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Submitted Written Testimony

**Freight Rail Reform: Implementation of the Surface Transportation Board
Reauthorization Act of 2015**

**Field Hearing
Carnegie Town Hall
Sioux Falls, SD
August 11, 2016
1:30 p.m.**

**U.S. Senate
Commerce, Science, and Transportation Committee**

Introduction

My name is Tom Heller and I am CEO of Missouri River Energy Services. I'd like to thank Chairman John Thune, Ranking Member Bill Nelson and the Members of this Committee for the invitation to speak with you today on "Freight Rail Reform: Implementation of the Surface Transportation Board Reauthorization Act of 2015".

Freight rail is a vital component of our nation's economy to help our farmers produce, deliver grains and agricultural products to market, heat our homes and businesses, ensure our drinking water is safe, and enhance our global competitiveness. The *Surface Transportation Board Reauthorization Act of 2015* is helping our entire nation – the U.S. Congress, the Surface Transportation Board, railroads, shippers, and the communities we all serve – better meet today's freight rail shipping demands and expectations.

Not only am I pleased to testify on behalf of Missouri River Energy Services, but as a Board member of the Freight Rail Customer Alliance (FRCA).

Missouri River Energy Services <http://www.mrenergy.com/>

To begin, Missouri River Energy Services (MRES) is a municipal power agency which supplies power and energy, and energy services to sixty (60) municipal utility members throughout Iowa, Minnesota, North Dakota, and South Dakota. Each member municipal utility is owned by the customers it serves; likewise, MRES was created and is owned by the member communities that it serves. Also, like its member-owners, MRES is a not-for-profit, member-owned and member-

controlled public entity. MRES is a political subdivision of the state of Iowa, and is headquartered in Sioux Falls, South Dakota. It was created under the Iowa Code Chapter 28E.

As an Iowa 28E entity, MRES must use a separate entity for financing of generation facilities or similar projects; that financing entity is Western Minnesota Municipal Power Agency (Western Minnesota). Western Minnesota is a municipal corporation and political subdivision of the State of Minnesota. Western Minnesota finances and owns the generation and transmission facilities used to serve members of MRES under the terms of power supply and transmission capacity contracts between Western Minnesota and MRES. All output and capacity of Western Minnesota facilities is dedicated exclusively to MRES.

All 60 MRES members are in Iowa, Minnesota, North Dakota, and South Dakota. Our municipal utility communities range in size from nearly 40,000 to those with populations around 200 people. The average population of MRES member communities is about 5,000. In total, our members serve a population of approximately 300,000 people, with over 150,000 customer meters. The MRES member communities are spread widely over a geographic area which is primarily rural.

Fifty-eight of the 60 MRES members have allocations of federal hydropower from Western Area Power Administration (WAPA) to supply some of their needs through 2050, and MRES serves the balance of each community's needs over and above the hydropower allocation. In addition to this hydropower, MRES members are also served by five wind energy projects located in Iowa, Minnesota, and North Dakota. These renewable energy investments mean that MRES members are served, on average, with 42 percent renewable energy.

In addition to wind energy projects, MRES relies on a single, base-load coal plant in Wheatland, Wyoming, called the Laramie River Station (LRS) to serve the needs of its members. The three units of LRS began commercial operations in 1980-1982, and generate 1,710 megawatts (MW). LRS has six owners: Basin Electric Power Cooperative (Basin), Tri-State Generation and Transmission Association, Lincoln Electric System, Heartland Consumers Power District, Western Minnesota, and Wyoming Municipal Power Agency. Western Minnesota is one of six owners of LRS, and it owns 16.5 percent of LRS, corresponding to approximately 282 MW.

LRS obtains its fuel from coal from the Power River Basin, located approximately 175 miles from LRS. In order to transport the coal to the plant, LRS, through its operating agent Basin Electric Cooperative (Basin), pays BNSF Railway to transport substantial amounts of coal daily to LRS. The owners of LRS own the railcars that the coal is shipped in; BNSF supplies the engines and engineers.

Based on the experience of MERS as a participant in a recent rate case involving LRS, let me offer a few observations on how future rate cases can be expedited.

STB Reauthorization Act Implementation and Expediting Rate Cases

Last year, the U.S. Congress passed, and President Obama signed into law, the *Surface Transportation Board Reauthorization Act of 2015* (the *Act*), P. 114-110 (S. 808, S. Rpt. 114-52).

Thanks to your steadfast leadership, Mr. Chairman, and support from your colleagues also serving on the Senate Commerce Committee, MRES strongly believes that there are aspects of the *Act* that may assist other shippers in future cases.

First, the STB has been working on streamlining rail rate cases and published the revised rate review procedural schedule in SAC tests (Docket No. EP 733, Advanced Notice of Proposed Rulemaking, Expedited Rate Cases). This new schedule is a step in the right direction at expediting rate reviews. However, MRES looks forward to the release of STB's survey and study of rate case methodologies. It is our hope that in its analysis, that the consultant hired by the STB, may provide recommendations that would allow the STB to use more stream-lined, yet appropriate, methodologies, to supplement SAC in appropriate cases.

Second the *Act* requires quarterly reports on unfinished regulatory proceedings. These reports have increased transparency and may have helped increase efficient use of resources at the STB, but they would be more useful and effective if they included additional detail such as delays or continuances, reasons for delays or continuances, and anticipated dates for procedural orders. It would promote not only transparency of the process to the parties and impacted customers, but it may assist the STB and staff in determining if there is a pattern in delays that can be addressed. For example, if delays are due to need for additional staffing, that is something that could be identified with the data and potentially addressed earlier rather than later, or not at all.

Third, the STB has also been moving ahead on developing rules regarding its authority to investigate rates and practices without a complaint being filed (Docket No. EP 731, Notice of Proposed Rulemaking, Rules Relating to Board-Initiated Investigations). We believe that this authority granted by the *Act* allows the STB to act in an expedited manner on unreasonable rates and practices, and look forward to seeing these proposed rules developed further during the current comment period.

Fourth, the development of revised arbitration procedures, as also specified in the *Act*, may allow for some rate cases to be even further expedited (Docket No. EP 730, Notice of Proposed Rulemaking, Revisions to Arbitration Procedures). Even though the case MRES was involved in would not have been eligible for arbitration, the availability of an effective and "usable" arbitration process may further expedite future cases to the benefit of the shipper, the railroad and the customers and also free up agency resources for those disputes where arbitration is not utilized. MRES also looks forward to seeing these proposed rules developed further during this promulgation period.

Freight Rail Customer Alliance <http://railvoices.org/>

As stated earlier, I am also sharing the views of the Freight Rail Customer Alliance (FRCA). An umbrella membership organization, FRCA members include large trade associations representing more than 3,500 manufacturing, agriculture, and alternative fuels companies, electric utilities, and their customers. Its membership base is expanding to include other industries and commodities.

FRCA is an alliance of freight rail shippers impacted by continued unrestrained freight rail market dominance over rail-dependent shippers. Its mission is to seek changes in Federal law

and policy that will provide all freight rail shippers with reliable freight rail service at competitive prices.

As with MRES, FRCA thanks you Mr. Chairman for your continued commitment in helping to enhance our nation's overall freight rail network. This includes your attention to and keen awareness of those issues and concerns unique to freight rail shippers – particularly those dependent upon receiving and distributing their products by rail.

FRCA was pleased to have actively supported the development of S. 808 during the legislative process – the first authorization for the STB since 1998. FRCA is continuing to work with the STB and industry stakeholders in helping to ensure that the *Act* is effectively implemented.

Considering FRCA's thoughts are aligned with the comments I previously shared on behalf of MRES, the remainder of my remarks will focus on other elements of the *Act* which are also proving helpful to freight rail shippers.

STB Reauthorization Act Implementation

Appropriations

For the past two decades, the STB's budget has remained essentially flat.

Even in our sustained difficult budget environment, the *Act* provides increased annual authorization levels for the STB. Without these levels providing the foundation, it would have been and will continue to be extremely difficult for the STB to secure the necessary funding for it to meet the new requirements specified in the *Act* and meet existing responsibilities.

For the current FY 2016, the *Act* sought to address this by authorizing an FY 2016 appropriation of \$35 million. The subsequent increased funding for the STB approved by Congress in the FY 2016 Omnibus (P.L. 114-13) was a crucial step in helping to implement this new *Act*.

In addition for FY 2017, on May 19, the U.S. Senate approved H.R. 2577 (S. 2844, S. Rpt. 114-243) providing \$37 million for the STB of which \$2.046 million is directed to IT system upgrades and enhancements. This appropriations amount is above the level authorized in the *Act* and the current FY '16 enacted level.

In a letter to the House Appropriations Committee, FRCA advised that STB needs to have the adequate annual appropriated funds to provide necessary and effective oversight over our country's growing reliance on freight rail. Freight rail is a vital component of our nation's economy to help our farmers produce, deliver grains and agricultural products to market, heat our homes and businesses, ensure our drinking water is safe, and enhance our global competitiveness.

Further, FRCA stressed that of particular importance to its members is adequate funding of enhancements to the STB's outdated information technology (IT) system. Freight rail shippers heavily rely on industry data provided through the STB to help: 1) make vital daily and longer term operational decisions; 2) forecast industry emerging trends; and, 3) monitor a railroad's level of service and performance.

FRCA is pleased that the FY 2017 measure (H.R. 5394, H. Rpt. 114-640) passed by the House Appropriations Committee on May 24th also includes the \$37 million for the STB and directs spending for IT improvements. FRCA remains hopeful that a final FY 2017 appropriations package will be realized providing this critical funding for the STB.

Data Reporting

FRCA applauds you, Mr. Chairman, and your colleague serving on the Senate Commerce Committee for instilling in the *Act* various provisions establishing new requirements or encouraging the completion of longstanding pending procedures before the STB. This is notably recognized in the *Act*'s commitment to update and enhance STB's information technology and data needs to help ensure transparency, consistency, timeliness, and ease of access.

FRCA particularly thanks you for your March 31, 2016 letter you sent to all three Members of the STB welcoming the STB's steps to advance the expeditious completion of the rulemaking for data collection [Docket No. EP 724 (Sub-No.4), Supplemental Notice of Proposed Rulemaking Rail Service Issues – Performance Data Reporting]. As stated earlier in the appropriations discussion, FRCA views data collection and timely access to data as a cornerstone in enhancing transparency and accountability. FRCA participated in Ex-Parte Communications and signed-on to comments submitted by the Western Coal Traffic League (WCTL), and others.

Unfinished Regulatory Proceedings

FRCA also welcomed your requests to the STB, as stated in your March 31, 2016 letter, regarding the required quarterly reports on Unfinished Regulatory Proceedings. FRCA appreciates the STB responding to some of your requests as included in the Board's most recent quarterly report issued July 1st. FRCA finds the listing of the pending Dockets and their respective status helpful and the fact that it easily accessible via this required quarterly reporting mechanism. The alliance looks forward to the STB continuing to enhance these quarterly reports which would include incorporating the other suggestions you made.

Informal and Formal Rail Service Complaints

FRCA could not agree with you more, Mr. Chairman, as you also stated in your March 31, 2016 letter, that the STB providing a brief description of the type of rail service associated with an informal complaint and a write-up of the guidance offered by STB would be helpful to shippers.

Rate Case Methodologies

FRCA echoes the comments I shared earlier on behalf of MERS pertaining to the *Act*'s direction to the STB to evaluate the cost-effectiveness of large rate case methodologies and potential, economically sound additional and alternative approaches to expedite particularly large rate cases. The length and cost of the current approach has proven to be an impediment to many rail customers obtaining rate protection under the STB rules. In addition to the report that is to be released by the consultant that STB hired to conduct this analysis and report, the STB should consider similar reports that have been produced by sister governmental agencies.

As an aside, FRCA signed-on to comments filed by the WCTL, and others, in response to Docket No. EP 733, Advanced Notice of Proposed Rulemaking, Expedited Rate Cases.

Board-Initiated Investigations

FRCA is supportive of the STB having the authority to initiate its own investigations. The alliance looks forward to the further development of a process in the pending proceeding, Docket No. EP 731, Notice of Proposed Rulemaking, Rules Relating to Board-Initiated Investigations.

Revenue Adequacy Procedures

Another issue that you, Mr. Chairman, included in your March 31, 2016 letter to the STB Members was on the *Act's* Section 16, Criteria. FRCA greatly appreciates you clarifying for the STB and industry that Section 16 does not mandate the use of replacement cost methodologies when evaluating revenue adequacy.

In addition, FRCA submitted written comments in Docket No. 722, Railroad Revenue Adequacy, during public hearings that were held by the STB in July 2015.

U.S. General Accountability Office Study

Earlier this year, FRCA members met with analysts from the U.S. Government Accountability Office (GAO) on its study, as required in the *Act*, on rail transportation contract proposals that cover movements from multiple origins to multiple destinations (commonly referred to as “bundled” contracts).

FRCA members appreciated the opportunity to meet with the GAO analysts. While the focus of its study is on bundled contracts, the analysts sought information on a wider range of topics relating to shipper experiences in dealing with the railroads and the level of competition in the railroad industry. In response to questions regarding contracts, FRCA explained how efforts to standardize terms and conditions of service reduce the ability of shippers to obtain transportation arrangements that fit their particular needs and constraints in serving their customers.

Other STB Proceedings

Although the *Act* did not specifically address some items of concern to freight rail shippers, FRCA is pleased that the STB is making progress on several very important proceedings.

Competitive Switching

Of note, FRCA is pleased that the STB issued its Decision on a request to adopt revised competitive switching rules – a matter that has been pending before the Board since 2011 [Docket No. EP 711 (Sub-No. 1) a Notice of Proposed Rulemaking (NPRM), Petition for Rulemaking to Adopt Revised Competitive Switching Rules].

FRCA has long supported efforts at the STB to increase competition in the railroad industry and spread its benefits more widely, especially for rail-dependent captive shippers. Reciprocal switching is one avenue to help achieve this. FRCA views this NPRM as an important step. The alliance will be reviewing the proposal in the coming weeks and looks forward to the further development of revised rules during this rulemaking.

Commodity Exemptions

FRCA submitted comments in response to STB's Notice of Proposed Rulemaking, Review of Commodity, Boxcar, and TAFC/COFC Exemptions, Docket No. EP 704 (Sub-No. 1).

The alliance has long stated that exemptions are no longer needed and are counterproductive for the reasons stated in the STB's notice – these decisions were instrumental when the transition was being made from a heavily regulated industry to a less regulated industry, but there have been many economic market changes during the past 30 years. Also, FRCA encourages the STB to give meaningful consideration to reviewing and reducing or eliminating most or all of its other existing commodity, boxcar, and TOFC/COFC exemptions (this NPRM applies to certain Standard Transportation Commodity Code groups)

Additional Recommendations and Acknowledgements

Reports

As noted in my remarks on behalf of MRES, FRCA also recommends that the STB review and consider other reports or studies that could help meet the requirements of the *Act* and enhance its overall effectiveness.

One such report is “*Modernizing Freight Rail Regulation*” a study conducted by the National Research Council's Transportation Research Board (TRB) and National Academy of Sciences, released in June 2015. FRCA is pleased that many of the issues discussed and recommendations made mirror the positions advocated by the alliance over the years and were included in the *Act*.

Some of the issues discussed in the report, although not included in the *Act*, could be considered by the STB including reviewing and introducing means to improve the accuracy, utility, timeliness, and availability of the Carload Waybill Sample.

STB's Interactive Maps

FRCA would like to acknowledge the STB on its interactive mapping portal that can be accessed on its website. Again keeping in mind that FRCA members heavily rely on data, these interactive maps are extremely valuable and STB is encouraged to continue developing these tools.

Conclusion

MRES and FRCA applauds you, Mr. Chairman, for holding this very important hearing on the implementation of the *STB Reauthorization Act of 2015*. Your personal and steadfast oversight, accompanied by the efforts of your staff, is helping to make the difference in transforming the STB into a more effective, accountable, and transparent agency – desperately needed in today's market for both shippers and railroads as freight demands increase here at home and overseas.

Again on behalf of MRES and FRCA, thank you for providing me the opportunity to testify before you and the Senate Commerce Committee today.

I am more than happy to answer any questions you might have.

[Appendix Follows.]

Appendix

Rate Case

Missouri River Energy Services (MRES) relies on a single, base-load coal plant in Wheatland, Wyoming, called the Laramie River Station (LRS) to serve the needs of its members. The three units of LRS began commercial operations in 1980-1982, and generate 1,710 megawatts (MW). Western Minnesota is one of six owners of LRS, and it owns 16.5 percent of LRS, corresponding to approximately 282 MW.

LRS obtains its fuel from coal from the Power River Basin, located approximately 175 miles from LRS. In order to transport the coal to the plant, LRS, through its operating agent Basin Electric Cooperative (Basin), pays BNSF Railway to transport substantial amounts of coal daily to LRS. The owners of LRS own the railcars that the coal is shipped in; BNSF supplies the engines and engineers.

In 2004, Burlington Northern Santa Fe (BNSF) imposed one of the single largest rate increases for the 175-mile trek; the rate increase would have increased consumer bills by over \$1 billion between 2004 and 2024.

On behalf of all of the owners of LRS, Basin and Western Fuels Association Inc., sought to moderate BNSF's rate actions by filing a rate complaint at the STB in 2004.

In the case, Basin proved it was entitled to substantial relief under the STB's very complex stand-alone cost (SAC) standards. These standards required Basin to model a "Stand Alone Railroad" (SARR) to show the full costs of building and operating its own theoretical railroad versus that of BNSF. Under SAC, the shipper bears the burden of proof of showing that the SARR provides an adequate replacement for the BNSF and does at a lower cost, taking into account each shovel of dirt, each section of rail, each employee, etc. Basin and the other owners in LRS met this burden and showed that they were in fact entitled to substantial relief.

However, the STB decided to change some key aspects of its SAC rules in 2006. In doing so, the STB applied the new rules retroactively to the pending LRS case, which the STB said "prejudiced" the case when it initially ruled in 2007. The STB permitted Basin and WFA to revise their SAC evidence, which resulted in a final 2009 decision in favor of Basin/WFA. At the time, it was the largest relief ever granted to a shipper in an STB rate case.

BNSF appealed that ruling to the D.C. District Court, which led to a multi-year ping pong match as the court remanded portions of the decision back to the STB, and even more appeals by BNSF. The STB again changed their SAC rules in 2013, and by 2015 Basin/WFA had spent more than \$10 million and more than 10 years on the case, Basin/WFA entered settlement talks with BNSF to avoid further delays. A final settlement was entered into in May 2015.