owner and also the operator of the White Bluff and Independence coal-fired generation plants described above. Its affiliate Entergy Gulf States, Inc. owns and operates the Nelson coal-fired generation unit located near Lake Charles, Louisiana, which typically burns in excess of 2 million tons of PRB coal annually.

As operator of White Bluff, Independence, Nelson, and other power plants, Entergy monitors the terms of fuel supply and coal transportation agreements. In discharge of its fiduciary duty to its members with regard to its ownership interest in the White Bluff, Independence and other power plants, and to assure efficiency in the supply of fuel to those plants, AECC also monitors the terms of fuel supply and coal transportation agreements. Through the review of data filed with the Federal Energy Regulatory Commission and other sources, AECC and Entergy each seek to assure that the cost of electric power generation at the plants in which it has an interest is competitive with the cost incurred by other utilities. This is of growing importance as the electric utility industry is becoming open to competition. It is well known, and demonstrated by both experience and FERC data, that coal-fired generation plants with competitive transportation options enjoy more favorable delivered fuel costs than do plants that lack such alternatives.

The White Bluff plant at Redfield, Arkansas formerly had only one option for rail service. It is now served by both the BNSF Railway Company ("BNSF") and the Union Pacific Railroad Company ("UP") as a result of the build-in/build-out condition imposed in the UP/SP merger proceeding,[2] a build-out authorized to implement the merger condition,[3] and an agreement reached between Entergy and UP.

[2] *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company-Control and Merger-Southern Pacific Rail Corporation Southern Pacific Transportation Company, St. Louis Southwestern Railroad Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760 (hereinafter *UP/SP)*, Decision No. 44 at 185 (served Aug. 12, 1996); Decision No. 88 (served Mar. 21, 2000).
[3] *Entergy Arkansas and Entergy Rail-Construction and Operation Exemption-White Bluff to Pine Bluff, AR*, STB Finance Docket No. 33782 (served May 4, 2000).

The Independence plant is located on a line of the Missouri and Northern Arkansas Railroad Company, Inc. ("MNA"), a subsidiary of RailAmerica, Inc (formerly known as RailTex, Inc.). MNA operates on this line by virtue of pair of agreements dated December 11, 1992 between MNA and Missouri Pacific Railroad Company ("MP", then a subsidiary of UP)[4] entailing lease and purchase of track in Missouri, Arkansas and Kansas.[5] MNA can interchange traffic not only with UP, but also with BNSF (at Ft. Scott, Kansas, and at Lamar, Carthage, Springfield and Aurora, Missouri)[6] and with The Kansas City Southern Railway Company ("KCS"). However, the agreements with MNA contain "paper barriers" that preclude MNA from participating in—and AECC and Entergy from enjoying-- competitive rail service to the Independence plant.

II. COMMENTS

The MNA/UP lease agreement covers 389 miles of track in Arkansas, Missouri and Kansas. Of particular relevance for these Comments, the lease includes former MP mainline trackage between Pleasant Hill, Missouri and Bergman, Arkansas and between Guion, Arkansas and Diaz Junction, Arkansas, a total distance of 282 miles. The 102-mile gap between Bergman and Guion is covered by a purchase agreement of that same date. Those agreements, which must be viewed as intertwined and therefore interpreted together, provide compensation to UP in the form of (i) $7.5 million for the Guion-Diaz Junction line segment,[7] (ii) a preset division of revenues on jointly handled traffic specified as payment from UP in dollars per carload or per loaded coal train,[8] and (iii) an annual rental payment that varies from $90 million per year to zero, decreasing as the percentage of traffic interchanged by MNA with UP increases from 0-4% to 95-100%.[9] Other economically beneficial terms to UP include a reduction in MNA's revenue

[4] Prior to 1982, Missouri Pacific ("MP") was a separate Class I railroad. UP acquired control of MP in a transaction that also included the Western Pacific Railroad (ICC Finance Docket No. 30000). MP operated as a subsidiary of UP until 1997, when it was merged into UP.
[5] *See* Exhibit 10.18 to RailTex, Inc. SEC Form S-1 (filed Nov. 19, 1993).
[6] In addition, BNSF has trackage rights on certain UP lines in Arkansas that were granted in the UP/SP merger and intersect the MNA line at Diaz. However, those rights are for overhead traffic only.
[7] Line Sale Contract at § 4.
[8] Lease Agreement at Exhibit E.
[9] Lease Agreement at § 4.03. An excerpt from the MNA/UP agreement showing the rental fee and related interchange percentage ratios may be found at Attachment 3 to the WCTL Renewed Petition.

division on certain traffic effective January 1, 1995,[10] an escalation adjustment factor of 50% of the RCAF-U, subject to a cap of 3.0% per year[11] (a favorable escalation term not seen by many shippers), a right to obtain trackage rights for the Diaz Junction-to-Independence, Arkansas segment - including the right to serve the Independence plant on an exclusive basis - for a payment to MNA of $60,000 per year this right is exercised,[12] and prohibition of interchange with any carrier other than UP at Kansas City.[13] The sale and lease agreements basically relieve UP of the operating and maintenance costs[14] and the common carrier obligation associated with these lines, while leaving UP with virtually total commercial control over all significant actual or potential interline movements.

It is not surprising that UP's private interests favored entry into the lease and sale agreements with MNA. UP retains substantially all of the economic benefits of the lines, and it escapes from maintenance, service and labor responsibilities. The real question is how the public interest benefits from the arrangement. As Vice-Chairman Mulvey recently stated in dissenting from approval of the lease of a line from a Class I railroad to a Class III where the transaction included paper barriers, "...while restrictions on interchange may be in the private interests of two railroads, they nevertheless operate as a restraint of trade and run counter to the public interest."[15]

WCTL's petition articulates important public interest considerations that justify Board investigation of paper barrier issues, and AECC and Entergy support Board involvement on those grounds. AECC and Entergy further believe that there are additional public interest considerations stemming from the Board's merger standards that should lead the Board to now give particularly careful scrutiny to paper barrier issues. As articulated in the discussion of public interest issues contained in the Board's merger rules, "(A)pplicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing

[10] Lease Agreement at Exhibit E. In addition, an amendment effective March 1, 1993—less than three months after the contract date—cut the division on the Independence movement by over 50%, thereby stripping out a substantial portion of MNA's contribution opportunity from this traffic.
[11] *Id.*
[12] Lease Agreement at § 3.01.
[13] Lease Agreement at Section 5.05.
[14] Lease agreement at § VI.
[15] Buckingham Branch Railroad Company--Lease—CSX Transportation, Inc., (served Nov. 5, 2004) at p. 7.

gateways … and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement."[16]

For coal moving to the Independence plant, the paper barriers under which MNA now operates foreclose viable "competitive and market options" that MNA predecessor MP could and would have provided.[17] While MP would have been the only carrier able to directly serve the plant, its ability to exploit this position would have been limited by options for BNSF-MP routings via junctions south/east of Kansas City. It is AECC's and Entergy's understanding that a BNSF-MP routing via Hoxie, AR (on BNSF's main line between Kansas City and Memphis) would be comparatively more efficient than a BNSF-MP routing via Kansas City.[18] Interchange at Hoxie also would have provided BNSF with a significantly longer haul. Under these circumstances, AECC/Entergy almost certainly could have relied upon BNSF cooperation, and would therefore have been in a position to pursue rate relief for the approximately 43-mile MP segment between Hoxie and the plant.

An independent MP also would provide options for AECC/Entergy to respond to the types of widespread service and operating problems that have become disturbingly routine in recent years. If one of the PRB railroads were to experience service problems as a result of merger integration difficulties, natural disasters, traffic fluctuations, management misjudgments, etc., an independent MP would enable AECC/Entergy to compensate by making greater use of the other PRB railroad.

Paper barriers make it impossible for MNA to replicate the beneficial competitive pressures on rates and service that would have been provided by an independent MP. MNA cannot serve Hoxie at all, and it cannot interchange with BNSF at Kansas City. Even if it could, the terms of its lease economically preclude any significant interchange with BNSF at any location. UP basically acquired a line of railroad that did not fit its

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[16] Title 49, Section 1180.1.c.2.i. The importance of this principle has been reiterated in several merger decisions, including the Board's April 9, 2004 decision in Finance Docket No. 34434 (CN/GLT): "The Board will hold applicants to their pledge that they will waive any defenses they might otherwise have …under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where a shipper prior to the …(T)ransaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule.

[17] The UP/MP/WP merger was consummated while the Independence plant was under construction.

[18] UP has chosen to incur approximately 120 miles of circuity to move loaded coal trains to the Independence plant via Diaz (rather than via MNA at Kansas City). The Board can reasonably infer that portions of the former MP line between Independence and Kansas City are comparatively inefficient for heavy haul movements.

long-term needs, saddled it with paper barriers that neuter its competitive influences (contrary to the public interest standards articulated in the Board's current merger policy), and then spun it off as an indentured servant.

UP has enjoyed the fruits of this situation for more than a decade. It is well time for the Surface Transportation Board to review its policies concerning paper barriers and to evaluate paper barriers—including those faced by MNA—under a public interest standard. Adoption of the policy and procedure proposed by the Western Coal Traffic League would well serve the public interest and the Board's statutory responsibilities.

III. RELIEF REQUESTED

Arkansas Electric Cooperative Corporation and Entergy Arkansas, Inc. respectfully request the Surface Transportation Board to initiate a rulemaking to consider amending its policies and procedures for evaluating paper barriers to interchange, and to adopt such policies and procedures as recommended by the Western Coal Traffic League, and thereafter to entertain requests for review of paper barriers upon request of an interested shipper or rail carrier.

Respectfully submitted,

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May 2, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing COMMENTS is being served by hand upon petitioner as follows:

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and upon the Association of American Railroads and the American Short Line and Regional Railroad Association, as follows:

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Dated: May 2, 2005