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Before the
House Judiciary Committee Antitrust Task Force
On Antitrust and Competition Policy

Hearing on H.R. 1650,
the "Railroad Antitrust Enforcement Act of 2007"

Mr. Chairman and Members of the Committee, my name is Terry Huval, and I serve as the Director of the Lafayette Utilities System ("LUS") in Lafayette, Louisiana. I am also appearing here today on behalf of the American Public Power Association (APPA), an organization for which I currently serve as the Chairman of the Board of Directors. Thank you for the invitation to participate in this hearing in support of H.R. 1650, the Railroad Antitrust Enforcement Act of 2007.

LUS greatly appreciates the opportunity to appear today before the Committee to discuss a matter of considerable importance to consumer protection and the public interest. We seek the removal of antitrust law immunities and outdated policies that have contributed to the current competitive problems facing rail customers, including LUS, and that are producing significant marketplace harm. LUS and numerous other consumers across Louisiana and this Nation believe that H.R. 1650 offers an important step in helping to address some of the competitive problems facing railroad customers today. We respectfully urge the Judiciary Committee to favorably act upon and report H.R. 1650 to the full House.

We are pleased that the Senate Judiciary Committee has reported identical legislation, S. 772, and that legislation is now pending on the calendar of the Senate. We encourage the Committee and Congress to achieve the enactment of this legislation in 2008.

I. LUS AND ITS RELIANCE ON THE RAILROADS

LUS is publicly owned and operated, and is a part of the City of Lafayette, Louisiana, a community of 120,000 located approximately 135 miles west of New Orleans. LUS exists to serve the electric power and other utility service needs of its citizens and business owners in Lafayette. As a community-owned utility, LUS is committed to providing electricity to our customers at the lowest possible cost with the highest reliability of service.

While LUS owns a mix of coal-fired and gas-fired electric generation on which it relies to meet customer demand, the majority of its electrical energy is derived from the 523 Megawatt coal-fired Rodemacher Power Station Unit No. 2 located in Boyce, Louisiana. LUS is a 50 percent owner of the Rodemacher plant. The remainder of the facility is owned by an investor-owned utility in Louisiana and several other municipalities in Louisiana through their membership in a joint action agency. This Rodemacher coal unit has been in operation since 1982 and is an essential component of LUS' generation portfolio, as it provides over 65 percent of the electric energy used in the City.

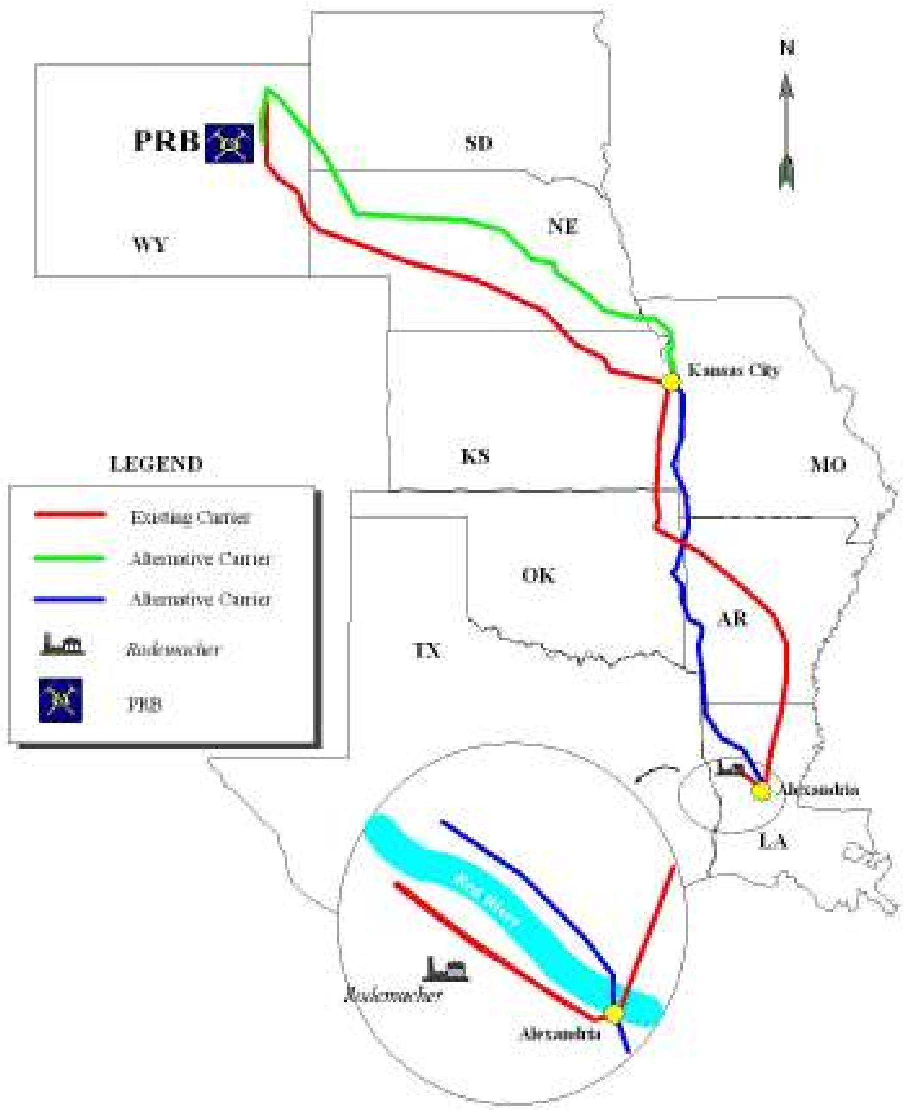
The Rodemacher plant's co-owners obtain the coal used at Rodemacher from mines in the Wyoming Powder River Basin (PRB) and collectively purchase approximately two (2) million tons of coal annually for use at Rodemacher. The only practical way to transport this coal from Wyoming to Rodemacher (a distance of over 1,500 miles) is by rail. To facilitate its rail deliveries, the Rodemacher co-owners have obtained and maintain, at the total expense of the co-owners, four (4) train sets of coal cars. Two (2) of those train sets are new aluminum car train sets (a total of 246 new railcars) that were very recently purchased by LUS for its service at considerable cost (approximately $16 million) in order to facilitate improved Rodemacher rail service and mitigate recent railroad service lapses, which I will describe later in this testimony.

II. LUS' RAIL COMPETITION PROBLEM

LUS is a classic captive rail customer. The Rodemacher station is served by only one railroad, the Union Pacific Railroad Company (UP). Theoretically, LUS has competition for much of its Rodemacher rail service. Two railroads originate coal in the PRB, the UP and the BNSF Railway Company (BNSF). BNSF and Kansas City Southern Railway Company have connecting rail lines in place covering approximately 99 percent of the 1,500 miles between the PRB coal mine origins and Rodemacher. However, Rodemacher is captive to UP at destination because only the UP serves the last 20 miles into the Rodemacher plant in Boyce.

The existing and possible alternative service routes to Rodemacher, are set forth in the schematic below:

__**Selected Routes For PRB Coal Moving to Rodemacher**__



A review of this schematic would suggest in a partially deregulated rail system that favors competition over government regulation that the Rodemacher plant would have two options: (1) a single rate on the UP from the Powder River Basin to the plant or (2) a competitive rate from either UP or BNSF/KCS to the junction point in Alexandria, then a rate from UP only from the junction to the plant. Unfortunately, under the Surface Transportation Board's (STB's) interpretation of the railroad deregulation law, the UP is not required today to provide a rate from the junction in Alexandria to the plant. Rather, the UP may only provide Rodemacher one rate from the PRB to the plant, making it captive – and paying high captive rail rates – from the PRB to our plant. Were we able to obtain a rate from the junction in Alexandria to our plant, then we would have a relatively short route where we have only one option and almost 1,500 miles where we would have the chance of competition between the UP and the BNSF/KCS. We believe our total rail bill would be lower if we were able to obtain a rate from the UP that allows us to access rail competition for 99% of the route to the Rodemacher plant.

LUS supports a strong national coal delivery network by rail, but it is in the Nation's interest to have a sound railroad system built on reasonable, not predatory pricing and service. Under the STB's interpretation of the railroad deregulation law, UP may use its monopoly "bottleneck" control over rail line facilities at plant destination to extend its 20 miles of monopoly power to the entire 1,500 miles of the route from the PRB to Rodemacher. In other words, UP's exclusive control of only 1 percent of the involved essential rail line to the Rodemacher plant enables UP to control 100 percent of the Rodemacher movement. This renders Rodemacher captive to UP for the entire origin-to-destination trip.

A. <u>The Cost of Captivity</u>

The cost of coal transportation is one of the single largest LUS electric generation expenses. Unfortunately, LUS pays substantially higher coal transportation prices than it would if we had access to effective origin-to-destination rail competition. For Lafayette, Louisiana, we believe this lack of railroad competition translates into approximately $15 million per year in "captivity payments" – the difference between what LUS pays its existing rail carrier compared to what LUS would pay if it had access to effective railroad competition. These higher payments are included in LUS customers' monthly electric bills and cause higher utility bills for all individuals and businesses in Lafayette.

Despite its lack of access to transportation competition, LUS has attempted to negotiate reasonable rate and service terms with its railroad service provider, but with no success. LUS's last contract with UP expired at the end of calendar year 2005. Attempts to negotiate reasonable rates and terms with UP for our Rodemacher service resulted in UP refusing to meaningfully negotiate new terms with us. Rather, UP presented LUS with its new "Circular 111" rates and terms for Rodemacher service. These rates and terms were not negotiable. LUS was left with little choice but to accede to UP's demands because of their monopoly control over LUS. Further, UP refused to provide us with any effective service guarantees, which we always had under our prior contractual arrangements with UP.

To add insult to injury, our rail service has been inconsistent, as UP has suffered well-known PRB coal delivery problems in 2005-2006. Thus, LUS is not only saddled with higher rail rates with no service guarantees, LUS also has virtually no ability to seek compensation for UP's service failures. In response to these UP delivery failures, LUS undertook extraordinary measures to help ensure an adequate coal supply. More specifically, LUS had to buy barge-delivered coal from Venezuela and truck lignite from Northwest Louisiana to help shore-up fuel inventory. In addition, LUS decided to prematurely replace (before the end of their useful life) its steel railcars with new aluminum railcars, which can carry more coal per train run, in an effort to help ensure that LUS is in the best position possible to meet the Rodemacher plant's annual coal requirements, even with UP service failures.

We hope this will assist UP to deliver more coal to Rodemacher in a timely manner and meet Rodemacher's annual coal volume requirements. But there are no guarantees and we are receiving little in return from UP for making these very expensive investments that produce considerable operating expense savings for UP. While our service has improved since 2005-2006, these are significant costs for a small utility that LUS would not need to incur if it was otherwise receiving reliable service and/or was able to obtain reasonable guaranteed service standards from UP.

1. Consumer Impacts

Very frankly, LUS customers must ultimately pay, in the form of higher electric rates, the $15 million extra payments LUS is required to pay annually in captivity payments. These overpayments are of critical importance to the City of Lafayette and its citizenry and businesses. Our customers care deeply about the cost of their electricity, and share LUS' concern about the need to ensure that our electric generation costs are kept as reasonable as possible.

For example, each year Lafayette educational institutions (e.g., the university, community colleges, trade schools, and all public and private schools) served by LUS consume approximately 10 percent of the total energy produced and purchased by LUS. Based on the aforementioned $15 million per year of captivity overpayments to LUS' rail provider, these schools are in turn paying approximately $1.5 million extra in electricity costs as their share of LUS' cost of rail captivity. This is $1.5 million from school budgets are funds that could obviously be more productively used in educational programs for students.

Besides the schools, I can also assure the Committee that fixed income families and retirees care deeply about these added monthly expenses, as do cost-conscious Lafayette businesses who are some of the largest consumers of LUS-produced electricity. The cost of captivity certainly matters and it has a substantial impact on Lafayette and our local economy. So contrary to some statements made by the rail companies, it is the electric residential and business consumer who pays 100 percent of all costs charged to us by the rail system, including premiums LUS is forced to pay due to rail captivity and those high costs have a direct impact on our community.

B. LUS Needs Effective Remedies to Protect Our Consumers

LUS needs meaningful remedies to protect its electricity consumers from this undue cost of captivity. Today, the railroads are exempt from many antitrust laws and the STB has already said it is fine for the UP to block LUS's access to competition through its ruling in the December, 1996 "bottleneck" decision. LUS could challenge our PRB rate from the UP at the STB, but these actions normally take up to three years and cost plaintiffs up to $6 million, and no shipper has received meaningful relief from the STB since 2001. For example, in the last rate case decided by the STB in September, 2007, the STB found that it was "reasonable" for a rail carrier to charge a rail rate that was 5 times greater than the cost the railroad incurred to make the coal deliveries in question.

III. THE REMAINING RAILROAD ANTITRUST IMMUNITIES SHOULD BE REMOVED

Mr. Chairman, it seems extremely ironic that the railroads, whose abuses of market power in the late 1800's led to the enactment of our Nation's antitrust laws are today exempt from many of those laws while their customers are subject to the Nation's antitrust laws. One must wonder why the railroads would oppose the removal of antitrust exemptions, unless they feel that the exemptions shield otherwise anticompetitive behavior as part of their conduct of business. Such a position by the railroads should by itself elevate sufficient suspicion to justify the passage of the H.R. 1650. This Task Force last year received a report from the Antitrust Modernization Commission that strongly argued against exemptions from the nation's antitrust laws. We think the railroad industry's exemptions from the antitrust laws are particularly unsupportable in light of the lack of competition that exists in many transportation markets and the very passive oversight of the rail industry by the STB.

We believe that the bottleneck decision of the STB would not stand if the antitrust laws of the nation applied to the railroad industry. Moreover, we believe that the application of the antitrust laws to the railroad industry would require the STB to implement the Staggers Rail Act of 1980 in harmony with the antitrust laws of the nation, just as the Federal Energy Regulatory Commission implements its regulatory authorities in harmony with the antitrust laws of the nation. We believe this requirement of law would lead the STB to re-examine its "bottleneck" decision in light of the nation's antitrust laws and, hopefully, reach a pro-competitive solution.

H.R. 1650 also would provide the prospect of additional oversight and involvement of the United States Department of Justice and the Federal Trade Commission, which has considerable experience in antitrust matters and which can provide presence and guidance in the area of railroad transportation that is sorely needed. In this respect, and in light of the massive concentration that has taken place in the railroad industry, LUS suggests that there is a need for Congress and this Committee to consider engaging in additional oversight of the operations and marketing practices of the railroads, including being alert to possible anticompetitive effects. This Committee could carry out this oversight responsibility by asking an appropriate independent entity other than the STB (whose policies have allowed the current competitive situation to be created and persist), such as through the Department of Justice's Antitrust Division, to oversee the competitive state of the railroad industry and regularly report to Congress on its oversight and on its recommendations for competitive and regulatory improvements.

We understand that the removal of existing antitrust immunities enjoyed by the railroads may not alone completely address or resolve the remaining competitive problems in the railroad industry or those being experienced by LUS. But subjecting the railroads to the antitrust laws will improve the dismal competitive climate that exists today and should send a strong statement that the Congress believes that promoting competition, and not fostering anti-competitive protectionism, is the right thing to do and is in the public interest.

On behalf of the APPA, I am also submitting a letter from them in support of H.R. 1650, which I respectfully request be included as part of the formal hearing record.

I am also attaching for your reference a letter dated September 27, 2004 and addressed to House Judiciary Committee Chairman F. James Sensenbrenner, Jr. This letter addresses the antitrust immunity granted to the railroad industry and how the STB has utilized this exemption to support its rulings against captive rail customers.

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Mr. Chairman, thank you again for inviting me to testify. LUS commends H.R. 1650 to your favorable attention and respectfully requests that the full Judiciary Committee favorably report out the bill as soon as possible.