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July 15, 2005

**VIA ELECTRONIC MAIL**

The Hon. Deborah A. Garza
Chairwoman
Antitrust Modernization Commission
1120 G Street, NW
Suite 810
Washington, DC 20005

Re: Request for Public Comment (70 Fed. Reg. 28902)

Dear Chairwoman Garza:

Enclosed for filing in the above-referenced matter, please find a copy of the Comments of the Western Coal Traffic League on Railroad Antitrust Issues Selected for Commission Study, provided in electronic portable document format (.pdf).

Thank you for your attention to this matter.

Sincerely,

Peter A. Pfohl
An Attorney for the
Western Coal Traffic League

Enclosure

**BEFORE THE**
**ANTITRUST MODERNIZATION COMMISSION**

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# COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE ON RAILROAD ANTITRUST ISSUES SELECTED FOR COMMISSION STUDY


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Dated July 15, 2005

**BEFORE THE**
**ANTITRUST MODERNIZATION COMMISSION**

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# COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE ON RAILROAD ANTITRUST ISSUES SELECTED FOR COMMISSION STUDY

In accordance with the Antitrust Modernization Commission's May 19, 2005 Request for Public Comment (70 Fed. Reg. 28902 (May 19, 2005)), the Western Coal Traffic League ("WCTL" or "League") submits these comments to express its views regarding certain issues being examined by the Commission as part of its Congressional mandate to "examine whether the need exists to modernize the antitrust laws and to identify and study related issues." WCTL is pleased to share its views and respectfully requests that these comments be included as part of the Commission's public hearing record. Additionally, WCTL subscribes to the Joint Statement of common principles being submitted this date, a copy of which is attached as Appendix 1.

## I.

## IDENTITY AND INTEREST OF WCTL

WCTL is an association formed in 1976 whose membership is composed of shippers, receivers, and consumers of coal mined from sources west of the Mississippi

River. WCTL members collectively consume more than 140 million tons of coal annually that is moved by rail. Its 21 members[1] include investor-owned electric utilities, rural electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

The Commission has noticed for comment a wide range of antitrust-related issues it is considering as part of its study. WCTL believes that none are more important to the public interest and consumer welfare than issues related to competition in and consolidation of the freight railroad industry. Because of considerable marketplace consolidation, all WCTL members are now either captive to a single railroad at destination or, at best, subject to railroad duopoly pricing and service power. WCTL's concerns are elevated by the recent renewed actions by the remaining two large western railroad carriers to exert "market discipline" in the provision of coal transportation services. Accordingly, WCTL has a direct and substantial interest in the railroad industry antitrust issues being examined by the Commission.

## II.

## SUMMARY OF COMMENTS

U.S. freight rail transportation customers, including coal customers, are being harmed by a lack of marketplace competition in a highly concentrated railroad

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[1] A list of WCTL members is appended at Appendix 2 to these comments.

industry. With markets protected from effective competition and customers largely without effective regulatory remedies, rail rates are going up and service has become erratic.

The issues selected by the Commission for study of interest to the WCTL include: (1) railroad immunities from private antitrust actions, (2) the circumstances in which a firm's practices of exclusionary or anticompetitive conduct should be deemed to violate the antitrust laws and the appropriate standards for addressing such conduct, and (3) the appropriate allocation of authority for railroad merger review between the STB and federal antitrust agencies.

Unlike all other network industries, the railroads remain immune from selected portions of the antitrust laws. These immunities are an anomaly: the result of aggressive lobbying and an outdated court decision rendered 80+ years ago in the midst of a bygone era of pervasive rate regulation. Additionally, many rail lines that presently serve captive shippers are essential facilities, but very few have been opened up to competitive service because of the railroads' marketing practices and fierce resistence to making available to competitors essential facilities on fair and reasonable terms. Finally, railroad mergers are reviewed not by the U.S. Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), or private actions, but instead by the federal Surface Transportation Board ("STB") which has general jurisdiction over freight rail transportation, under a broad "public interest" standard that has been used to approve almost every merger that has come before it, notwithstanding strong objections by DOJ and consumers. These outdated policies collectively have contributed to a railroad industry that views itself as entitled to protection from competition, producing significant marketplace harm. The modernization and updating of the antitrust laws is necessary to help address some of the competitive problems facing the railroad industry.

## III.

## COMMENTS

In reviewing the antitrust laws as they apply to the railroads, WCTL believes it is beneficial for the Commission to consider the following factual backdrop. Since 1980, the number of major "Class I" railroads[2] in the U.S. has shrunk from 42 to 4. While this tremendous industry consolidation has set off alarms with consumers and DOJ, who have opposed recent major rail mergers, these warnings have been largely ignored by the STB and most mergers have been approved. The result: the railroad industry is now so concentrated that there are only two lead carriers in both the West (Union Pacific Railroad Company ("UP") and BNSF Railway Company ("BNSF") and the East (CSX Transportation, Inc. and Norfolk Southern Railway Company), and many customers are served by only one railroad.

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[2] Railroads are grouped by annual revenues into categories under Surface Transportation Board ("STB") regulations. Class I railroads are the largest carriers whose annual revenues from railroad operations exceed $250 million in 1991 dollars. There are officially seven Class I carriers, but the four largest of them move the vast majority of the total traffic (or approximately 93% of total annual ton-miles).

Demand for coal transportation services is highly inelastic. Coal-fired generating plants are, generally speaking, continuously-running plants devoted to meeting the baseload power requirements of millions of electric customers. In most instances, coal must be moved entirely by rail as it is not possible to move coal by non-rail means (e.g., truck, barge).

Coal shippers that have origin or destination "bottlenecks" theoretically have competitive options over non-bottleneck portions of movements. However, railroads usually establish rates only on a through (total) movement basis and refuse to establish rates for their individual segments. The STB's 1996 Bottleneck decision allows the shipper to challenge only the full through rate; the shipper cannot challenge just the "bottleneck," captive segment. As a result, the carrier with the monopoly segment captures the economic rent for the entire movement. Meanwhile, Class I carriers frequently spin-off lower density lines to short-line railroads, but impose "paper barriers" that suppress competition by preventing the short-line carriers from diverting business to other railroads.

For western coal shippers, following the Chicago and North Western Railway's entry into the western Powder River Basin coal fields in 1984 in affiliation with UP, UP and BNSF competed vigorously for coal business through private contracts for which the carriers demanded secrecy. Today rail capacity is limited, and carriers can and do refuse to compete on hauls, and they have publicly expressed their intent to and success at raising customer rates. Also, the major western carriers are now engaged in "public pricing" initiatives, even on competitive movements.[3] These duopoly carrier "public pricing" programs are characterized by higher rates, unilaterally decreed service terms, an unwillingness to negotiate confidential contracts, and a reluctance or even outright refusal to compete for traffic that enjoys access to both systems.

With markets protected from competition, and customers largely without effective regulatory remedies, rail rates are going up, service has become erratic, and customers have been asked to pay more to fix service reliability problems.

A. Immunities and Exemptions

Section 1 of the Sherman Act declares illegal "[e]very conspiracy . . . in restraint of trade or commerce among the several states . . . ." 15 U.S.C. § 1. Section 4 of the Clayton Act provides that any person injured under Section 1 of the Sherman Act may sue in federal court of competent jurisdiction to recover "threefold" actual damages and "a reasonable attorney's fee." 15 U.S.C. § 15.[4] However, limited immunities from the antitrust laws remain in place that prevent certain injured parties from bringing treble damages actions.

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[3] Competitive shippers have no regulatory remedy against excessive rates given the jurisdictional barrier precluding STB review of the reasonableness of rates where there is a lack of "market dominance" over the transportation to which the rate applies (e.g., where a shipper has two-carrier service). See 49 U.S.C. § 10707(b).

[4] Also, section 16 of the Clayton Act, as amended by the ICC Termination Act, prohibits private parties from seeking antitrust law-based injunctions against "any common carrier subject to the jurisdiction of the Surface Transportation Board." 15 U.S.C. § 26.

In its Notice, the Commission states that it "intends to conduct a general evaluation of antitrust immunities and exemptions" and specifically intends to examine the "filed rate/Keogh doctrine," which refers to the Supreme Court's 1922 decision in Keogh v. Chicago & Northwestern Ry., 260 U.S. 156 (1922). Notice at V. A. That decision accords antitrust immunity to rail carriers in certain instances.

The Keogh decision, as summarized by the Supreme Court, holds that shippers may not pursue private treble damages actions against railroads if their claim is that a "rate submitted to, and approved by, the ICC was the product of an antitrust violation." Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986).[5] While the Court in Square D did cite the many legal, regulatory, and policy developments that "seem to undermine" the continuing validitity of the Keogh doctrine, it nonetheless concluded that it was the place of the Congress, and not the courts, to overrule Keogh. Id. at 424.

Actions to overrule Keough are long overdue. The railroads were granted exemption from private treble-damage antitrust actions under Keogh to avoid conflict with a pervasive regime of federal rate regulation based primarily on principles of rate

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[5] In Keogh, the Supreme Court held that shippers could not recover treble damages under the antitrust laws against railroads accused of conspiring to fix rail rates, because to allow such relief would be in effect to grant such a shipper an unlawful rebate from the conspiring carriers' Interstate Commerce Commission ("ICC")-approved tariff rates. The fact that those rates might be higher than they would have been, but for the illegal price-fixing conspiracy, did not alter their legally-binding status, said the Court; only the ICC could order a reduction in those rates, and not an antitrust court.

equalization and non-discrimination in rates and services. But that regime is long gone. Since the enactment of the Staggers Rail Act of 1980,[6] the railroads have been operating in a deregulated environment.

Railroad rates are no longer required to be filed with the STB; the railroads now have the complete initiative in ratemaking and no rates require agency "pre-approval;" the STB has jurisdiction only if a shipper files a formal complaint; and the STB has no jurisdiction over rates found to be at or below a "jurisdictional threshold" level of 180% of the variable costs of service, or over rates where there is a lack of market dominance (49 U.S.C. § 10707).[7]

In sum, captive shippers have very limited rate or other regulatory remedies to addressing marketplace abuses, and competitive shippers have none.[8] Thus, few rate complaints are filed with the STB under its maximum rate standards.[9] Currently, only

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[6] Pub. L. No. 96-448, 94 Stat. 1895.

[7] Also, under the Staggers Act, the railroads were authorized to engage in private transportation contracts with shippers, under which the majority of coal traffic has moved since the mid-1980s. The STB has no jurisdiction over these private contracts. See 49 U.S.C. § 10709.

[8] Even though there still exists limited railroad regulation, modern precedent makes clear that anticompetitive activities should not be immunized from antitrust scrutiny simply because they occur in a regulated industry, and exemptions from the antitrust laws are to be strictly construed and strongly disfavored. See, e.g., Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

[9] STB Chairman Nober has admitted that there are no practical rate remedies for small shippers, and that "[i]f no small cases are brought, this means that in practice, only about 75 coal shippers have a meaningful opportunity to challenge rail rates." Testimony of the Hon. Roger Nober before Subcommittee on Surface Transportation and Merchant

three maximum rate cases are pending, all of which involve western coal movements.[10]

The United States Supreme Court has declared that, in the structure of the antitrust laws, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). Modern economic policy and the history of deregulation of similarly situated industries (e.g., the airlines, telecommunications, and natural gas pipelines) that were once heavily regulated demonstrates that there is no need to immunize monopolies from private treble damages suits. Immunizing the railroads from the antitrust laws is detrimental to consumers, the economy, technological innovation, and service improvements.

In light of the nature of the railroad industry, the dramatic changes in regulatory policies, and the public need for competitive protections, WCTL submits that the Commission should recommend and take appropriate actions to overturn the Keogh doctrine.

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Marine; Railroad Shipper Issues and S. 919, the Railroad Competition Act of 2003 (October 23, 2003).

[10] Maximum rate cases are complicated, long, and expensive (STB Chairman Nober has testified that cases cost $2-3 Million for shipper-complainants and $5 million for railroad-defendants) -- and only the largest bulk commodity shippers have been able to use the Board's rate reasonableness standards to seek relief. Moreover, the recent track record for rate relief in such cases has not been encouraging.

B. Exclusionary Conduct

The Commission is seeking comment on the circumstances in which a firm's refusal to deal with (or discriminate against) rivals violates the Sherman Act, liability under the "essential facilities" doctrine, and suggested standards for addressing such exclusionary conduct activities. Notice at IV. 2.

The "essential facilities" doctrine traces its roots back 90+ years to a 1912 railroad case. In that case, United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912), the Supreme Court found that certain railroad facilities in St. Louis could not be duplicated economically and directed the owner of those facilities to open them up to shared use by competitors. Applicable precedent renders such a refusal to deal subject to potential liability as a restraint of trade and monopolization violation of Section 2 of the Sherman Act. See, e.g., United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980).

Many rail lines today are essential facilities to captive shippers, but very few have been opened up to competitive service. This is in part due to the railroads and the ICC's and STB's fierce resistence to utilizing existing pro-competitive statutory remedies under the law (e.g., reciprocal switching, terminal trackage rights), and the inherent difficulties in bringing an antitrust lawsuit (length, expense, jurisdictional issues, etc.). Many shippers' geographic captivity at origin/destination is such that obtaining competitive service through construction of a rail line to a second access carrier is economically and/or environmentally impossible. Therefore, the only way for these shippers to obtain direct rail-to-rail competition is through access to essential rail facilities.

Applicable case authority has established a four-prong test to establish liability under the essential facilities doctrine of the antitrust laws: (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. See, e.g., MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983). The essential facilities doctrine is a long-established means of pursuing access relief for captive customers, and its clear application to the railroad industry should act as a deterrent to continued resistance on the part of carriers and the STB to open bottlenecks to competitive access.[11]

WCTL submits that Commission recommendations for legislation in this area could include clarifying provisions specifying the type of relief that may be sought (e.g., access or reciprocal switching), where relief may be sought (e.g., the courts, DOT, STB, etc.), that a rail customer (and not just a competing railroad) may seek such relief, that a railroad's overall profit status or revenue needs may not be used as a grounds for

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[11] It took 30+ years of litigation for the imposition of mandatory access and nondiscrimination over essential bottleneck telecommunications facilities of the Bell System. The lesson learned is that natural monopolies possessing market control of essential facilities have the incentive and ability to foreclose or distort competition in markets that depend on the facility -- to the detriment of consumers, service, and the national economy -- unless the essential facility is made available to competitors on fair and reasonable terms.

denying such a remedy (consistent with the antitrust laws), and that an expedited time frame for proceedings and the determination of reasonable compensation should be adopted. These changes would be reasonable steps to help ensure that competitive forces, rather than protectionism, will guide the future of the rail industry.

## C. Authority Over Railroad Mergers

The Commission is seeking comment on mergers in regulated industries, and specifically, "how should authority for merger review be allocated between the antitrust agencies (DOJ and FTC) and the relevant regulatory agency." Notice at IX. 6.

DOJ and FTC's analytical approach to mergers and acquisitions is set forth in the agencies' joint Horizontal Merger Guidelines. 57 Fed. Reg. 41,552 (1992). These Guidelines consider concentration and the competitive concerns expressed by consumers as essential components of the merger review analysis. For example, under the Guidelines, if the governing Herfindahl-Hirschman Index (HHI) exceeds 1800, the market is considered highly concentrated, and in such a market an increase in the HHI of more than 50 points creates significant competitive concerns.

In contrast, in evaluating railroad mergers under the ICC Termination Act,[12] the STB has sole jurisdiction over railroad mergers and the Board is not required and does not utilize the Guidelines. Instead, the Board's "single and essential standard of approval" in merger proceedings is that it must "find the [transaction] to be 'consistent with the

[12] Pub. L. 104-88, 109 Stat. 803 (December 29, 1995).

public interest.'" Finance Docket No. 32760, Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. -- Control and Merger -- Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co., Decision No. 44, (STB served Aug. 12, 1996) at 98 ("UP/SP"), citing, Missouri-Kansas-Texas R.R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980), cert. denied, 451 U.S. 1017 (1981).

Under this general merger review standard, almost every merger that has come before the STB has been approved, despite strong competitive concerns expressed in many such cases and indications that such mergers would not withstand scrutiny under the DOJ/FTC Guidelines. For example, in the UP/SP merger, the HHI analysis prepared for the western coal market showed a pre-merger HHI of 4322 and a post-merger HHI of 4831 -- well-above the levels considered to raise significant concerns under the Guidelines. See Comments of WCTL (WCTL-22) (filed June 3, 1996). The proposed transaction also set off alarms with DOJ. DOJ strongly opposed the merger, concluding that the merger "raise[d] significant competitive problems in a large number of markets."[13] Comments of the U.S. Department of Justice (DOJ-8) (filed Apr. 12, 1996) at 1-2. WCTL also presented compelling evidence showing that the adverse market concentration impacts would be compounded by the adverse effects on unit train coal

[13] DOJ is authorized by the STB, like any other interested party, to file comments on proposed railroad transactions, but its comments are afforded no greater weight than any other parties' comments.

service. Id. Notwithstanding these well-documented objections, the UP/SP merger was approved by the Board with only minimal and largely ineffective protective conditions.

Consolidating railroads have routinely represented in their merger applications that service disruptions would be avoided and there would be ample savings and benefits for all as a result of increased efficiencies, particularly through additional single-line service and the elimination of interchanges. However, they have, with rare exception, completely failed to deliver on those claims and representations as severe service disruptions have ensued and the competitive service offerings have not been enhanced.[14] Regrettably, much of the cost and other burden has fallen on shippers, who have received poor service and escalating rates based on inflated costs and heightened market power demands. Meanwhile, the Board itself candidly acknowledged that the recent round of Board-approved rail mergers has severely hurt the shipping public:

> In [recent] years, the railroad industry in the United States underwent several mergers involving the nation's largest railroads, with the result that now only four large railroads remain -- two in the West and two in the East. Unfortunately, with those mergers came severe service disruptions that have cost shippers nationwide hundreds of millions of dollars in lost freight or delayed shipments, and, again unfortunately, many of those problems persist even to this day.

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[14] Compare, UP/SP's 1995 Merger Application (Vo. 1) at 26-27 ("[t]he UP/SP merger will provide more significant opportunities to improve service quality, reliability and efficiency than any rail merger proposed since the Staggers Act") with August 31, 1998 UP Press Release ("[w]e have assumed too often that the product was there when capacity . . . was not. Best intentions aside, we failed our customers") and UP's 2004 Annual Report at 1 ("we did not fully meet [2004] demand as we experienced considerable operating difficulties").

* * *

> The well-publicized service crisis that developed shortly after approval of the UP/SP merger cost American business (including both railroads and their customers) hundreds of millions of dollars and crippled railroad activities throughout the United States for nearly a year. The subsequent service problems following the Conrail division "threatened to bring parts of rail service in the East to a standstill" and "cost corporate shippers millions [of dollars] in delays." The problems with the BN/SF merger, while less publicized, were also substantial, even though, as pointed out by several shippers and shipper groups, . . . that merger was considered to be largely an "end to end" combination that presumably would not create such difficulties. And even the CN/IC merger, which is not yet fully implemented, and as to which the jury is thus still out . . . , has not left all shippers satisfied.

Brief of Respondent Surface Transportation Board, No. 00-1115, et al., Western Coal Traffic League v. STB (D.C. Cir., filed May 19, 2000), at 4, 10-11 (footnotes omitted).

Not only have Board-approved mergers caused irreparable injury to the shipping public, the mergers have led to an industry that is so concentrated that the likely "next round" of mergers, if approved, will produce a national rail duopoly -- putting control of most American rail freight in the hands of two mega-carriers. In light of these developments, it is clear that the STB's existing merger review policies, as applied by the Board, have proven insufficient to addressing the severe competitive and service harms caused by the rash of industry consolidation.

At this belated date, with only a handful of large carriers remaining, most of the harm caused by the consolidation already has been done, and there may be little opportunity to undue it. With this in mind, and in response to the Commission's specific request for comments concerning the procedures for agency review of mergers, WCTL submits that if review authority is to remain at the STB, in evaluating mergers and in imposing competitive remedial conditions the Board at a minimum should be required to give controlling weight to evidence filed by DOJ or others employing the Horizontal Merger Guidelines standards. This added requirement is amply justified in light of the demonstrated competitive and service harms that have resulted from recent mergers.[15]

## CONCLUSION

The very essence of the antitrust laws is to protect competition, and not to protect marketplace competitors from competing. The railroads do not need special competitive protections. There is an immediate need to update and modernize the antitrust laws involving the railroads in the manner specified above in the areas being considered by the Commission to ensure that promoting competition -- not protecting monopolies -- drives national policy.

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[15] Additionally, while beyond the scope of areas noticed to be studied by the Commission, events have demonstrated that the STB has a very limited ability (or willingness) to remedy competitive/service problems once they emerge following the consummation of mergers, and railroad customers require additional means for obtaining recourse for the harms (both competitive and service) caused by mergers or the impacts of the railroads' failure to live up to their merger promises. WCTL would be pleased to discuss with the Commission additional remedial actions that should be taken in this regard should the Commission seek further comments in this area.

WCTL greatly appreciates this opportunity to present its views.

Respectfully submitted,

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Dated: July 15, 2005

**BEFORE THE**
**ANTITRUST MODERNIZATION COMMISSION**

**JOINT COMMENTS BY**

**ALLIANCE FOR RAIL COMPETITION**
**AMERICAN CHEMISTRY COUNCIL**
**CHLORINE CHEMISTRY COUNCIL**
**COLORADO WHEAT ADMINISTRATIVE COMMITTEE**
**CONSUMERS UNITED FOR RAIL EQUITY**
**IDAHO BARLEY COMMISSION**
**IDAHO WHEAT COMMISSION**
**MONTANA WHEAT & BARLEY COMMITTEE**
**NATIONAL ASSOCIATION OF WHEAT GROWERS**
**NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**
**NEBRASKA WHEAT COMMISSION**
**NORTH DAKOTA GRAIN DEALERS ASSOCIATION**
**OKLAHOMA WHEAT COMMISSION**
**SOUTH DAKOTA WHEAT COMMISSION**
**TEXAS WHEAT PRODUCERS ASSOCIATION**
**WASHINGTON WHEAT COMMISSION**
**WESTERN COAL TRAFFIC LEAGUE**

In response to the Antitrust Modernization Commission's Request for Public Comment (70 Fed. Reg. 28902) on matters related to its study of "whether the need exists to modernize the antitrust laws and to identify and study related issues," the following associations, including Alliance for Rail Competition, American Chemistry Council, Chlorine Chemistry Council, Colorado Wheat Administrative Committee, Consumers United for Rail Equity, Idaho Barley Commission, Idaho Wheat Commission, Montana Wheat & Barley Committee, National Association of Wheat Growers, National Rural Electric Cooperative Association, Nebraska Wheat Commission, North Dakota Grain Dealers Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producers Association, Washington Wheat Commission, and

Western Coal Traffic League (collectively, "Subscribing Shippers") whose members collectively ship and receive hundreds of millions of dollars of freight by rail annually, hereby submit the appended Subscribing Shippers' Joint Statement of Principles as to Railroad Antitrust Immunities and Exemptions Issues Being Considered by the Antitrust Modernization Commission.

Respectfully submitted,

**Alliance for Rail Competition**
**American Chemistry Council**
**Chlorine Chemistry Council**
**Colorado Wheat Administrative Committee**
**Consumers United for Rail Equity**
**Idaho Barley Commission**
**Idaho Wheat Commission**
**Montana Wheat & Barley Committee**
**National Association of Wheat Growers**
**National Rural Electric Cooperative Association**
**Nebraska Wheat Commission**
**North Dakota Grain Dealers Association**
**Oklahoma Wheat Commission**
**South Dakota Wheat Commission**
**Texas Wheat Producers Association**
**Washington Wheat Commission**
**Western Coal Traffic League**

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Dated: July 15, 2005

**EXHIBIT**

Appendix 1

# SUBSCRIBING SHIPPERS' JOINT STATEMENT OF PRINCIPLES AS TO RAILROAD ANTITRUST IMMUNITIES AND EXEMPTIONS ISSUES BEING CONSIDERED BY THE ANTITRUST MODERNIZATION COMMISSION

- America's farmers, electric utilities, manufacturing and intermodal transportation industries that rely on rail transportation service to move their goods are being harmed by the lack of direct competition among railroads and the lack of reliable transportation service. Unlike almost all other transportation modes and industries that freely compete, the railroads enjoy special regulatory protections and antitrust law immunities that are adversely impacting marketplace competition and service.

- The railroad industry enjoys immunities from private antitrust actions for treble damages in certain instances where common carrier rates are involved under the longstanding "Keogh" doctrine and railroads are generally exempt from private antitrust actions for injunctive relief (15 U.S.C. § 26). The Keogh doctrine was rendered 80+ years ago in a bygone era of pervasive railroad rate regulation and filed rates. The railroads have been operating in a deregulated environment for 25 years, but notwithstanding the dramatic changes in regulation (e.g., no filed rates, limited STB jurisdiction over rates, etc.) and new policies disfavoring antitrust exemptions, railroad antitrust immunities remain.

- In 1980, there were over 40 major "Class I" railroads in the nation. Because of massive industry concentration, today only 2 major carriers remain in the West and only 2 major carriers remain in the East. This industry consolidation, combined with the railroads' antitrust exemptions and regulatory decisions protecting the railroads from full marketplace competition, have helped foster a range of anticompetitive practices (e.g., refusing to provide rates for "bottleneck" segments of rail movements, imposing "paper barriers" suppressing competition by short-line carriers, restricting access to service/dictating to the market compulsory service requirements, and instituting new public pricing practices comprised of higher rates and inferior service).

- In other major network industries that have undergone deregulation (e.g., trucking, telecommunications, airlines, and natural gas pipelines), Congress has correctly concluded that for free markets to work as intended, and to preserve and promote competition, the removal of antitrust immunities should accompany the removal of regulation.

- The railroads do not need special competitive protections in the modern era. It is in the public interest to remove the antitrust immunities enjoyed by the railroads.

## WESTERN COAL TRAFFIC LEAGUE MEMBERS

Alliant Energy

Ameren Energy Fuels and Services

Arizona Electric Power Cooperative, Inc.

Arizona Public Service

Associated Electric Cooperative, Inc.

Cleco Corporation

City of Austin, Texas

CPS Energy

Kansas City Power & Light Company

Lower Colorado River Authority

MidAmerican Energy Company

Minnesota Power

Nebraska Public Power District

Omaha Public Power District

Texas Genco, LP

Texas Municipal Power Agency

Westar Energy

Western Farmers Electric Cooperative

Western Fuels Association, Inc.

Wisconsin Public Service Corporation

Xcel Energy