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BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: : Docket Number:  
DISCUSSIONS WITH UTILITY AND : AD06-8-000  
RAILROAD REPRESENTATIVES ON :  
MARKET AND RELIABILITY MATTERS :

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Hearing Room 2C  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D.C.  
Tuesday, May 23, 2006

The above-entitled matter came on for public  
meeting, pursuant to notice at 1:20 p.m.

- COMMISSIONERS PRESENT:
- CHAIRMAN JOSEPH T. KELLIHER
  - COMMISSIONER NORA MEAD BROWNELL
  - COMMISSIONER SUEDEEN G. KELLY

## 1 APPEARANCES :

2 GLENN ENGLISH, CEO OFFICER, NATIONAL RURAL  
3 ELECTRIC COOPERATIVE ASSOCIATION

4 ALAN H. RICHARDSON, PRESIDENT AND CEO, AMERICAN  
5 PUBLIC POWER ASSOCIATION

6 WILLIAM MOHL, VICE PRESIDENT, COMMERCIAL  
7 OPERATIONS, ENTERGY (ON BEHALF OF EDISON  
8 ELECTRIC INSTITUTE)

9 JOHN E. SHELK, PRESIDENT AND CEO, ELECTRIC POWER  
10 SUPPLY ASSOCIATION

11 EDWARD R. HAMBERGER, PRESIDENT AND CEO,  
12 ASSOCIATION OF AMERICAN RAILROADS

13 CARL R. ICE, EXECUTIVE VICE PRESIDENT AND COO,  
14 BURLINGTON NORTHERN SANTA FE CORPORATION

15 CHRISTOPHER JENKINS, VICE PRESIDENT, COAL AND  
16 AUTOMOTIVE, CSX TRANSPORTATION

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## P R O C E E D I N G S

(1:20 p.m.)

CHAIRMAN KELLLIHER: This meeting is called to order.

If we can close the doors.

My colleagues I believe are on the way. But we should probably start. To the extent they have any kind of opening comments we can break and allow them to make them.

Let me start with a brief statement.

The purpose of this meeting is to examine the railroad coal delivery matters and their impact on electricity markets and electric system reliability. The Commission is concerned about the adequacy of electricity supply this summer. Coal plays a critical role in U.S. electricity supply. In fact, coal provides the majority of our electricity supply. Coal units tend to be low-cost base load units that operate at high capacity levels. The loss of large base load coal units during the summer can have major reliability impacts and significant price impacts as well.

With respect to reliability, the North American Electric Reliability Council has placed Powder River Basin coal delivery limitations on its watch list and stated that -- quote:

If the coal delivery situation

1                   worsened the ability of some entities  
2                   to meet electric demand might be  
3                   threatened.

4                   We share these concerns.

5                   Overall coal inventory levels are higher than  
6                   last year. But at the same time there's anecdotal evidence  
7                   that inventories at certain large coal base load units are  
8                   very low. It's possible both sets of data are true.  
9                   There's also more than one explanation on why coal  
10                  inventories at certain coal power stations may be low.

11                  The purpose of this meeting is to assess the  
12                  adequacy of electric supply this summer by examining the  
13                  nature of the coal delivery and inventory problem. We'll be  
14                  asking questions and gathering facts, and we'll draw certain  
15                  conclusions. And we'll want to understand the extent of the  
16                  problem and what caused the problem.

17                  At the same time we've requested additional data  
18                  on coal inventories from the Energy Information  
19                  Administration and have set up a meeting with EIA to discuss  
20                  the sharing of information regarding coal inventories within  
21                  the statutory requirements.

22                  Once the Commission has a greater understanding  
23                  we'll decide what steps, if any, we will take next. Our  
24                  interest in this area is very similar in nature to our  
25                  interest in the adequacy of electric supply in New England

1 two winters ago. At the time some electric generators in  
2 New England remarketed their gas supplies in lieu of using  
3 them to generate electricity. That raised issues regarding  
4 natural gas transportation arrangements. So the Commission  
5 has previously examined issues relating to transportation of  
6 a primary fuel used to generate electricity.

7 Now while the Commission administers the  
8 Interstate Commerce Act, it only administers the parts of  
9 the Act relating to oil pipelines, not railroads. We  
10 recognize that our jurisdiction is limited in some of the  
11 areas that we'll be examining today, and recognize that it  
12 is the Surface Transportation Board that has jurisdiction  
13 over rail service.

14 We have structured this meeting as a single panel  
15 in order to encourage interaction among the panelists, and  
16 that interaction will help the Commission understand the  
17 nature and extent of the coal delivery and inventory  
18 problem. I look forward to hearing the views of the  
19 panelists.

20 Let me recognize my colleague to see if she has  
21 any comments she'd like to make.

22 COMMISSIONER BROWNELL: Thank you. I'm not going  
23 to take much time because I'm really interested to get  
24 started.

25 I think this is important in order to get a real

1 picture of what's happening. I know there's some  
2 disagreements between and among you. And certainly we  
3 understand that. But I think the goal here is to see if we  
4 can get a better understanding of the nature of the problem,  
5 and then to begin to identify solutions. It isn't terribly  
6 productive to point fingers; it might make us feel good --  
7 actually I love to do that -- but it really doesn't address  
8 the issue, which is how do we get reliable service for  
9 customers. How do we begin to address the future needs.

10 I think with the high gas prices and the advent  
11 of new technologies for coal, coal has created new  
12 opportunities for everyone. And we want to make sure to  
13 take advantage of that as we look at infrastructure in other  
14 segments of the energy markets. I think probably we need to  
15 begin to look at the interaction and the relationship of  
16 infrastructure in the rail sector, whether or not we have  
17 jurisdiction. That certainly has never stopped me.

18 So I thank you for coming here today.

19 CHAIRMAN KELLIHER: You're not supposed to say  
20 that.

21 COMMISSIONER BROWNELL: I don't believe in due  
22 process any more either. But you know, whatever. I'm  
23 looking forward to an informed and a lively debate, but with  
24 the idea that we really need to kind of begin to get a  
25 better picture than we have today.

1                   So it's not about who hit Bob. It really about  
2                   what do we need to do collectively to assess the extent of  
3                   the issue, and then whatever we need to do to fix the issue.

4                   CHAIRMAN KELLIHER: Thanks.

5                   COMMISSIONER BROWNELL: I really do believe in  
6                   due process. And I never exceed my jurisdiction -- not  
7                   ever.

8                   CHAIRMAN KELLIHER: And when Commissioner Kelly  
9                   arrives we'll take a break so she can make any kind of  
10                  opening comments.

11                  Staff will also be participating in this later on  
12                  with questions. And I think Joe wants to participate right  
13                  now.

14                  MR. MC CLELLAND: Yes. Let's kick it off.

15                  Good afternoon. Welcome to the Federal Energy  
16                  Regulatory Commission. My name is Joe McClelland, the  
17                  Director of the Division of Reliability. And I'll be  
18                  chairing today's discussions.

19                  As Chairman Kelliher said, the purpose of this  
20                  meeting is to examine railroad coal delivery matters and  
21                  their impact on electricity markets and electric system  
22                  reliability. We appreciate the time and effort of our  
23                  speakers to prepare their remarks and to appear here before  
24                  the Commission.

25                  I'd like to begin with a few housekeeping issues.

1 Please feel free to step in and out of the conference room  
2 as necessary. There are restrooms located past the  
3 elevators in the left and right hallways.

4 Also, to the audience, please turn off any pagers  
5 or cellular telephones during this meeting.

6 Any presentation that we've received  
7 electronically from today's speakers will be posted on the  
8 FERC website and appended to today's event on the calendar.

9 The Commission will accept comments to this  
10 meeting through June 30, 2006. The docket number under  
11 which to file comments is AD 06-8-000. Let me repeat that.  
12 AD 06-8-000.

13 Our panel for this meeting is comprised of  
14 members of the electric utility industry and the railroad  
15 industry.

16 Representing the electric utility industry are  
17 Glenn English, Chief Executive Officer of the National Rural  
18 Electric Cooperative Association, Alan Richardson, President  
19 and Chief Executive Officer of the American Public Power  
20 Association, William Mohl, Vice President, Commercial  
21 Operations of Entergy.

22 Speaking on behalf of the Edison Electric  
23 Institute, John Shelk, President and Chief Executive Officer  
24 of the Electric Power Supply Association.

25 Representing the railroad companies are Edward

1 Hamberger, President and Chief Executive Officer of the  
2 Association of American Railroads, Carl Ice, Executive Vice  
3 President and Chief Operating Officer of Burlington Northern  
4 Santa Fe Corporation, and Christopher Jenkins, Vice  
5 President, Coal and Automotive, of CSX Transportation.

6 I want to be sure we get the ground rules right  
7 because we will cut you off at ten minutes if you exceed  
8 time. Each of you will have a maximum of ten minutes for  
9 your presentations. I'll provide you with a warning when  
10 you have one minute remaining. Take the warning very  
11 seriously, folks. I don't like to stop anyone.

12 We'll begin the presentations with the  
13 representatives of the electric utility industry. We'll go  
14 in this fashion.

15 Mr. English, the floor is yours.

16 CHAIRMAN KELLIHER: Why don't we recognize  
17 Commissioner Kelly first for any comments.

18 COMMISSIONER KELLY: My comment is I'm sorry I'm  
19 late and I look forward to your presentations.

20 (Laughter.)

21 CHAIRMAN KELLIHER: Actually, it's the Honorable  
22 Glenn. He wants to be precise about these things.

23 MR. ENGLISH: Thank you very much, Mr. Chairman.  
24 I appreciate that very much.

25 As well as being the CEO of the National Rural

1 Electric Cooperative Association, I want to point out that I  
2 serve as Chairman of the Consumers United for Rail Equity,  
3 which is a captive shipper advocacy group and represents a  
4 broad array of different industries, such as chemical  
5 manufacturers and processors, pulp forest products,  
6 agricultural commodity producers and processors, along with  
7 cement and building material suppliers, all of whom have an  
8 interest as far as rail transportation is concerned.

9 Mr. Chairman, Commissioner Kelly, Commissioner  
10 Brownell, I was over at Homeland Security earlier this year  
11 meeting with the folks doing a little review with what  
12 happened during Katrina and Rita. And during the  
13 discussions the point was made by one of the top officials  
14 of Homeland Security that one of the lessons that they  
15 learned was that until you get the power back on there  
16 really wasn't much that was going to take place. And they  
17 really didn't appreciate what a great priority that must be.

18 I think it's true of many of the American people  
19 and probably most of the folks in our economy, to appreciate  
20 the impact that that has on our economy and what happens  
21 when the power goes off. And fortunately, we haven't seen  
22 that happen too often in this country. It does have an  
23 enormous impact when that takes place.

24 Also I think we all recognize the fact that we  
25 have reached the end of the capacity from the standpoint of

1 the surplus that was built during the 1970s, late '70s and  
2 early '80s. With that surplus now gone we have to build new  
3 generation. As I think this Commission is very aware of the  
4 fact that back in 2001 Vice President Cheney made that point  
5 in stating that in order to meet this nation's electricity  
6 needs that we were going to have to build generation over  
7 the next 20 years.

8 In fact, the Vice President said we would have to  
9 have a plant a week come on line in order to meet this  
10 nation's needs. Certainly at the time he was making that  
11 speech he also was recognizing the fact that we have an  
12 abundant supply of coal in this country and that we are  
13 blessed by that and that would help meet our needs in  
14 providing reasonably priced electric power. Obviously  
15 that's extremely important.

16 That brings us to where we are today. We may  
17 have an abundant supply of coal and we may be building the  
18 capacity to meet this country's needs. But unless we get  
19 that coal to the point where that power is being generated  
20 that really isn't going to do us a lot of good. And  
21 certainly the developments of the last two or three years  
22 are very disturbing as we plan for those events, as we look  
23 at what's happened in the last couple of years, coal  
24 deliveries by rail have become increasingly unreliable and  
25 expensive.

1           Certainly there have been delivery problems that  
2           have been contrary to the contracts that were agreed upon  
3           and that did have the potential of affecting the reliability  
4           of the electric generation in this country. Coal piles at  
5           individual utilities have been dangerously low over the past  
6           couple of years, and in some cases we've arrived at the  
7           point that the stockpiles are less than ten days.

8           We also find that we're faced with reduced and  
9           unreliable coal supply, that generators are having to turn  
10          to very expensive natural gas based generation. That, of  
11          course, has an upward impact on the price of natural gas for  
12          other consumers in this country.

13          The failure of the railroads to reliably deliver  
14          coal has either directly or indirectly produced winners and  
15          lowers in the electric utility industry, contrary to  
16          certainly the intent of the 1992 Energy Act and what this  
17          Commission has tried to do. That is to bring competition  
18          into wholesale markets.

19          Also we find that some domestic utilities have  
20          been driven to the point of purchasing coal supplies from  
21          foreign countries rather than use our very reasonably priced  
22          domestic sources. That's exacerbating, of course, the  
23          balance of trade payments that we have with this nation.

24          I might also say to underscore not only the fact  
25          that they haven't been able to receive the power, but when

1 they do -- excuse me, receive the coal -- but when they do  
2 the price of transportation of that coal has exceeded the  
3 price of the coal itself.

4 The Department of Energy has found that the  
5 railroad industry consolidation, downsizing and increasing  
6 demand has resulted in the lack of spare capacity.  
7 Obviously that spells trouble for the future as we look at  
8 building a lot more coal-fired generation in this country.

9 There is little competition for coal by rail and  
10 we would argue that the narrow railroad self-interest has  
11 resulted in congestion, and that is producing an upward  
12 pressure on rail transportation rates. FERC has  
13 jurisdiction to examine this problem, Mr. Chairman. The  
14 problems of coal delivery are part of a new reliability  
15 jurisdiction that was provided as a part of the recently  
16 passed Energy Act. We would also argue from the standpoint  
17 of its market assessment and outlook studies that FERC  
18 should monitor coal delivery problems not only today in the  
19 summer, but into the future.

20 And just as it monitors the market situation for  
21 other fuels, FERC should encourage NERC to maintain a focus  
22 on coal delivery problems. FERC should commit to a future  
23 technical conference to examine whether the current  
24 conditions have improved or worsened. And certainly FERC,  
25 though coordination with the Surface Transportation Board,

1       should ensure that rail capacity increases sufficiently in  
2       order to support the needs for new generation.

3               Also, I think it's very important, Mr. Chairman,  
4       to recognize that as we've looked at these reliability  
5       issues we have found no one in the Federal Government other  
6       than FERC has been given that authority by the Congress.

7               So you have sole jurisdiction, and I would argue  
8       sole responsibility to make sure that that coal is delivered  
9       to those generating plants, and to make sure that in fact  
10       those generating plants are reliable far into the future.  
11       That's going to mean a commitment to additional resources to  
12       make certain that our systems are upgraded, to make certain  
13       that the capacity exists to be able to move that coal, and  
14       it's going to mean to make certain that those investments  
15       are made in the areas of delivering Powder River Basin coal  
16       to the electric generators of this country.

17               Thank you very much, Mr. Chairman.

18               MR. MC CLELLAND: Thank you.

19               I'm in somewhat of a dilemma. Should I say  
20       'thank you, your Honor,' or 'thank you, Mr. English'?

21               MR. ENGLISH: Whatever seems appropriate to you.  
22       I'm not picky.

23               MR. MC CLELLAND: Thank you.

24               Mr. Richardson.

25               MR. RICHARDSON: Thank you very much.

1 Chairman Kelliher, Commissioners -- Do I call you  
2 Chairman as well?

3 (Laughter.)

4 MR. RICHARDSON: It's always a pleasure to follow  
5 Glenn. He leaves not a lot to say. But I'm going to say a  
6 few things in any case.

7 First of all, I'm delighted that you accepted the  
8 invitation from the trade associations to conduct this  
9 hearing. Believe me, we're very respectful of the  
10 jurisdictional boundaries that the Commission has. But we  
11 also feel -- and I feel like Mr. English -- that there are  
12 things that are within the Commission's jurisdiction and  
13 there are activities that the Commission could and should  
14 undertake to deal with what we regard not simply as a short-  
15 term issue but as a long-term issue.

16 I'm not here to say that the sky is falling. I  
17 am here to say that we don't think anybody is looking up.  
18 We hope that the Commission can look up and monitor the  
19 situation to move forward.

20 This is an issue of great importance to my  
21 members. It was placed in the top five priorities by my  
22 Board of Directors earlier this year. APPA members have a  
23 smaller percentage of coal generation than the national  
24 average -- about 30 percent of our installed capacity is  
25 coal-fired as opposed to 50 percent nationally, and for the

1 cooperatives I think it's about 80 percent. In terms of  
2 ownership of coal-fired generation we have the least.

3 Barges and trucks can deliver coal for a few of  
4 these members, but not many. Most are captive to the  
5 railroads, and in many cases captive to a single railroad.  
6 Those that don't have coal-fired generation, many are  
7 dependent on the wholesale market and much of the power that  
8 they purchase comes from coal-fired generation.

9 So one way or another a lot of my members are  
10 affected by what happens with respect to coal deliveries and  
11 the costs of failures. The issues of poor service, rapidly  
12 escalating delivery costs and depleting stockpiles of coal  
13 have been of growing concern to my members. We don't regard  
14 this as a short-term issue. We regard this certainly as an  
15 issue that has been building and has many consequences, both  
16 today and in the future.

17 Mr. English mentioned some of the economic  
18 consequences. If you could curtail coal-fired generation  
19 and substitute natural gas the prices obviously for  
20 consumers are going to increase as higher cost fuel is used.  
21 That puts more pressure on natural gas, taking it away from  
22 other uses, particularly as feedstocks for the production of  
23 other products.

24 My membership pursued some self-help remedies to  
25 try to address this, to work around the problems. But

1 they're usually costly and not particularly effective. They  
2 purchased or leased train sets; for example, in Powder River  
3 Basin, the Laramie river station purchased a fourth train  
4 set in order to move more coal, but with no guarantee that  
5 that train set could move over the tracks that were there.  
6 They rented an extra train set because their deliveries were  
7 not keeping up with their demand. They were able to  
8 purchase coal in the short-term market and then they saw  
9 their prices of coal in the short-term market go from five  
10 to seven dollars a ton to about \$20 a ton during the course  
11 of one year.

12 Other work-arounds include -- if you can believe  
13 it -- the importation of foreign coal from Indonesia, in the  
14 case of MIAG Power in Georgia, or from Columbia for City  
15 Public Service in San Antonio, Texas. This really gives new  
16 meaning to the adage taking coal to Newcastle given the  
17 abundance of coal in the United States.

18 Interestingly, CPS Energy in San Antonio was not  
19 getting adequate supplies of coal from the north. So they  
20 had to ship coal from Columbia into Corpus Christi, then to  
21 move that coal 100 miles north to their power plant they  
22 couldn't get rail service from Corpus Christi to their plant  
23 so they had to move that coal by truck. So they're taking  
24 about 80 to 100 truckloads of coal per day on the highways  
25 to make sure that they have adequate supplies.

1           The consequences also include power supply  
2 planning. A lot of my members are moving forward with plans  
3 to build new coal-fired generation. And they are or soon  
4 will be making billion dollar decisions. And they're  
5 essentially placing their funds and their futures in the  
6 hands of the railroads, counting on them to reliably meet  
7 the need for coal for the next several decades.

8           Given the current state of affairs I can tell  
9 you, those members who are moving forward with new coal-  
10 fired generation are very concerned about whether their  
11 investments will be secure and they will have a return on  
12 those investments as a result of what's happening today in  
13 the industry, in the railroad industry.

14           And, of course, there are reliability  
15 consequences, which is what we're here to talk about both  
16 today and tomorrow. Curtailments of base load coal-fired  
17 generation can challenge good reliability. Depleted  
18 stockpiles leave little room for error. I don't personally  
19 like to drive around on less than a quarter of a tank of  
20 gas; I don't know if I'm going to get stuck in traffic or  
21 get to the next gas station.

22           You can imagine the anxieties the managers,  
23 owners and operators of the coal-fired power plants feel.  
24 These individuals have an obligation to serve their  
25 customers. They cannot avoid that obligation. And when

1 their stockpiles are depleted, believe me, it's a very  
2 serious challenge to them in their business operations. Of  
3 course, with depleted stockpiles just minor disruptions can  
4 have a significant consequence. Disruptions that you could  
5 withstand if you had a 30 or 40 day stockpile become much  
6 more challenging if you're down to ten or fewer days.

7 So we're looking with increased reliance on coal  
8 from all sectors of industry. Reliability and continuity of  
9 service are called into question.

10 As far as recommendations, I agree with the  
11 suggestions Mr. English has made. This workshop is just an  
12 excellent opportunity for us to come and discuss our  
13 concerns with you. We think it's a first step -- or at  
14 least we hope it's a first step -- and we hope that you  
15 follow on with additional discussions of this nature.

16 We think the Commission should monitor coal  
17 stockpile levels on a monthly basis at plants in those  
18 states and regions where stockpiles are already below prior  
19 year levels. This is not a difficult task.

20 The Energy Information Administration does  
21 collect this data. They collect it on plant by plant basis.  
22 It's available three or four months after collection --  
23 available to the public. But they can make that information  
24 available, that information which is collected by them in a  
25 confidential basis, they can make that available to other

1 federal agencies. So you have a way of keeping your thumb  
2 on the pulse of what's happening with respect to this  
3 problem simply by going to the Energy Information  
4 Administration and working with them to make sure that  
5 you're tracking what's happening at the coal-fired power  
6 plants, particularly those in the most vulnerable areas, the  
7 three regions with stockpiles that are below where they were  
8 last year: west north central, west south central, and the  
9 mountain region. And they are also below the levels of last  
10 year in 14 states, and they're below those levels in the  
11 range of from two percent at the lowest to 42 percent below  
12 last year's level in the highest, with an average of about  
13 16 percent.

14 Other recommendations. You obviously have  
15 authority to recommend legislation to Congress. Should you  
16 find, after monitoring the situation over a period of time,  
17 that there are things you feel Congress needs to address,  
18 you have the authority and the responsibility, I think, to  
19 make recommendations to Congress. And I don't believe that  
20 authority is limited to recommendations to amend the Federal  
21 Power Act.

22 If you find laws in other parts of our legal  
23 structure that need to be addressed to make sure that you  
24 can fulfill your responsibilities then I believe you clearly  
25 have the authority and responsibility to recommend that

1 Congress take action in those areas.

2 You can coordinate with the Surface  
3 Transportation Board to ensure that they're aware of your  
4 interest in and concern about the adequacy of rail service.  
5 And as far as I know, nothing restricts the ability of the  
6 Surface Transportation Board to engage in discussions with  
7 you about the same issue.

8 Finally, you can work with the North American  
9 Electric Reliability Council to ensure this issue remains on  
10 their agenda as well.

11 Thank you very much again for accepting our  
12 request for this meeting. We look forward to the discussion  
13 that follows.

14 MR. MC CLELLAND: Thank you, Mr. Richardson.  
15 Mr. Mohl.

16 MR. MOHL: Good afternoon, Chairman Kelliher,  
17 Commissioners, and Commission Staff. I am William Mohl,  
18 Vice President of Commercial Operations for Entergy  
19 Services. I appreciate the opportunity to discuss railroad  
20 coal delivery matters and how they are impacting the  
21 electric utility markets and overall electric reliability.  
22 I appear here today on behalf of Entergy as well as the  
23 Edison Electric Institute.

24 The Commission has my prepared statement. I will  
25 try to focus this afternoon on the highlights of that

1 statement.

2 First, I'd like to focus on why the Commission  
3 should be concerned about how the lack of reliable rail  
4 service impacts and puts in jeopardy the reliability of the  
5 electric utility system. Entergy's experience provides a  
6 good illustration of how declining rail service from the PRB  
7 has put the reliability of the nation's electric plants at  
8 risk.

9 The coal-fired stations owned by Entergy's  
10 operating companies -- which I'll refer to hereafter  
11 collectively as Entergy -- are designed to burn and  
12 historically have burned exclusively PRB coal. Rail is the  
13 only means of originating coal from the PRB and is the only  
14 practical means of delivering coal to our Arkansas plants,  
15 the White Bluff and Independence Station, and Nelson Station  
16 in Louisiana.

17 Entergy is one of the oldest, largest PRB coal  
18 shippers in the country. We've had contractual  
19 relationships with both western carriers -- that's Union  
20 Pacific and BNSF -- since the early 1980s. Our primary  
21 transportation for the Arkansas plants is currently with the  
22 Union Pacific. We rely on the commitments made by the  
23 railroads in all these contractual agreements in planning  
24 how we are going to meet our load requirements.

25 In addition, we have also invested heavily in

1 rail transportation ourselves, including but not limited to,  
2 the purchase or leasing of train sets and the installation  
3 of additional trackage at our facilities to allow for longer  
4 train sets, all in an effort to improve overall efficiencies  
5 of delivery.

6 The reason we are here, however, is because  
7 relying on the railroad's commitments has become  
8 increasingly difficult given the serious deterioration in  
9 service levels that have occurred on PRB since 2005 and  
10 continuing today. Prior to 2005 severe service disruptions  
11 were a rarity, limited to the problems that were experienced  
12 in the aftermath of the 500 year Midwestern floods in '93  
13 and '94 and the well-publicized UP service meltdown in '97  
14 and '98.

15 To put it in perspective, in the 20-plus years  
16 the railroads have been serving Entergy prior to 2005 there  
17 were only seven or eight isolated force majeure claims, none  
18 of which extended more than a few days. By contrast, since  
19 January 1st, 2005 the railroads have declared seven force  
20 majeure claims.

21 Most notable of these claims relates to a force  
22 majeure claim that began with two derailments on the PRB  
23 joint line in May 2005. While BNSF cleared its tracks and  
24 ended the force majeure after roughly three weeks, UP relied  
25 on this event to justify a seven-month maintenance effort

1 during which they continued force majeure and effectively  
2 suspended its volume and service commitments to Entergy and  
3 other customers.

4           During this extended force majeure claim UP  
5 rationed PRB coal supplies among its various coal  
6 transportation customers, publicly stating that it would  
7 deliver approximately 85 percent of shipper nominations.  
8 While claiming to supply about 85 percent of nominated  
9 tonnages, Entergy -- and we suspect others -- has received  
10 less than that amount.

11           While deliveries have somewhat improved in 2006,  
12 we are still receiving substantially less than the amount we  
13 are entitled to under this and other coal transportation  
14 agreements. This extended service disruption caused many  
15 utilities -- including Entergy -- to curtail the output of  
16 its low-cost coal-fired generating stations, and to replace  
17 that curtailed generation with higher cost purchased power  
18 and natural gas.

19           As detailed in my prepared statement, Entergy  
20 also was forced to seek higher priced coal from both  
21 domestic and foreign sources in an effort to supplement  
22 deliveries during this crisis period. Entergy, similar to  
23 MIAG, had purchased from Columbia, and has also purchased  
24 coal from Indonesia in an effort to bridge the gap between  
25 the lack of PRB coal we have not received due to the service

1 of the railroads.

2 The loss of this coal-fired generation at Entergy  
3 and other utilities resulted in increased costs to the  
4 utilities, which in turn resulted in increased costs to  
5 consumers.

6 You're going to hear many excuses relating to the  
7 rail service disruptions, which largely consist of the  
8 railroads taking no accountability for letting up to the  
9 contractual commitments that they made to their customers.  
10 For example, the railroads have suggested that utilities  
11 should have carried coal inventory stockpiles to prevent  
12 against the severe disruptions that they experienced in  
13 2005. They also suggest that the service problems are the  
14 product of unanticipated increased demand and other events  
15 beyond their control.

16 Finally, they tout the fact that they delivered  
17 more coal in 2005 than in any other year.

18 As it relates to inventory levels the railroads  
19 seem to want to hold utilities to a standard that they do  
20 not want to live up to themselves. While we are expected to  
21 hold inventory to protect us from spikes in demand, the  
22 railroads no longer want to carry adequate real capacity to  
23 assure that they can handle volume spikes and meet their  
24 commitments.

25 As I explained my prepared statement, the level

1 of inventory that would have been needed to protect against  
2 the shortfalls we experienced in Arkansas would not have  
3 been feasible for Entergy. We do not even have the physical  
4 space available to maintain inventory at levels that are  
5 based on the regular breakdown of the transportation  
6 network.

7 The railroads' demand theory also is overstated.  
8 Joint line PRB coal originations have risen from  
9 approximately 75 million tons in 1984 to nearly 350 million  
10 tons in 2005. The trend in that growth has been fairly  
11 consistent and predictable. It should have been no surprise  
12 to the railroads that demand for PRB coal would continue to  
13 rise.

14 Moreover, to the extent that the coal is  
15 transported under long term contracts like Entergy's, there  
16 is no basis to deprive the utility of the stated volume  
17 commitment of the capacity that it bargained for. UP as  
18 well as BNSF are moving away from contract commitments in  
19 favor of common carrier type pricing and service terms,  
20 which provide little if any guarantees of delivery.

21 The intense UP-BNSF competition that prevailed in  
22 the PRB between 1984 and 2004 has disappeared. Even  
23 utilities that were once able to give intense competition  
24 are now faced with increased rates for worse service. While  
25 the railroads are claiming that they delivered more coal in

1       2005 than in any prior year, the simple fact is they are not  
2       meeting their commitments to existing customers like Entergy  
3       and many other utilities.

4               In short, the railroads serving the PRB simply do  
5       not have the capacity to meet the demand of its existing  
6       customers and something needs to be done.

7               FERC was given explicit statutory authority in  
8       the Energy Policy Act to oversee the development and  
9       implementation of mandatory electric reliability standards.  
10       Similar authority does not exist for the Surface  
11       Transportation Board.

12               Despite these differences in authority, this does  
13       not preclude voluntary cooperation and coordination between  
14       the STB and the FERC. The FERC has worked well with the NRC  
15       on nuclear matters impacting the grid. Its efforts can be  
16       seen as a model for coordination with the STB on rail.

17               FERC needs to closely monitor the rail capacity  
18       situation on a continuous basis. We do not believe the  
19       situation just relates to the summer. But we are  
20       encouraging FERC to look at this in an ongoing manner. And  
21       FERC should coordinate closely with STB to ensure adequate  
22       rail deliveries of coal and to avoid potentially harmful  
23       impacts on electric markets or reliability.

24               As far as we're aware, there is nothing precludes  
25       this collaboration between FERC and STB.

1           In addition, we would ask that if FERC in its  
2           efforts to ensure electric reliability determines that there  
3           is insufficient rail capacity or government authority to  
4           address rail service problems to meet the reliability needs  
5           of the electric industry that it report these results to  
6           Congress. Stockpile improvement has largely been the result  
7           of numerous steps that utilities took, as mentioned above,  
8           to conserve coal and train sets and obtain alternate  
9           supplies of coal over the course of the last year.

10           Rail deliveries of coal are an integral part of  
11           electric reliability, and adequacy of long-term coal  
12           deliveries is fundamental to the cost-effective operation of  
13           the bulk power electric system. However the lack of  
14           capacity and reserve that exists within the PRB network puts  
15           the electric utility industry at risk.

16           The reality is that the railroads, like  
17           utilities, needs to maintain sufficient reserves to meet  
18           surging and/or growing demand rather than continuing the  
19           practice of managing their constrained capacity through  
20           pricing and just-in-time capital investment programs.

21           Admittedly, the railroads face many difficult  
22           challenges in managing their capacity to meet the demands of  
23           their customers. However, as you are well aware, utilities  
24           without retail open access have an obligation to serve their  
25           customers and are held accountable by various regulatory

1 agencies, including the FERC. Railroads, on the other hand,  
2 do not feel any obligation to serve or meet their  
3 commitments and are not held accountable by any regulatory  
4 agency.

5 This has clearly been a recipe for disaster from  
6 the electric industry's perspective. And we hope that you  
7 will help us address this problem.

8 Thank you.

9 MR. MC CLELLAND: Thank you, Mr. Mohl.

10 Mr. Shelk.

11 MR. SHELK: Thank you very much.

12 Chairman Kelliher, Commissioner Brownell and  
13 Commission Kelly, I appreciate your inviting the Electric  
14 Power Supply Association to participate in today's meeting.  
15 After listening to my colleagues I confess, while I'm  
16 honored to be batting cleanup on the generator part of this  
17 panel, I'm reminded of Congressman Mo Udall's admonition  
18 that everything that needs to be said has been said. It's  
19 just that not everyone has said it, at least from the  
20 generator perspective.

21 (Laughter.)

22 Competitive power suppliers account for nearly 40  
23 percent of the installed generating capacity in the United  
24 States, and only one-third of actual power generation.  
25 These suppliers operate a very diverse fuel fleet, with coal

1 the largest single source at almost 40 percent of the  
2 competitive sector's fuel use. This translates into a  
3 competitive sector coal consumption of well over 220 million  
4 tons annual, or about one-fifth of all coal consumed in  
5 power plants in the United States.

6 As a result coal rail deliveries issues are  
7 important to our members and the millions of customers we  
8 serve. Rail issues are near the top of the list of concerns  
9 of our members who operate coal-fired power plants.

10 I'd like to briefly summarize the written  
11 statement that we've submitted.

12 First, coal rail issues are very real. Others on  
13 the panel have already described various issues around  
14 deliveries, rates, fuel surcharges, and shifts to coal  
15 imports. These matters, as I indicated, are detailed in our  
16 statement. And I would concur with the observation that  
17 there is something amiss when coal-fired power plants have  
18 to import coal from thousands of miles away when the United  
19 States has hundreds of years of domestic reserves with a  
20 much lower delivered cost.

21 I should also add that these issues, while the  
22 focus has been on the PRB, our members report some problems  
23 in the east as well as the problems discussed in the west.

24 Our second point is that coal rail issues are in  
25 fact largely plant- and location-specific. I have to say

1 that some of our members recently reported some notable  
2 improvements in specific instances while also reporting  
3 worsening conditions in other cases.

4 At its core, this is and should be a partnership  
5 between all wings of the supply chain: the mine mouth to  
6 end use consumption. And as the Commissioners have  
7 indicated, all should approach this in good faith and with  
8 an emphasis on problem-solving, not finger-pointing.

9 Our third point is that coal rail issues are  
10 certainly not new, as others have said. I can attest from  
11 person experience while with the National Mining Association  
12 prior to joining EPSA last year. They had regular senior  
13 level meetings among coal generating and rail executives.  
14 These issues have been discussed for quite some time.

15 The fourth point is that coal rail issues are not  
16 a function of increased use of natural gas. The power  
17 plants with rail delivery problems today are the plants that  
18 have been around, frankly, for decades. The increased use  
19 of coal in tonnage terms is in large part a function of the  
20 widely predicted and expected shift to lower sulfur but  
21 lower heat content western coal predicted at the time of the  
22 passage of the Clean Air Act Amendments in 1990. I believe  
23 the statistics will prove out that that shift has been  
24 gradual and not abrupt.

25 New natural gas generation which did occur in the

1 '90s was used to meet new peaking demand but not to displace  
2 existing coal units. The coal units we have today, getting  
3 coal to them is important to reliability for the reasons  
4 you've heard.

5 Fifth, and perhaps most importantly, coal rail  
6 and other fuel delivery issues are not going away. While  
7 the near term outlook is largely favorable overall this  
8 summer, some coal-fired plants are indeed in better shape  
9 than others. More importantly, the focus must be on the  
10 future.

11 The Energy Information Administration's Annual  
12 Energy Outlook should be sobering and should serve as a  
13 wake-up call for all of us. According to the Outlook, the  
14 nation will likely need on the order of 350 gigawatts of  
15 additional generation by the year 2030, with some regions  
16 short on power next year and in 2008.

17 I recently read that the General Electric  
18 Services Company predicted this will cost somewhere around  
19 \$250 billion in investment. The EIA projection is that half  
20 of the additional 350 gigawatts is coming from coal, --  
21 which also comes at the same time coal will start to realize  
22 its potential to produce liquid fuel. So there will be  
23 demand for coal as well as transportation issues for  
24 applications of coal not prevalent today.

25 Most importantly, EIA estimated that much, if not

1 most, of the new coal-fired generation will occur at or very  
2 near coal mines, far from the loads to be served by the  
3 generation. While FERC cannot do much of anything about  
4 these issues in the short-term, and certainly not directly  
5 about rail rates and service, we believe and submit that the  
6 Commission has a critical role to make sure that we learn  
7 from the lessons described today and anticipate future  
8 needs.

9 If, as EIA projects, coal-fired power is to come  
10 more by wire and less by rail car, truck or barge, it is  
11 imperative that the open access rules of the Commission be  
12 as strong as possible and aggressively enforced. While the  
13 Commission is not an expert in captive rail issues, the  
14 Commission is certainly well versed in the obstacles put in  
15 the way of captive customers of many parts of the electric  
16 transmission grid, including competitive generators.

17 The recently released proposed rulemaking on  
18 reform of Order 888, along with other Commission initiatives  
19 and transmission investment, will help prevent or reduce  
20 future fuel deliver obstacles.

21 Certainly the impact on reliability from  
22 shortfalls at one or more power plants, for whatever reason,  
23 underscores the importance of robust and competitive  
24 regional wholesale markets. In such markets there's a  
25 greater pool of plants available to meet the needs of any

1 given set of customers. If plant-specific problems arise  
2 robust markets minimize the impact on consumers by making  
3 other options more readily available.

4 Finally, I would concur that one model for the  
5 Commission to address these real issues is how well the  
6 Commission has stimulated thoughtful fact-based public  
7 discussion on natural gas for well over a year now, as I  
8 recall. Both sets of issues, rail and natural gas, are in  
9 fact directly linked as rising costs facing power generators  
10 underlie the increased electricity rates in all regions of  
11 the country.

12 There is indeed a direct link between rail and  
13 natural gas issues. As the summer forecasts from the  
14 Natural Gas Supply Association and others have pointed out,  
15 the extent of gas use this summer for power generation will  
16 only increase if rail delivery problems turn out to be  
17 greater than expected. All the more reason why in our view  
18 regulators should institute economic dispatch protocols  
19 where they are not now in place, so that the least amount of  
20 natural gas is used that will generate electricity  
21 consistent with reliability and the cost of the dispatched  
22 power.

23 In conclusion, I think the EIA forecasts I noted  
24 earlier show that all of us at this table and in the  
25 regulatory community and elsewhere really have our work cut

1 out for us to meet that increased demand. Rail issues, as  
2 important as they are, are just part of the broader  
3 challenge to actually site power plants where needed,  
4 deliver the fuel those plants will require, and get that  
5 power to market with contributions and a level playing field  
6 from all participants.

7 We at EPSA in the competitive sector pledge to do  
8 our part, as always. And we as always look forward to  
9 working with the Commission, the state regulators, and other  
10 market participants to make this happen to benefit  
11 consumers.

12 We look forward to the discussion at the  
13 appropriate time.

14 Thank you.

15 MR. MC CLELLAND: Thank you, Mr. Shelk.

16 Next let's turn to the representatives from the  
17 railroad industry.

18 MR. HAMBERGER: Actually, we're going to switch  
19 after me. Mr. Jenkins will come next and Carl Ice will bat  
20 cleanup.

21 I appreciate the opportunity to be here on behalf  
22 of the Association of American Railroads and the opportunity  
23 to discuss our role in moving coal and helping to provide  
24 electric reliability.

25 I echo Mr. Shelk's hope that this is a thoughtful

1 and fact-based discussion. We will certainly stick to facts  
2 and not rhetoric.

3 Let me make clear. What I have heard here today  
4 has nothing to do with electric reliability. I have not  
5 heard one case where one generator was threatened to shut  
6 down. There has been a fuel switch. There have been -- We  
7 cannot provide every kind of coal that is desired. But we  
8 are moving more coal than has ever been moved before.

9 This is not a matter of reliability. It is a  
10 matter of supply and demand in the coal industry.

11 Members of this Commission should know that there  
12 is no crisis. Our ability to deliver coal is anything but  
13 broken. In 2005 we moved more coal than ever before. And  
14 we are on track to move more coal in 2006, breaking 2005's  
15 record.

16 During the first five months of 2006 Union  
17 Pacific, for example, loaded 5304 coal trains, 1090 in the  
18 Powder River Basin in May alone -- the best May performance  
19 ever. Norfolk Southern also set a new record in May for  
20 coal volumes: 16.5 million tons, up 8.7 percent from May of  
21 last year, and reports that 90 percent of its utility  
22 customers have stockpiles exceeding last years.

23 While my statement will focus on freight  
24 railroads, I want to emphasize that railroads are just one  
25 part of a much larger interconnected coal supply chain. A

1 complete assessment of the reliability of coal-fired  
2 electricity generation must include an examination of  
3 actions taken or not taken by all elements of the supply  
4 chain, including the coal producers themselves, other coal  
5 transporters such as the inland waterway industry and the  
6 ports on our inland waterways, and in fact the utilities  
7 themselves.

8           Therefore while I am glad to testify today, I am  
9 somewhat disappointed that FERC is concentrating just on a  
10 single factor in the coal delivery chain instead of taking  
11 our request to invite the National Mining Association and  
12 the American Waterway Operators to be here as well.

13           But we do have the utilities here. So let me  
14 talk a little bit about what role they have in this supply  
15 chain.

16           For example, it is within their portfolio, within  
17 their bailiwick to address stockpile management. Now it is  
18 not up to us to say what is the appropriate stockpile for a  
19 utility to have. But in a just-released white paper from the  
20 Department of Energy, the Department of Energy observes that  
21 during the 1980s, the 1990s, coal stocks at utilities were  
22 greatly reduced. The utilities made these cost-cutting  
23 improvements to their operations that are now making them  
24 vulnerable. It is their decision to cut the stockpile.

25           Number two, it is their decision how much to

1 invest in the unloading facilities at heir utilities.

2 And third, it is their decision where to invest  
3 in new generating capacity.

4 As our chart indicates, the signals sent to the  
5 marketplace between 1995 and 2005 were unmistakable. For  
6 the past five years alone only one new gigawatt of new coal  
7 capacity was added compared to 193 gigawatts of natural gas  
8 capacity. Utilities were clearly showing their preference  
9 for natural gas, and railroads, and undoubtedly the mines as  
10 well developed their capital plans accordingly.

11 Again, this is not just our opinion. But in a  
12 statement filed by the Missouri River Energy Service for  
13 this hearing -- much of which I do not agree with -- but on  
14 page one, paragraph three, the Missouri River Energy Service  
15 says -- quote:

16 For a variety of reasons much of the  
17 recent generating capacity built in  
18 the United States has been fueled with  
19 natural gas. Recent volatility in  
20 natural gas prices underscored the  
21 risks associated with this strategy.

22 So there is a long, broad chain. Everybody has  
23 to take a look at what their role is. And we recognize our  
24 role. We have a very important role and we're pleased to be  
25 here to talk about it.

1           In 2005 there were indeed temporary disruptions,  
2 particularly coming out of the Powder River Basin. There  
3 are several reasons for that. First, just over a year ago  
4 the eastern half of Wyoming experienced heavy rainfall and  
5 snow. Combined with an accumulation of coal dust in the  
6 road bed -- and Mr. Ice will talk about this in great detail  
7 -- there were two derailments. Repairs were needed, and  
8 shipments coming out of the Powder River Basin were  
9 affected.

10           Later in the year, of course, Hurricanes Katrina  
11 and Rita affected the entire Gulf Coast part of the network,  
12 having a ripple effect throughout the network. And finally,  
13 in October a deluge dumped a foot of rain in Kansas,  
14 disrupting rail service on several major coal carrying  
15 routes for a lengthy period of time due to bridge damage and  
16 track wash-outs.

17           Second, the demand for rail transportation in  
18 general was much higher across all of our customer groups.

19           Third, the situation was exacerbated by a  
20 dramatic increase in the price of natural gas, leading to an  
21 unprecedented increase in demand for coal-fired electricity  
22 generation. This was a reversal of what had been happening.  
23 Our second chart gives you a depiction of demand for coal in  
24 2001.

25           In 2002, 2003, 2004, we were asked to move less

1 coal than in 2001. We had excess capacity. In 2005 we were  
2 asked to move more coal; in fact, we were asked to move even  
3 more than we did. We responded moving as much as we could,  
4 and even with the washout in the Powder River Basin, even  
5 with Hurricane Rita, even with the Kansas floods, we did  
6 move more than ever before.

7 But we are not utilities. Utilities have peak  
8 demand capacities built into their asset base for ratemaking  
9 purposes. A recent article indicated Xcel Energy is asking  
10 the Colorado Public Utility Commission for permission to  
11 begin charging its customers for the construction of a new  
12 coal-fired plant that will not be in service for a couple of  
13 years. We don't have that capability. We cannot charge our  
14 customers now for capacity that may be needed in the future.

15 A fourth reason that we ran into trouble,  
16 railroads cannot and should not be expected to keep spare  
17 capacity just in case utilities decide, like they did in  
18 2005, that they now want coal instead of gas. I wonder, in  
19 fact, now that gas prices are starting to decline, if we  
20 won't see a corresponding drop in demand for coal.

21 Our leading coal publication, Platt's Coal  
22 Trader, dated Tuesday, June 13, 2006 -- begging,  
23 respectfully, to disagree with you, Mr. Shelk -- headline:

24 With natural gas stocks at record  
25 levels power plants could switch from

1 coal. With underground natural gas  
2 storage stocks running ahead of usual  
3 this year, many analysts are  
4 predicting prices will fall and power  
5 plants, which switched from natural  
6 gas to coal when supply tightened,  
7 switched from natural gas to coal when  
8 supply tightened and prices  
9 skyrocketed, could switch back.

10 Nonetheless we are making the investments needed  
11 to meet what we perceive to be the demand in coal. But  
12 Platt's is telling us the market may be sending a different  
13 signal. That's the point I want to get across.

14 This is the market working. The market is  
15 sending us a signal in 2002, 2003, 2004. It is now sending  
16 us a different signal and we are reacting accordingly.

17 But unfortunately, investments cannot happen  
18 overnight. We are investing \$8.3 billion this year on a  
19 total revenue base of \$45 billion -- about 20 percent of our  
20 revenue going back into capital investment. But we have to  
21 order locomotives. It takes six months to hire and train  
22 new employees. But we are committed to making that  
23 investment.

24 Looking at the short term, we believe there is no  
25 crisis in the electric generation reliability for 2006.

1 That's again not just our opinion. Your own staff of  
2 Enforcement reported that coal stockpiles are well above  
3 last year's levels. And while worth watching, staff's view  
4 is that they are likely to continue to build.

5 NERC itself said that coal delivery limitations  
6 do not appear to present a reliability problem this summer.  
7 Again Platt's Coal Trader reports that utilities have good  
8 stockpile levels of around 30 days. And a recent headline  
9 in the April 2006 Coalcast, produced by Energy Ventures  
10 Analysis, reads:

11 Huge jump in April stocks, almost back  
12 to normal: a 14.4 million ton  
13 increase, 56 percent above normal.

14 And EBA specifically notes that the increase in  
15 coal was due in part to improved PRB rail shipments. It  
16 would take some time to fully rebuild coal inventories, but  
17 we believe the immediate problem is behind us.

18  
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1                   Moving forward, we are making the investments.  
2                   My testimony has an exhaustive list of those by railroads,  
3                   and I draw your attention to it.

4                   But I will just end by taking a look at the  
5                   Powder River Basin: In 1999, Burlington Northern, Sante Fe,  
6                   and Union Pacific, asked CANAC to perform a capacity and  
7                   operational analysis of the Powder River Basin, and to  
8                   recommend actions needed to move the annual tonnages to 350  
9                   and then 400 million tons.

10                  At the time, PRB volume totaled 279 million tons.  
11                  I was struck by the rhetoric by the gentleman two doors to  
12                  my left here, that we don't take our obligations seriously,  
13                  and that somehow, miraculously, the Powder River Basin grew  
14                  from 75 million to 300 million. It grew because we worked  
15                  with our customers, because we invested.

16                  The last point I will make in my last 30 seconds,  
17                  is just that; we take very seriously, our need to work in  
18                  cooperation with the mines, with our utilities. We have  
19                  CEO-level calls and conferences, face-to-face meetings with  
20                  the EEI members and with the National Mine Association  
21                  members.

22                  We have monthly calls at the staff level, we take  
23                  it very seriously, and we think that that is the way that  
24                  these issues need to be addressed, the delivery service  
25                  issues, on a bilateral basis, between and among the private

1 sector companies involved. Thank you.

2 MR. McCLELLAND: Chris? Thank you, Mr. Hamberger  
3 and Mr. Ice.

4 (Slides.)

5 MR. JENKINS: Thank you, and good afternoon. CSX  
6 Transportation is pleased to participate in these  
7 discussions on the subject of electric power reliability and  
8 the role of railroads, utilities, merchant power producers,  
9 and coal mines.

10 CSX is a major transporter of coal. The map  
11 shows our geographic operating area, which generally  
12 Chicago, Boston, Miami, New Orleans. All of our operations  
13 are confined within that rectangle.

14 We move over 180 million tons of coal annually,  
15 over 80 percent of that going to the electric power sector.

16 We're the largest transporter of coal east of the  
17 Mississippi, and we serve more than 130 mines in nine  
18 states. During a typical week, we load about 30,000  
19 carloads of coal on CSX and several thousand additional cars  
20 are received at interchange.

21 CSX is a vital link between the utilities and  
22 mines in the production chain of coal-based electricity. In  
23 2005, coal represented one-fourth of our total revenue.  
24 It's very important to us. As a percentage of tons on CSX,  
25 coal was 40 percent of the volume we moved.

1           Over the past two years, we have shipped  
2           increasing volumes of coal with tonnage growth of six  
3           percent in 2004, another four percent in 2005, and I'm  
4           pleased to report that our volumes are up an additional  
5           three percent thus far in 2006.

6           Our utility customers are growing their  
7           stockpiles. Our customers are also showing confidence in  
8           the future of coal.

9           We have many new coal-fired power plants under  
10          development on CSX's network. Three new coal-fired units  
11          have been announced in South Carolina; construction is  
12          already underway on two of them.

13          We also have plants announced in Florida,  
14          Georgia, North Carolina, and Kentucky. We expect between  
15          500,000 and two million tons of new business from each of  
16          those facilities.

17          While we're excited about the new construction,  
18          we've also been working hard to win new business from the  
19          competition. In 2006, two plants, two existing utility  
20          plants, have begun taking rail deliveries from CSX, who  
21          previously received all of their coal by barge or by truck.

22          Needless to say, we have every incentive to carry  
23          as much coal as we can. We work hard to develop and promote  
24          new coal generation on our system, and we recognize that  
25          reliability is the key for growth.

1                   Now, in recent years, our coal volumes have  
2 fluctuated, and it's been driven largely by decisions of our  
3 customers. The variations in utility demand can be best be  
4 seen by looking at eastern coal stockpile data.

5                   What this chart represents, are the days of burn  
6 on hand at receivers in the East, based on EIA data, with  
7 the last two months estimated by Energy Ventures' analysis.

8                   What you see is a sawtooth pattern, patterns of  
9 building inventory levels, and declining inventory levels.  
10 During those periods of declining inventory levels, we  
11 typically have surplus capacity on the CSX system.

12                   In fact, in February of 2003, we had 4,000 CSX-  
13 owned coal cars in storage for lack of demand from our  
14 customers.

15                   A year later, we still had a thousand carloads in  
16 storage, and it wasn't until inventory levels reached the  
17 bottom of the trough, that there was sufficient demand for  
18 us to put all of our equipment in service.

19                   The utilities, for their own business reasons,  
20 make changes in the amount of inventory that they carry,  
21 many times anticipating a decline in -- a further decline in  
22 prices and delaying purchases.

23                   And then when inventories reach an extremely low  
24 level, it is the simultaneous decision by many receivers in  
25 the East, to increase stockpiles, that creates an apparent

1 shortage, and it's a shortage that would not exist,  
2 obviously, in a more steady-state demand. But because we  
3 have these peaks and valleys, it creates apparent shortages.

4 But even give that variability in demand, we have  
5 been able to rebuild stockpiles when called upon to do so.  
6 As the chart shows, there was a very significant increase in  
7 2001 and 2002, a decline until early 2006, with a strong  
8 build going on this Spring, and inventor levels coming back  
9 into the normal range.

10 So we've worked hard with our customers to boost  
11 their inventories, but our capacity isn't limitless.

12 MR. McCLELLAND: One minute.

13 MR. JENKINS: All right, very good.

14 MR. McCLELLAND: No, my mistake. You still have  
15 four minutes.

16 MR. JENKINS: I'll make the best of it.

17 There are market forces at play here, and when  
18 demand from our customers increases, we take action to  
19 address that demand. That includes several hundred million  
20 dollars that we have spent on locomotives in the last three  
21 years, the rebuilding of around 2,000 system coal cars,  
22 hiring crews, and building a new state-of-the-art training  
23 center in Atlanta, where we have trained over 4,000  
24 operating people in the last 18 months.

25 So we feel we have risen to the challenge created

1 by the 2002 inventory drawdown, and that there is no  
2 stockpile crisis on CSX. The proof is in the numbers.  
3 Eastern inventories have recovered, and, you know, we have  
4 actually gained share at the expense of competing modes.

5 Every link in the supply chain is important.  
6 Now, that supply chain begins with the mines. Railroads  
7 stand in the middle, as do other transporters such as  
8 waterway operators.

9 When utilities ask for more coal, it can't always  
10 be provided instantly, but we've demonstrated an ability to  
11 react and add capacity, as market forces require.

12 The supply chain ends at the power plant. There,  
13 the utility holds responsibility to have efficient unloading  
14 systems in place, to make sure that rail car capacity is not  
15 lost by slow unloading, and, to make reasoned decisions  
16 about private fleet sizing and sourcing, and, finally, about  
17 inventory levels.

18 In fact, we submit that the singlemost important  
19 central question in considering the reliability of coal, is  
20 power plant inventory. And while it wouldn't be appropriate  
21 for us to suggest how much inventory utilities should carry,  
22 we have seen a deliberate drawdown in inventory levels over  
23 time.

24 And, now, Ann, yes, that's the correct chart,  
25 thank you.

1 (Slide.)

2 MR. JENKINS: This chart goes back all the way to  
3 1990; in fact, it goes all the way back to 1987, and shows  
4 the major change in inventory levels in the Eastern United  
5 States, moving from what was a kind of normal level of 70 to  
6 90 days of on-hand-coal, to what is now considered the norm  
7 of 40 to 60 days, with many generators feeling that 30 days  
8 or 35 days is a target.

9 Utilities have reduced their investment in the  
10 East in coal inventory, we estimate, by over \$2 billion.  
11 That has an effect or potential effect on reliability.

12 We believe that higher inventory levels would  
13 moderate the impacts of disruption, and, in the long run,  
14 could be a benefit to reliability.

15 MR. McCLELLAND: Now it is one minute.

16 MR. JENKINS: All right, thank you.

17 Today, CSX is fully capable of meeting all  
18 reasonable demands of our utility customers. We're making  
19 major investments to keep up with the growth that we can see  
20 for the future.

21 We work closely with our customers, so that we  
22 can understand and react to their infrastructure needs.

23 The long lead times for new coal plant  
24 construction, or the addition of scrubbers at an existing  
25 plant, give us adequate lead time to add rail capacity.

1           The future capacity needs for our coal customers  
2 will not be unexpected events, and we are prepared to invest  
3 where the market and customer needs support investment.

4           In summary, there is no stockpile crisis at CSX-  
5 served plants today. We stand ready, willing, able, to  
6 transport more coal, and, in fact, as of this moment, we  
7 have over 600 cars in storage, awaiting orders from our  
8 customers. Thank you.

9           MR. McCLELLAND: Thank you, Mr. Jenkins. Mr.  
10 Ice?

11           MR. ICE: Thank you. Good afternoon, Mr.  
12 Chairman and Commissioners. I appreciate the chance to be  
13 here on behalf of my Company to respond to your request.

14           In order to help with my remarks, we have  
15 prepared a handout, and hopefully you all have one. I'll do  
16 my best to make it clear, which page I'm on.

17           Given that we don't appear before you, it wasn't  
18 clear to us, how much previous information you have, so we  
19 thought it would be helpful to take a moment and describe  
20 our Company, in general, and then move to the topics of the  
21 Powder River Basin and our overall investments there and the  
22 service outlook.

23           So, on page 2, you see a map of our network, and  
24 you can see that we serve a significant part of our country.  
25 We have about 32,000 route-miles in 28 states, and we do

1 have one of the largest rail networks in North America.

2 We serve the Midwest and Pacific Northwest, and  
3 the Southwestern and Southeastern regions, as well. We have  
4 one of the top -- we are one of the top providers of  
5 intermodal service, and we are the largest grain shipper.

6 And, of course, since the purpose of our  
7 discussion today is about coal, we've highlighted on this  
8 map, what we call our coal routes and our coal reserves.

9 On page 3, you see a chart that shows capital  
10 spending as a percent of revenue. We've talked a lot about  
11 investment and capacity today, and one of the reasons that's  
12 important in this discussion, is that railroading is an  
13 incredibly capital-intensive operation, more than the vast  
14 majority of industries, and even more than the mines and  
15 utilities we work with in the coal segment.

16 And you can see where more than 18 percent of our  
17 revenue goes to capital. Out of that, it's also important  
18 to note that a significant part of that investment, 60 or 70  
19 percent, is maintenance to continue to refresh ourselves, to  
20 renew our rails and ties and infrastructure, in general.

21 On page 4, you see the investment of BNSF since  
22 1997. There are actually a couple of things that we show on  
23 this chart: One, we show our capital expenditures by year.  
24 We also stratify that by our maintenance, by our expansion,  
25 and, then, lastly, we show our returns.

1                   So there are three things that I'd like you to  
2 take from the chart on page 4: First, the bottom bar, the  
3 orange bar, that's our ongoing maintenance.

4                   And you can see, through the period, regardless  
5 of what was going on with the rest of our returns and so  
6 forth, we had a steady -- actually, increasing amount of  
7 maintenance going to our railroad, so we do believe we have  
8 maintained a robust railroad, and a railroad that today is  
9 in better condition than it was five years ago.

10                  But the second thing you see is, in the middle  
11 years, to actually match what some of what Mr. Hamberger  
12 showed you on coal shipments, you can see our return falling  
13 into the 6.5 percent range.

14                  Given that that returns is not re-investable,  
15 compared to our cost of acquiring funds, we viewed that as  
16 one of the most significant strategic concerns we had as a  
17 Company, and we also view that it's very important for our  
18 shippers, as well.

19                  If we're going to be around for the long term  
20 refreshing ourselves, we have to be at re-investable levels.

21                  But you can see that our actions and our plans  
22 made improvements. We've received more value for what we  
23 do. We've driven more volume across our network, and you  
24 see our returns getting to over ten percent last year.

25                  The last part, the models worked perfectly. You

1 can also see, then, our capital -- our expansion capital  
2 increasing across that timeframe, to where we get to a 2.5  
3 billion project number for 2006.

4 On page 5, we turn to coal. This is a depiction  
5 of the Powder River Basin and the mines we serve there.  
6 You've heard a lot of us already talk about the joint line  
7 here today.

8 That's the line that's jointly owned by  
9 Burlington Northern Santa Fe, and by Union Pacific. On this  
10 map, it runs just down from the location called Donkey Creek  
11 in the center, but you can see a significant number of mines  
12 served on the joint line, as well as other parts of the  
13 railroad.

14 On page 6, you see coal demand. You've heard  
15 this several times today, but you can see that the growth in  
16 Wyoming, the significant growth, and also how it's grown  
17 more than other parts of the country.

18 On page 7, you see an amplification of the growth  
19 in the Powder River Basin, and this is very similar to  
20 charts you've seen in some of the other presentations.

21 And we have had good and appropriate growth as  
22 we've made investment and improved our capabilities, but you  
23 do also see in the early part of the decade of 2000, that  
24 for overall shipments, there was some dampening.

25 And, on page 8, it's just BNSF transportation,

1 and you can see, in our case, we actually fell in 2002 and  
2 2003, to less volume than we handled in 2001.

3 Now, as predicted, I am going to mention that  
4 2005 was an all-time record year for our shipments, and  
5 although I won't suggest that means our work is done, in  
6 terms of making sure that we move as much coal as possible,  
7 I will suggest that that describes an operation that's  
8 actually a good one, and that we can move and have moved a  
9 lot of coal.

10 On page 9, you see a further breakdown of the  
11 last few years. The orange bars are 2006. I think you'll  
12 be struck by how tall those all are. Four of our all-time  
13 record months happened in 2006, so, of the five months that  
14 have happened in 2006, four were an all-time record. The  
15 only one that wasn't, was February, but that was because  
16 they overcome -- it's only a 28-day month, and June is  
17 pacing at a similar pace.

18 Right now, we're up almost ten percent for the  
19 year, over 2005, which, again, was a record, so I do think  
20 that shows that we've made improvements and we continue to  
21 drive more capacity across our network.

22 Now, that chart also does show May and June of 05  
23 and the fallout there. The well-chronicled events that  
24 happened in 05, were previously mentioned a couple of times,  
25 especially by Ed.

1           On page 10, just to take a moment, I'd like to  
2           try to describe what happened, and there may be questions on  
3           that later.

4           Page 10 is a cross section of our track  
5           structure, and you can see that the parts of the earth, the  
6           compacted subgrade, and then the sub-ballast and the  
7           ballast.

8           The purpose of the ballast is to hold the track,  
9           to keep it from moving, to dissipate force as trains run  
10          across that track, but also to provide drainage. A wise  
11          engineering person once told me a lot about track  
12          maintenance is keeping the water away from the railroad.

13          And so, as it does that, then, again, that lets  
14          the force dissipate all through the ballast section.

15          Now, what happened to us in 05, there was an  
16          accumulation of coal dust, which reduced the ability of the  
17          ballast section to allow for that proper drainage. That,  
18          then, combined with the precipitation we had at the same  
19          time we had normal thawing, and then a heavy late-season  
20          snowstorm, there was a lot of precipitation in the line, a  
21          lot of water in it, and then doing that, then we lost the  
22          integrity of the track structure, and that's the repair work  
23          that we came back in and did in May and June.

24          Now, after that -- and we did continue to do  
25          track work throughout the year, to do what we call

1       undercutting, and that is to go through and basically clean  
2       the ballast out, and move the fouling out of the ballast and  
3       let it be clean and let things move through there.

4               We did about 75 miles of undercutting last year,  
5       and we have a plan to do around 90 this year, and until the  
6       coal dust problem is solved, we'll have to do some  
7       accelerated undercutting as we move forward.

8               So, pending further questions later, I'll move on  
9       from there.

10              Now, on page 11, there's a bit about market  
11       drivers for why there is growth in Powder River Basin coal.  
12       I think you all know more about these drivers than I do, so  
13       I'll just point to the ones on the bottom:

14              As to efficient transportation, first of all, we  
15       have made significant capital investments in our coal route  
16       and I gave some of those numbers earlier, and I'll cover  
17       some of those further as we go forward, but, also, there's  
18       been a lot of comments and questions about contracts, as  
19       well as tariffs.

20              For BNSF, about 90 percent of the coal that moves  
21       out of the Powder River Basin, moves under contracts, and  
22       those contracts have provisions in them for volume, for  
23       service, and remedies and damages for what happens if those  
24       are not met.

25              And we believe that we have met our contractual

1 obligations. Also, then, the remaining ten percent, move  
2 under tariff, and those are, of course, covered by the STB,  
3 and then there are abilities in terms of remedies there for  
4 rate and so forth.

5 And we offer service under both tariffs and  
6 contracts on the same basis: Operationally, once a train  
7 comes to the railroad, it's a train that we move, regardless  
8 of what the particular mechanism was for the market.

9 Now, also, I think it could be helpful to point  
10 out discussions about nominations, because we use  
11 nominations in two or three different ways.

12 We have a monthly planning tool that we do in  
13 conjunction with NCPA, where each utility provides their  
14 volume -- or their demand expectations for the month, does  
15 it by mine.

16 We aggregate those, and then, based on that, then  
17 we plan the proportions of the train slots, to make sure  
18 that the various shippers have availability of that. So  
19 that is a nomination process, but it's not tied to  
20 contracts, and there's no formal mechanism in terms of what  
21 happens if those aren't met.

22 So, especially as you can think about a tight  
23 demand situation, you can maybe envision the bias that might  
24 exist in some of that.

25 So that's one nomination that gets talked about

1 separately from the nomination within contracts.

2 On page 12, there's the capacity investments that  
3 we mentioned a moment ago on the previous slide, and, for  
4 us, you can see that a significant investment has been made  
5 over the last -- since 1994, over \$3 billion.

6 You do see in 2001 and 2002 and 2003, some  
7 falloff in those investments. Now, what was happening to us  
8 at those times?

9 Remember, on our overall --

10 MR. McCLELLAND: One minute.

11 MR. ICE: Okay, I'll be brisk. On the overall  
12 chart that showed the return on invested capital, that was  
13 the same time we were around 6.5 percent. We saw overall  
14 coal dropping; we had a long-running trend of reducing  
15 rates, and so our response was not to invest in additional  
16 capacity.

17 As our situation has changed, you can see that in  
18 the last two years, we've invested a considerable amount in  
19 expansion, especially in 2006, of about \$600 million.

20 The next few pages cover what those expansions  
21 are. I will skip over those.

22 On page 16, you see a list of our records, and  
23 I'll just sum that up by saying that we've had a lot of  
24 records in 2006, as I already mentioned, and in doing that,  
25 none of our utilities have run out of coal, and although we

1 can't predict everything that's going to happen, and,  
2 particularly what's outside our control, as the Summer  
3 unfolds, we don't expect delivery issues.

4 So if we look at the rail service outlook, it's a  
5 heavy-tonnage line; it's a world-class operation. We will  
6 continue to derive improvements and expect to do so.

7 The coal dust problem needs to be solved. We've  
8 had voluntary cooperation on grooming, and that's a good  
9 start, but it's not enough, and we need to drive further, in  
10 terms of how we have coal dust mitigation.

11 So, in summary, the demand is going to continue  
12 to grow. There's been discussion about our investments.

13 We believe they've been appropriate, both in  
14 terms of when our returns were down, but also, as volume has  
15 come to us, we've made increased investment, and we do have  
16 the same high service standards, whether it's a tariff  
17 shipper or whether it's a contractual shipper. Thank you.

18 MR. McCLELLAND: Thank you, Mr. Ice. This  
19 concludes the formal presentations of the speakers. Do  
20 members of the panel have questions?

21 COMMISSIONER BROWNELL: I actually have a lot of  
22 questions, and, unfortunately, I have a p previous  
23 engagement in New York.

24 I feel a little bit at a loss here, trying to  
25 sort through competing facts and some aggregated data, when

1 I heard very clearly that this is more of a region-specific  
2 issue.

3 So, I think one of the things we probably want to  
4 think about, is how we can drill down in some of this data.

5 Were I able to stay, among the questions, I would  
6 ask, is this: I'd like the utility industry to respond to  
7 the issue of the inventory management. Candidly, I don't  
8 know an industry that hasn't changed its inventory  
9 management over the past 20 years.

10 I think that the 70 days might have been a  
11 kinder, gentler regulatory regime that allowed expenses like  
12 that to be carried without question. I have no idea of  
13 knowing what is a legitimate inventory, but I'm certain the  
14 experts do here.

15 I'd love to hear more conversation about the  
16 nomination and scheduling protocols. I don't actually  
17 understand how a one-month nomination would work, unless  
18 it's the equivalent of a short-term market response.

19 There was a comment that you're moving from  
20 basic, long-term contracts to common-carrier-type models.  
21 What does that mean? How has that percentage changed over  
22 time?

23 Is that driven by customers and the desire for  
24 more flexibility, or not, and other things that you can, as  
25 you respond to each other, perhaps answer.

1                   I'm not sure I understand what reliability  
2 standards are imposed by your regulator, how they're  
3 monitored, whether there are penalties, how often those are  
4 updated, what we can do to look at, you know, kind of some  
5 common ideas for solutions. I still didn't hear that.

6                   I heard a little bit of, it's not our fault; it's  
7 your fault, so I'm not sure how to respond to that.

8                   But I apologize, but this is a longstanding  
9 speaking engagement that I couldn't bail out of, because  
10 this is much more interesting.

11                   (Laughter.)

12                   COMMISSIONER BROWNELL: So I'll look at the  
13 transcript. I have other questions, but I know you'll  
14 probably cover a lot. What doesn't get answered, I'll just  
15 send out in writing.

16                   Thank you all for coming. It's good to see you.

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1                   CHAIRMAN KELLIHER: I guess I was really hoping  
2 for a Eureka moment at some point during the panel, and I  
3 can't say I've gotten to that.

4                   (Laughter.)

5                   CHAIRMAN KELLIHER: It seems this wasn't quite  
6 point-counterpoint, because you made arguments that somewhat  
7 were different, addressing different issues. Let me start  
8 with the railroads.

9                   The railroads seemed to argue -- and I'm boiling  
10 down, so I know I'm not going to fairly characterize it, or  
11 I'm going to try to fairly characterize it, but I might  
12 inaccurately characterize. You made a couple arguments.  
13 One, you're investing a lot. You're a very capital-  
14 intensive industry. You're investing a lot. And that  
15 deliveries have increased between 2004 and 2005. Deliveries  
16 have increased. Utilities have consciously dropped  
17 inventory levels from the 70- to 90-day to the 30 or 35-day  
18 range.

19                   Utilities have argued that in some cases,  
20 anecdotally, there are some large coal stations that are far  
21 below the 30, 35-day range; that some are in the single  
22 digits. They've also argued that you're breaking your  
23 contracts; that deliveries might be off, but you're not  
24 honoring your contracts. That's what I think I heard.

25                   All of those things could be true, both what you

1       said and the utilities said. The problem is, it doesn't  
2       help us that much. We're an agency. We regulate different  
3       services under both tariff and under contract, and parties  
4       can come to us to enforce both services provided under  
5       tariff and under contract.

6               I guess I want to dispute Mr. Hamberger just a  
7       little bit in your characterization of the meeting, because  
8       this meeting is about electric supply reliability, and we're  
9       starting off looking at a coal inventory, a question about  
10      coal inventories. As I said at the beginning, and I guess  
11      I'll repeat it just to -- hopefully, so it'll register  
12      better -- is there's more than one reason why coal  
13      inventories might be low.

14             One reason could be rail service, that rail  
15      service is inadequate. It's not the only reason. It could  
16      be that utilities are buying. They're engaged in last-in-  
17      time -- I'm forgetting the right phrase -- purchasing of  
18      coal, just-in-time purchasing of coal. That's possible.

19             It's also possible coal production is somehow  
20      inadequate: that rail service is perfect, but coal  
21      production hasn't kept pace. And there's one other  
22      explanation I can think of that is escaping me, but there's  
23      three or four major explanations on why, in certain  
24      stations, inventory's been very low.

25             I'm really most interested, since there's

1 aggregate data suggesting overall coal inventories are  
2 higher than last year, I'd really like to look at the  
3 stations that have very low levels, the ones that are in the  
4 single-digit levels. Why are they in the single-digit  
5 level? Is there a common denominator? Is it Powder River  
6 Basin? I thought Mr. Shelk said that no, that there's  
7 actually low inventories at some stations that are getting  
8 coal from outside Powder River Basin.

9 So is it a Powder River Basin issue? Is it rail  
10 service, and if so, is it one particular railroad? Is it  
11 that the utilities that own those stations were engaged in  
12 just-in-time purchasing of coal? Is it a coal production  
13 problem?

14 I guess I'll ask the utilities that. The  
15 stations that are very low inventory levels, why do they  
16 have low inventory levels? Glenn?

17 MR. ENGLISH: Mr. Chairman, let me take a crack  
18 at that. I think it's all the above that you listed, and I  
19 don't think there's any single one answer to that response.

20 I would first of all point you to the Office of  
21 Electricity Delivery and Energy Reliability of the  
22 Department of Energy making the observation of what has  
23 happened over the past 25 years since 1980, with  
24 deregulation of railroads. The key sentence is, after they  
25 were talking about the downsizing and increasing demand, the

1 freight movements have left the rail industry with little  
2 spare capacity in terms of track, cars and locomotives.  
3 After the disruption is ended, the lack of spare capacity  
4 makes it very difficult to compensate for lost deliveries by  
5 running more cars or trains on already-congested tracks.

6 Now that's number one. Number two, we've run  
7 into a situation without question in which weather played a  
8 role. When we have coal dust on the rails and that gets to  
9 be a problem and that causes some derailments, then  
10 obviously that makes the problem even worse. And I think we  
11 got into the situation the last couple years where they can  
12 only operate about 80-85 percent of capacity. And this is a  
13 time you're trying to move coal into these stations, and  
14 they couldn't get it there.

15 The other situation is the weather. Now they say  
16 this year, you've got coal stocks coming up. I would agree  
17 that is the question. In fact, I'd like to get up a chart  
18 with regard to Laramie River station. Laramie River  
19 Station is less than 200 miles away from the Powder River  
20 Basin. I'm going to take this chart all the way over here.  
21 The coal stocks -- that's the railroad side over there,  
22 John. I just wanted you to know.

23 (Laughter.)

24 MR. ENGLISH: And I can barely see it. Ed, if  
25 you'd get your head out of the way --

1 (Laughter.)

2 MR. ENGLISH: The point that I would make is, as  
3 you look at that chart, why, it appears coal stocks are up.  
4 They're coming up about where they were normal, you know.  
5 We had to report to NERC whenever those stocks fell back and  
6 it was affecting reliability. You see where it came down.

7 Well, the reason was you've got a generator off  
8 the line. They took it off line this spring, and that's the  
9 reason the stocks went back up, because they quit using so  
10 much coal.

11 MR. HAMBERGER: Could you explain why they took  
12 it off line, Glenn? It was for maintenance, was it not?

13 MR. ENGLISH: Exactly.

14 MR. HAMBERGER: So it was not taken off the line  
15 for lack of coal?

16 MR. ENGLISH: Well, I wasn't going there anyway.

17 MR. HAMBERGER: Well, some people may jump to  
18 that conclusion. So I just wanted to make sure.

19 MR. ENGLISH: I appreciate the help, Ed.

20 (Laughter.)

21 MR. HAMBERGER: This is a discussion, as I  
22 recall. I think it was called a discussion.

23 MR. ENGLISH: Well, let me finish my discussion,  
24 then you can have your discussion.

25 (Laughter.)

1                   MR. ENGLISH: The point that I would make here,  
2 Mr. Chairman, is the fact if you look -- if in fact this  
3 were not a warm winter, and if we weren't down for  
4 maintenance this spring as Ed pointed out, you can see if we  
5 needed that generation exactly where we'd be. We'd still be  
6 below the line that was demand. And that is basically what  
7 is explaining a good deal of the recovery on the stocks, is  
8 we had a warm winter and you have the normal maintenance  
9 that's taking place during the springtime.

10                   Now, as we saw down in Texas early this year,  
11 weather doesn't always cooperate with us as far as meeting  
12 the nation's needs with regard to electricity. We got into  
13 brownouts down in Texas because we had unusually warm  
14 weather. We had temperatures in excess of 90 degrees, which  
15 was very unusual for that time of year, and we can see then  
16 you need all the capacity you can have.

17                   That's the situation we get into. And I think  
18 this is the basic issue that comes down before FERC. Is  
19 this question long-term, as we look into the future and we  
20 have this very limited capacity, and we're going to build  
21 all these new coal-fired plants. Are the railroads going to  
22 be able to keep up? Are they going to be able to meet the  
23 nation's needs?

24                   Now, the question that I think comes up, and I  
25 think this is a very fair question, is that we've got two

1 different objectives going here. The railroads have got  
2 themselves in a situation where, quite frankly, it's very  
3 beneficial by having a very tight supply. They make a lot  
4 of money that way. They can charge more when things are  
5 tight. It's supply and demand. It's the free market, and  
6 so on and so forth. So you've got all that part.

7 Then you've got this other situation over here in  
8 which you're dealing with the nation's energy needs, and  
9 when we're going to need it and what capacity. And I think  
10 the railroads have a fair point with regard to saying: Okay,  
11 well whose responsibility is it to have that excess  
12 capacity, just in case we're going to have more power  
13 needed?

14 When you put all this stuff together with all  
15 this -- we're going to increase the generating capacity over  
16 the next 20 years by a third of what we got today, and a  
17 good part of that is going to be coal-fired, and whether  
18 it's two years or not, you're still into a situation with  
19 the very limited abilities that the railroads have today to  
20 keep up with what we need. Where are we going to be five  
21 years from now? That I think is a critical question for  
22 FERC.

23 Now there's a second issue that I think comes up  
24 here, Mr. Chairman, that FERC needs to recognize. And you  
25 pointed out --

1 MR. HAMBERGER: Is there a rebuttal here or what?

2 MR. ENGLISH: Not in this case, Ed. I can  
3 filibuster in this case. Don't worry about it, I'm being  
4 nice to you.

5 (Laughter.)

6 MR. ENGLISH: The thing that you come down to on  
7 issue number two here, Mr. Chairman, that I think we also  
8 have to look at: you made the point that with some  
9 companies, some plants have higher stockpiles than do  
10 others. Some are getting coal deliveries, some are not.  
11 When you get into these very tight supplies, that's when you  
12 get into this issue of winners and losers. Who gets coal  
13 deliveries and who does not? Who gets it satisfied, who  
14 does not?

15 We all have contracts. They all have  
16 obligations. What the railroads are talking about -- and  
17 this is another, number three, important issue -- they're  
18 changing the contracts. These contracts, as was pointed out  
19 in the testimony, are now getting much, much shorter. So  
20 you've got a shorter timeline, shorter obligations, and  
21 you've got the question of determining who the winners and  
22 losers are going to be by who gets deliveries and who does  
23 not. Who is forced to go out and either buy on the open  
24 market, or who is forced to use natural gas on peakers?  
25 That's the real question we come down to.

1                   CHAIRMAN KELLIHER: Utilities, you purchase coal  
2 transportation service by tariff and also by contract. Is  
3 one increasingly the norm, or do you have the option to take  
4 it under the railroad's tariff or negotiate a bilateral  
5 contract?

6                   MR. MOHL: I'll speak to that.

7                   Typically, the utility industry has entered into  
8 longer-term arrangements with the railroads. However,  
9 there's been a trend to go to much shorter-term arrangements  
10 under tariff rates.

11                  CHAIRMAN KELLIHER: A trend that the utilities  
12 prefer?

13                  MR. MOHL: No, we don't prefer it. Obviously,  
14 from a planning perspective, as it relates to our ability to  
15 plan for new solid fuel resources, it puts us in a very  
16 difficult situation to be able to make capital commitments  
17 for those types of resources in the future, with no  
18 guarantee of service from the railroads.

19                  As it relates to the railroad contracts, there  
20 was a comment made that the railroads have met their  
21 contractual obligations, and there's remedies under these  
22 contracts if they don't. I'd just like to point out that in  
23 our situation, and certainly in the situation the situation  
24 of other EEI members, as we meet on this on a regular basis,  
25 there is a problem in that the railroads are determining how

1 to allocate the capacity among all contracts. They believe  
2 that, for example, it's okay to allocate less than the  
3 contractual commitment or the nomination, as it may be, in  
4 order to equally serve all of their customers. Customers  
5 such as Entergy and others have had long-term agreements in  
6 place in which they rely on those railroad commitments.

7 So as a result, now the railroads are in a  
8 position where they will either claim force majeure when  
9 they have a problem, such as they did in the Powder River  
10 Basin in May, and simply try to eliminate their obligations  
11 under the contract, or they will defer to paying liquidated  
12 damages. The intent of those contracts was not for the  
13 railroads to have that choice, to pay liquidated damages.  
14 The intent was for them to meet those contractual  
15 commitments.

16 In our case, we have not been able to rely on  
17 that. On average, we are seeing deliveries of about 85  
18 percent of expectations. That was 2005, and consistent with  
19 2006. Therefore, it makes it very difficult to plan. In  
20 fact, at our plants in both Arkansas and Louisiana, we are  
21 having to purchase supplemental coal from other suppliers,  
22 and that includes Indonesia and Colombia, in order to  
23 maintain full load operation of our units over the summer  
24 and into the remainder of the year.

25 So to say that the issue's been resolved, the

1 industry's delivered more coal, is simply ignoring the fact  
2 that you've still got these utilities that are receiving  
3 inadequate amounts of coal, and that is harming the  
4 consumer.

5 CHAIRMAN KELLIHER: Do you agree that the  
6 railroads are delivering more coal, but you think they're  
7 not fulfilling contractual obligations?

8 MR. MOHL: They're not meeting their contractual  
9 obligations. In fact, if you look at BNSF, in their annual  
10 report of 2005, it says: Coal revenues of \$2,277,000,000 for  
11 2004; increase, \$252 million or 12 percent versus a year  
12 ago. The increase was primarily a result of new customer  
13 business volumes and higher demand from existing customers.

14 What this means to me is they've oversold that  
15 capacity in order to be able to take advantage of the new  
16 tariff rates they're receiving from the higher-priced  
17 contracts. They're pro rata reducing deliveries to all of  
18 their customers across the board.

19 CHAIRMAN KELLIHER: If you don't think contracts  
20 are being honored, have you sought to enforce them either at  
21 the STB or in the courts?

22 MR. MOHL: We have actually sought to -- we're  
23 currently in litigation with UP at this point in time as it  
24 relates to that situation.

25 CHAIRMAN KELLIHER: I guess I have another

1 question.

2 My understanding is the STB has emergency  
3 authority. If there's a complaint about adequacy of rail  
4 service, a shipper can go to the STB and request an  
5 emergency order to improve service. My understanding is  
6 there have been no such complaints, and I just have a  
7 question: why not?

8 MR. MOHL: I think a couple reasons. One is, the  
9 STB doesn't have jurisdiction over the bilateral contracts  
10 that are entered into between the railroads --

11 CHAIRMAN KELLIHER: It does not?

12 MR. MOHL: Does not. And the majority of the  
13 business is done under bilateral contracts.

14 CHAIRMAN KELLIHER: So they regulate service  
15 provided under tariff only?

16 MR. MOHL: Yes.

17 The other issue is, one of our members -- in  
18 fact, the president of AECC, one of our co-owners of our  
19 Arkansas plant -- wrote a letter to Chairman Knobler in  
20 August of 2005 indicating concern over this very issue.  
21 That individual never received a response from the STB, but  
22 however did receive a response from BNSF three months later.

23 When STB was approached about this issue, the STB  
24 indicated that the letter didn't request a response, so they  
25 felt no response was necessary and they deferred to the

1       railroads. So that's some of the frustration that the  
2       shipper community has with the STB at this point in time.

3               CHAIRMAN KELLIHER: I just had a question of the  
4       railroads.

5               Part of your argument seems to be that utilities  
6       might be engaging in last-in-time purchasing. The average  
7       inventories have dropped from 70 to 90 days to somewhere in  
8       the 30- 35-day range, and that isn't necessarily a bad  
9       thing, it doesn't seem. But when they've dropped below  
10      that, is the cause the utility taking a bet and somehow --  
11      coal prices have been more variable in recent years than  
12      previously. They used to be a nice flat line, slightly  
13      declining, and they've been a little bit more sawtoothed, to  
14      use your expression, than they used to be.

15              Is it the utilities running a bit of a risk and  
16      assuming the prices might drop, so therefore letting  
17      inventories consciously get a little bit lower?

18              MR. ICE: Let me answer that. I do have a couple  
19      things I'd like to say about a couple of those other  
20      questions, if I may, as well.

21              CHAIRMAN KELLIHER: Okay.

22              MR. ICE: First, in that case, certainly we've  
23      all talked about all the factors, and size of inventory's  
24      one of them. But I would like to say, when I was speaking  
25      to investment and what that meant, it was a slightly

1 different point, and that is that when we evaluate our  
2 returns, when we evaluate what we do in terms of coal to the  
3 point that got mentioned earlier, within our structure and  
4 with what we have to do, we can't be in a position of adding  
5 capacity just in case someone needs it. That's a quick path  
6 to us not being in a position to continue to invest in the  
7 railroad capacity long-term, but even in terms of  
8 maintenance.

9           And so, if one looks at what went on with coal  
10 dropping and so forth, and then as you've heard, suddenly  
11 then demand -- even though we've set new records -- that's  
12 all being suggested as totally inadequate. We couldn't be  
13 in a position to add all that extra capacity.

14           I think that fits, then, with the contractual  
15 point. When those contracts have clauses about what happens  
16 if one falls short, if you use those clauses, that is still  
17 meeting the contract. In many cases, I do think we've met  
18 the tonnage with the contracts. I still think there's a  
19 little bit of a disconnect when we're talking about 85  
20 percent. Is that contract nominations or is that what  
21 people are saying they need from their NCTA nominations?

22           Then lastly, Laramie River. There's absolutely  
23 no doubt there was a station that was off-line. That does  
24 suggest something about how much it needed to run to be  
25 caught up as well. But I don't think that whole discussion

1 well recognizes what we've done. We're on pace to handle 8  
2 percent more coal to Laramie River in 2006 than we did in  
3 2005 -- 8 percent more. And that's with the current  
4 contract, the most we've handled in years.

5 It is true that they participate adding extra  
6 sets. But we added extra locomotives, extra crews and so  
7 forth. And the other thing we've been forced to deal with  
8 this year is that the amount that they purchased off of the  
9 joint line up north, on what we call our Campbell sub if you  
10 go back to that one map, increased. So that tonnage has to  
11 move from there all the way down the joint line through all  
12 the other coal that wants to move throughout the country,  
13 just to get to the station.

14 So they're using our coal route, where all that  
15 coal is, as a through route to move the coal from up north  
16 down to there. So again, when you take all these individual  
17 situations, you have to be very careful about what all the  
18 drivers are, and so forth.

19 To come back then around to your point about  
20 inventory, when inventory goes down like that, I think the  
21 point is that that does mean there is more chance demand  
22 wants to spike up. If demand wants to spike up, and we're  
23 suddenly asked to move a lot more in a short period of time,  
24 we can't adjust like that.

25 MR. JENKINS: One comment in regard to the market

1 on CSX that we have seen is that inventories fluctuate at  
2 receivers because of changes in the coal market. For  
3 example, in the 2002 to 2004 period, as coal prices fell,  
4 there were bankruptcies of many of the major eastern coal  
5 producers. And as a result of that, a lot of production  
6 disappeared from the market, making coal supplies tight and  
7 causing inventories to fall.

8 Simultaneously, the world export market improved,  
9 and some of the U.S. eastern coals that are suitable either  
10 for producing electricity or for producing coke for  
11 steelmaking were drawn to the export market by the high  
12 prices the coal producers could receive in the export  
13 market. Those are normal market workings, but they are a  
14 reason that it is a good idea for utilities to maintain  
15 higher inventory levels so that they're not as much at risk  
16 to those market forces.

17 MR. HAMBERGER: If I could just add one point,  
18 Mr. Chairman. I apologize, but it really is an issue of  
19 investment and forecasting the market, and we're not alone  
20 in that. I have here a speech given by a gentleman by the  
21 name of J.M. Shaffer, the executive vice president of  
22 TriState Utilities, a member of Mr. English's outfit.

23 He explained at his annual meeting to his members  
24 that they will be managing through a period of time called  
25 the gap era -- it's a cute name -- when the association's

1 membership load requirements will significantly exceed its  
2 existing baseload generation resources. During this time,  
3 TriState will be required to fulfill its membership's  
4 growing energy needs with more expensive spot power  
5 purchases on the volatile open market until it can bring new  
6 facilities on line.

7 So he has responded to the market. He did not go  
8 out and invest until he knew to project what his demand was,  
9 until he could raise the capital. It's going to take him  
10 time to build it. In the meantime, he has a gap era.

11 We, as I tried to show in my testimony, saw as  
12 Carl showed a market where use of coal was going down. New  
13 generation was gas. And so we now have a situation, because  
14 of \$16 an Mcf gas, where all of a sudden, as Platt's says,  
15 there's a spike in demand, and we are responding. They are  
16 responding.

17 The point I think that needs to be hammered home  
18 is, yes, we can meet that long-term need. As Chris pointed  
19 out, they are working with the utilities. They are making  
20 commitments to build new coal-fired generation plants in  
21 several of the states in CSX. It's true all around. It's  
22 going to be true in Texas with TXU. And that's the long-  
23 term planning.

24 And what is difficult, not only on the generation  
25 side but also on the transportation side, is when that

1 demand changes so very quickly and spikes so very quickly,  
2 but the planning -- the coal operations going in will have  
3 the capacity to meet that long-term. We're delighted that  
4 the utilities are now saying, we're going to invest more in  
5 coal-fired generation, because that is the way to go, and  
6 that they're indeed putting their faith and confidence in  
7 us. And we're going to be there. We will meet demand long-  
8 term.

9 CHAIRMAN KELLIHER: I can understand you're not  
10 utilities. I can understand there's no particular incentive  
11 to overbuild and to build excess capacity. I can understand  
12 why you don't want to make major investments based on  
13 guesses about where the market may go. But you do have an  
14 obligation to fulfill your contracts, and that's an issue  
15 where -- isn't your planning dictated by the contracts you  
16 entered into?

17 MR. ICE: Of course it is. Again, I think I've  
18 said twice that I do believe we've fulfilled our contracts.  
19 And the remedies as well as the service standards are all  
20 jointly negotiated in those contracts.

21 So when they started to say we haven't fulfilled  
22 them, it does sound like we want it both ways here, to meet  
23 the contract when that helps, but then if somehow that  
24 doesn't work for us, then we want to do something  
25 differently.

1                   CHAIRMAN KELLIHER: Does the contract specify  
2 only a maximum amount? Does it specify a minimum amount?

3                   MR. ICE: Some don't even have amounts in them,  
4 sir. Some of them have a process for how then the tonnage  
5 is forecast ahead of time. But that of course is what we  
6 chose to do.

7                   In those cases, then, there are also provisions  
8 for how coal sets get added and how well they cycle and so  
9 forth, and then that's how it's determined if the service  
10 clauses and so forth are met. These are BNSF contracts. I  
11 can't speak for how everybody else writes their contracts.

12                   CHAIRMAN KELLIHER: The contract may not specify  
13 an amount, but may provide some kind of nomination schedule  
14 for X months in advance?

15                   MR. ICE: Quarterly or annually, some of them  
16 have. Some of them do not. And then, there are also  
17 provisions for what happens then if somehow those  
18 obligations aren't met, for how those remedies are dealt  
19 with. And those are part of the negotiated contract as  
20 well.

21                   So if higher needs for reliability or certainty,  
22 and so forth, are necessary, then those can be built into  
23 the contracts at the same time. We, BNSF, are not  
24 suggesting in any way that we don't need to follow our  
25 contracts. We absolutely do and will.

1                   We have a common carrier obligation as well,  
2                   which we view as quite serious and take it very seriously.  
3                   But it is within the regulatory scheme in which we function,  
4                   and it has to be considered in light of all that as well.

5                   But over 90 percent of yours moves by contract?  
6                   The comments have been made about the switch, that's  
7                   present. So there has not been a long trend away from  
8                   moving a lot from contracts.

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1                   MR. JENKINS: We're about 95 percent contract.  
2 We have around 200 coal transportation contracts with our  
3 customers.

4                   Not a single one of those has gone to court for  
5 failure to perform, on our part, in modern memory, if ever,  
6 certainly not in the last five or six years.

7                   We consider service provision as a negotiable  
8 item, as part of the contract. Some customers want it; some  
9 customers don't.

10                  Some contracts have more specific volume language  
11 than others, but in no case have we had a legal dispute with  
12 our customer about ability to serve.

13                  CHAIRMAN KELLIHER: It seems hard to demonstrate  
14 breach of a contract that doesn't have an amount specified,  
15 though.

16                  Anyway, I'm trying to think of a way to do that,  
17 and I can't come up with one.

18                  MR. MOHL: Commissioner, I would just say that it  
19 probably would be prudent, if you looked into this a little  
20 more and saw some actual examples of what we're trying to  
21 detail here.

22                  Certainly, we don't believe that was the intent  
23 of those contracts, to be able to, pro rata, cut those,  
24 based on over-sales of capacity. We believe that's what's  
25 happening.

1                   CHAIRMAN KELLIHER: Is that a governed by  
2 contract or by a tariff? If prorationing is necessary, is  
3 it governed by contract?

4                   MR. ICE: As to contracts, it's hard to speak  
5 about it in the abstract, because they're all different in  
6 terms of what's necessary.

7                   But I think I'd have to say no to that. We don't  
8 think we're rationing.

9                   We have a process for how to make sure that  
10 everything is served. I think we have to do that.

11                   If coal moves for us as though it's a long  
12 assembly line, it's moving sometimes thousands of miles. As  
13 that happens, then we've got to make sure we manage the  
14 network to move in that fashion and try to move one train  
15 around or something like that, we work with our customers.

16                   We are aware that we have the issues, and we do  
17 our best, which is usually pretty good, to make sure that  
18 their stockpiles are addressed.

19                   But we can't decide to move some in relation to  
20 others quickly, because it would lower the overall total  
21 capacity, and that would be in no one's interest.

22                   CHAIRMAN KELLIHER: Thank you. Commissioner  
23 Kelly?

24                   COMMISSIONER KELLY: I need a little information,  
25 just to bring up to speed on railroad regulation.

1 I understand how the utilities are regulated.

2 Are railroads regulated the same way?

3 For example, we regulate rates of our utilities.

4 Are your rates regulated?

5 MR. HAMBERGER: No, our rates are partially  
6 deregulated. The Surface Transportation Board has authority  
7 over what could be called unreasonable rates.

8 That is to say, there is a process where a  
9 utility can come in and assert that the rate is unreasonable  
10 and the test is, it takes awhile; it's a two-year process.

11 It is expensive, but it is important. When the  
12 Board makes a decision, it generally enters a decision for  
13 as long as 20 years, if it caps the rate, so the issue is,  
14 what would an efficiently-run, stand-alone railroad look  
15 like?

16 What would the costs be, and compare what is  
17 being charged by the railroad, versus an efficient railroad  
18 would need to recover to be in operation.

19 There are a lot of economic studies and a lot of  
20 assumptions that go into that, but that is the upper limit  
21 of rate regulation underneath that.

22 COMMISSIONER KELLY: That's enough for me now,  
23 thanks.

24 (Laughter.)

25 COMMISSIONER KELLY: When you enter into a

1 contract, is the contract rate based on your tariff rate, or  
2 are you free to negotiate whatever you want?

3 MR. ICE: It's a negotiated rate. What we  
4 mentioned, moving in the tariff, is a preamble to what Ed  
5 described as the rate case, because we can't get to  
6 agreement on a contract rate.

7 So then it moves under tariff, and we fulfill our  
8 obligations. That could then be the next step, which could  
9 be the rate case.

10 COMMISSIONER KELLY: It sounds to me as though  
11 rates are partially regulated, partially deregulated, but  
12 when the regulator gets involved, it takes a long time and  
13 the rate lasts for a long time.

14 MR. HAMBERGER: If the rate is found to be  
15 unreasonable, I believe it's a 20-year prescription that  
16 comes out of the STB; that's correct.

17 COMMISSIONER KELLY: Are unduly discriminatory  
18 rates and services prohibited? Are you regulated?

19 The electric utilities are regulated, in that  
20 they can't unduly discriminate in rates or service.

21 MR. HAMBERGER: There is price differentiation  
22 that is allowed. We are subject too the antitrust laws of  
23 the Sherman and Clayton Acts with respect to that, but there  
24 is no other STB jurisdiction on it.

25 COMMISSIONER KELLY: How about adequate service?

1 Do you have a service obligation?

2 MR. HAMBERGER: We have a common carrier  
3 obligation, which is reasonable service upon reasonable  
4 demand at reasonable rates.

5 In this case, since 90 to 95 percent moves under  
6 contract, as you've heard, that is generally covered in the  
7 contract.

8 COMMISSIONER KELLY: As a common carrier, there's  
9 an obligation to carry, to the extent you have the capacity,  
10 and to carry fairly, but there's not an obligation to build  
11 capacity, as necessary?

12 MR. HAMBERGER: There is no obligation to build  
13 capacity; that is correct.

14 MR. ICE: As Ed emphasized earlier, though, as  
15 long as the returns are justified, we would intend to build  
16 capacity; we have built capacity, and we expect we will be  
17 positioned to handle this demand, long-term, with certainty.

18 COMMISSIONER KELLY: I would think that if you're  
19 in the business to move coal, or to move commodities over  
20 your rails, that's how you make your money.

21 If you can make money doing that, you want to do  
22 it and do more of it.

23 MR. ICE: That's where we are.

24 COMMISSIONER KELLY: I thought I might take a  
25 stab at where I think you all might agree. We'll see if we

1 can get anywhere here.

2 (Laughter.)

3 COMMISSIONER KELLY: It seems to me that  
4 everybody agrees that some coal stockpiles at some utilities  
5 are low.

6 MR. ICE: Or have been.

7 COMMISSIONER KELLY: Or have been. It seems that  
8 you all agree that some utilities want more coal moved by  
9 rail.

10 Presumably, you wouldn't be here, if you didn't  
11 want more coal --

12 MR. MOHL: Obviously, we wouldn't be burning  
13 Indonesian and Colombian coal, voluntarily; it's because we  
14 haven't received the deliveries of PRB.

15 COMMISSIONER KELLY: Everybody agrees that you  
16 would like to move the coal, if you make enough money.

17 MR. ICE: Yes.

18 COMMISSIONER KELLY: So, it comes down to, you  
19 don't think you're getting enough money, and you think  
20 you're paying too much.

21 (Laughter.)

22 MR. ENGLISH: May I leap in?

23 COMMISSIONER KELLY: Yes.

24 MR. ENGLISH: You're leaving out something. We  
25 do, too.

1 MR. HAMBERGER: Even with your statement --

2 MR. ENGLISH: What you're leaving out is a class  
3 of shippers, which many, particularly our members, fall into  
4 this category and many, if not all who buy power or buy coal  
5 from the Powder River Basin, fall into, the so-called  
6 stranded shippers.

7 The stranded shippers -- you've got to understand  
8 that back in 1980, when the Congress, in its wisdom,  
9 deregulated the railroads, there were over 60 Class I  
10 railroads. The whole idea was competition.

11 Today, you're down to four Class I railroads.  
12 That's all that's left.

13 The Congress, in its wisdom, in 1980, decided  
14 that most of the antitrust provisions under the law, should  
15 not apply to railroads and baseball -- railroads and  
16 baseball, that's it.

17 COMMISSIONER KELLY: The two most important  
18 things in America.

19 MR. ENGLISH: I'm not sure the baseball folks  
20 would agree with you. Anyway, the point I'm making is this:  
21 You've got the original concept that you would have fairness  
22 applied to those people where competition did not exist.

23 Without the application of the antitrust laws,  
24 and you only have four Class I shippers, you have agreements  
25 that are taking place.

1           So where there's no competition from those mines  
2           in the Powder River Basin to the main track, you would  
3           think, well, that's where competition would take place.  
4           Well, there is none.

5           Those same rates apply to the stranded shippers,  
6           the people who are arguably where the monopoly exists. You  
7           have the same conditions you do with any other monopoly.

8           Therefore, their rate applies to the destination,  
9           2,000 miles away, even if you are traveling over track where  
10          competition supposedly exists.

11          So, what you find for a major portion of this  
12          industry that relies upon this coal, and you talk about  
13          negotiating contracts, it's a take-it-or-leave-it basis.  
14          There isn't any negotiation, so to speak, it's a take-it-or-  
15          leave-it basis.

16          That's part of the problem that's tied up in this  
17          entire issue, and that's the reason, that when it comes down  
18          to it, many in the utility industry found themselves and  
19          others that are stranded shippers find themselves as  
20          basically a different class within the rail industry.

21          And we don't receive the same benefits. As I  
22          understand it, where there's competition, the margin the  
23          railroads receive, is six to eight percent, which is what  
24          you'd normally get with most businesses.

25          For those that are stranded shippers,

1 particularly under the new contracts, the short-term  
2 contracts that won't last long, it may be anywhere from 200  
3 to 400 percent, and you're saying those that are paying  
4 those kinds of amounts, have no right to expect that their  
5 needs are going to be met?

6 You know, that's what a monopoly is all about  
7 here. That's where we've got a real issue, and that's what,  
8 as you move more toward a competitive market, part of FERC's  
9 responsibility, and you have to look at this issue of  
10 reliability.

11 You know, that's what comes into play in being  
12 able to meet what was envisioned by Congress with the  
13 passage of this last energy bill, as well as meeting what  
14 people would expect as far as an obligation to serve by this  
15 entire industry.

16 MR. HAMBERGER: We wanted to promise to get this  
17 to facts, so let me --

18 MR. McCLELLAND: Point of order: You need to let  
19 Mr. English finish.

20 MR. ENGLISH: Not to mention the fact that this  
21 industry has such a dramatic impact on the entire economy of  
22 this nation, the fact that this industry, the electric  
23 utility industry must go outside this nation to purchase our  
24 most plentiful supply, and certainly the most reasonable  
25 fuel we have, from a cost standpoint, is ludicrous.

1           Anybody who can't see that there's something  
2 enormously wrong with that kind of development, they've got  
3 to have their blinders on. There's something seriously  
4 amiss here.

5           The fact of the matter is that the deregulation  
6 in 1980 of what was intended by Congressman Staggers, is not  
7 being carried out today. It's not being applied in the  
8 manner it was intended, and the problems and the grievances  
9 and the unfairness of the entire system, is not being  
10 remedied as intended by Congressman Staggers.

11           I was there when that debate took place. I know  
12 what his intent was, and it is not being followed. Thank  
13 you very much, Mr. Chairman.

14           CHAIRMAN KELLIHER: Thank you, Mr. English. I  
15 just wanted to ask one question of Mr. Jenkins and Mr. Ice,  
16 and then I'm going to have to leave. I'll appoint  
17 Commissioner Kelly Acting Chairman for purposes of the rest  
18 of this meeting.

19           COMMISSIONER KELLY: My moment of glory.

20           (Laughter.)

21           CHAIRMAN KELLIHER: Your Al Haig moment here.

22           (Laughter.)

23           CHAIRMAN KELLIHER: Well, for the moment; it  
24 could be for real in a couple of years.

25           (Laughter.)

1                   CHAIRMAN KELLIHER: In 2008, it's possible.

2                   Mr. Jenkins, Mr. Ice, I just want to ask you  
3 about how often you avail yourself of liquidated damages  
4 provisions, in order to transport less than the contractual  
5 amount? How often are liquidated damages provisions  
6 invoked?

7                   MR. JENKINS: We do have a case from time to  
8 time, where we will make a shortfall payment to a customer,  
9 under the terms of a contract, but that is extremely rare.

10                  Typically, the contracts allow us to supplement  
11 deliveries to the customer over a correction period, or they  
12 allow us to supplement deliveries by adding our own system  
13 cars, in the case where a customer is using cars that he  
14 owns.

15                  It happens; it is extremely rare in our  
16 circumstance.

17                  MR. ICE: I think we're relatively similar. This  
18 is not an area that I'm most articulate in within our  
19 company.

20                  CHAIRMAN KELLIHER: Thank you very much.  
21 Chairman Kelly?

22                  COMMISSIONER KELLY: So sorry you have to leave.

23                  (Laughter.)

24                  COMMISSIONER KELLY (Presiding): I know that  
25 we're running overtime, so I'll try not to hold you long.

1                   I just have a couple more questions. What it  
2 boils down to, Glenn, is that the electric industry's belief  
3 is that the railroads are using their monopoly power to  
4 either withhold capacity or extract monopoly rents.

5                   MR. ENGLISH: I think this is fair, and given the  
6 circumstances, it's understandable, but, basically, you've  
7 got four Class I railroads left. They're trying to maximize  
8 their profits. They're going to do that in any manner they  
9 can.

10                  The rules, the law, the way it's being applied,  
11 the way it's been or not being regulated, comes down to the  
12 fact that they have a huge opportunity, with 20 percent of  
13 the business. You're also dealing with a portion of the  
14 business coming out of the Powder River Basin.

15                  There isn't any other way to move that coal out  
16 of there. You move it by rail. You certainly can't move it  
17 by truck, not the amount that it takes to move it 2,000  
18 miles across this country, to try to take care of  
19 generators, so you've got that kind of problem.

20                  And then, on top of this issue, is this question  
21 of limiting the capacity, so that you maintain that kind of  
22 choke-hold on those stranded shippers, that portion of their  
23 business, to be able to wring as much profit out of it as  
24 you possibly can. Those are the rules that they're  
25 operating by.

1           I don't consider that to be their fault. You may  
2 say that that's the fault of the Congress and the fault of  
3 the regulators for not stopping this kind of activity, but  
4 that's what's happening.

5           What's happened here now since the Energy Bill  
6 passed last year, is that you all have responsibility.  
7 You're the only people, as I mentioned when I started out,  
8 you're the only folks that can point to something directly  
9 and say, you have the responsibility with regard to  
10 reliability.

11           You were handed that responsibility by the  
12 Congress. You're the only folks. The Surface  
13 Transportation Board doesn't have it; the Department of  
14 Transportation doesn't have it; there's no one that has it.

15           So, the real question in addressing this issue,  
16 if we're to move forward with coal-fired generation, is, is  
17 this Government going to require the railroads to recognize  
18 that they have an obligation to serve those people who  
19 receive electric power, the same as those people who  
20 generate that electric power have, to serve their members or  
21 customers.

22           That's what this whole thing revolves around, is  
23 that issue. Yes, there are big price questions, but if we  
24 can't do that, there are a lot of people in the electric  
25 utility business getting ready to make some huge mistakes.

1                   They're going to go out and build coal-fired  
2 generations, and the railroads can't deliver for them. And  
3 if there's no fuel there, they they've got to go buy on the  
4 open market, or they're going to have to have so much in the  
5 way of gas peakers, that they're not peakers anymore.

6                   It becomes insane at that point, and the impact  
7 it has on the economy of the country and what we're going to  
8 have with regard to brownouts and blackouts for the future,  
9 is preordained by that decision.

10                  COMMISSIONER KELLY: Thanks. I know you all have  
11 a response.

12                  MR. JENKINS: Could I begin by saying that there  
13 is absolutely no question that CSX has the capability, the  
14 desire, the ability to meet future coal generation needs.

15                  We are actively encouraging the development of  
16 new coal-fired power plants on our system. We believe we  
17 will have the economic wherewithal to add the capacity that  
18 is needed for those plants.

19                  It is a business opportunity that we look forward  
20 to, and there should be no doubt about our ability to  
21 support the growth of the coal industry.

22                  MR. ICE: We're in the same spot. I think most  
23 of our discussion was about that. That was an artful  
24 construction of what the situation is, but it doesn't  
25 recognize things like we've already told you.

1           We're spending \$600 million in 2006. We've  
2 announced expansion beyond that, and how all of that can be  
3 construed as constraining capacity, is beyond me.

4           As you pointed out a moment ago, if we're making  
5 reasonable returns on this, why wouldn't we continue to do  
6 that? That's exactly what we're going to do.

7           You did say earlier, something about we're not  
8 making enough money. That really was not our point.

9           Where we have contractual obligations, again, we  
10 will live up to those. Those are what they are.

11          The point about returns and all those things, for  
12 us, is simply about -- in our scheme, which now this seems  
13 to have worked its way to, is, what is our regulatory  
14 structure?

15          Within our situation, we cannot, I don't believe,  
16 be expected, again, to make investments just in case. And  
17 what we were suggesting was, is we've responded to this  
18 situation in a reasonable manner, and we've made investments  
19 appropriate with what was going on at all the various points  
20 in time.

21          And now we're making significant investments. As  
22 we do that, we will be there to serve. We will absolutely  
23 be there to serve, as long as the returns work, as long as  
24 there's no shock to our system, and so forth, we will do  
25 that.

1                   If the near-term demand is described by  
2 everything everybody want might to build up, other  
3 stockpiles, and what shortfall they had las year or  
4 additional rates, we said we won't make that this year; we  
5 don't believe the whole system can; we don't believe the  
6 mines can serve that as well.

7                   But over a longer period of time, we'll  
8 absolutely move the coal.

9                   MR. HAMBERGER: If I could just correct a couple  
10 of facts for the record, number one, we are covered by the  
11 antitrust laws, as I indicated. Both the Sherman and  
12 Clayton Acts do apply to railroads in terms of rate  
13 collusion or in terms of market segmentation.

14                   The agreements taking place, thrown out by my  
15 friend, may have led you to conclude differently, but, in  
16 fact, it's a matter of record, because of a request from the  
17 industry or the utility industry, that the Department of  
18 Justice has been looking at UP and BNSF and the Powder River  
19 Basin, to determine whether or not there have been any  
20 antitrust violations.

21                   Clearly, we are covered by the antitrust laws.  
22 If not, no one told the Justice Department we weren't.

23                   Secondly, there are seven Class I railroads, not  
24 four.

25                   Let me put into context, the issue of imports.

1 That's a great soundbite, but the fact of the matter is, in  
2 2005, the total amount of imports was 30 million tons, out  
3 of 1.1 billion that was used, and we exported 60 million  
4 tons.

5 It is a commodity. There are lots of issues that  
6 would go into determination by a utility, and it is there.  
7 Colombia is trying very hard to export more coal. I would  
8 say, again to Glenn's point, if the railroads aren't there,  
9 a lot of his members are making bad investments.

10 I've got great faith in his members. I believe  
11 they have sat down with the railroads; I believe they  
12 understand that with long-term planning and commitments on  
13 their part, the commitments from our part will be there as  
14 well, and that they're not making bad investments.

15 And as far as the issue of the rate regulation,  
16 that really is not something to get into here, but the STB  
17 does have very good processes in place there.

18 COMMISSIONER KELLY: John?

19 MR. SHELK: Mr. English is certainly correct that  
20 the coal can't get to market in any other way, a present,  
21 while there may be four or seven Class I railroads. From  
22 talking to our members, there's only two railroads out of  
23 any given coal field and one at the coal plant.

24 So, I think, to underscore what I said in the  
25 prepared statement, as the Energy Information Administration

1 has pointed out, despite what the railroads will do -- and I  
2 think they are trying to do their best -- and despite what  
3 happens on the utility side, we're going to have to look at  
4 coal-by-wire, not only because of the rail issue and the EIA  
5 outlook where they talk about rising transportation rates  
6 being projected into the future, yes, maybe inventories are  
7 okay, but we haven't really talked much in this session  
8 about why the rates are going up very dramatically, the fuel  
9 surcharges and other issues.

10 The whole area of coal-by-wire is one area that  
11 this Commission can explore, because it's not only a  
12 question of the rail transportation rates; it's also, as we  
13 know, where we're going to site these plants.

14 It's one thing for EIA to run models that say we  
15 need more coal, and it will be half of the demand over the  
16 next 25 years. Somebody somewhere has to build those  
17 plants, particularly in the West, near the Powder River  
18 Basin.

19 That's not going to happen in downtown Los  
20 Angeles or Seattle or anywhere else. So, the whole question  
21 of how the transmission is run, getting investors to write  
22 rules, robust regional markets, I think that's an area this  
23 Commission understands.

24 Lastly, I think you put your finger on it very  
25 well, when you asked the question, with all due respect to

1 Mr. Hamberger, about the difference between the way rates  
2 are regulated.

3 As I understand the way FERC does it, if there is  
4 mitigated market power or no market power, then market-based  
5 rates are permitted. Otherwise, you go to a traditional  
6 cost-based standard.

7 As I understand, in preparing for this meeting,  
8 talking to people who are, frankly, more conversant than I  
9 am. It's a totally different regime that the STB operates.  
10 You don't have the standard that says market-based rates,  
11 only if there's no market power.

12 You've heard the statistics on how few railroads  
13 there are. That may be one area where the two Commissions  
14 could explore, but, ultimately, at the end of the day, we  
15 have to do what this Commission can do, which is  
16 reliability.

17 No one can think of any reason why the two  
18 agencies can't cooperate and talk about these things on a  
19 more regular basis. I think what you did on natural gas,  
20 was precisely the model, and we hope you'll follow it as you  
21 continue to look at this issue, so that it's not just a one-  
22 day event today; it's something we all work on together with  
23 you and the other agencies.

24 We're all in the same team here, at the end of  
25 the day to try and serve customers. We've got to notice

1 that more coal will be needed.

2 And there were some good suggestions on how to do  
3 that.

4 COMMISSIONER KELLY: Thank you. Bill and Al and  
5 I didn't include you, specifically before when Glenn spoke.  
6 You did speak eloquently, and, in fact, I'm sure, summarized  
7 your concerns, as well as his, but if you wanted to take  
8 this opportunity to make a final statement --

9 MR. RICHARDSON: Thank you. Glenn's members have  
10 80 percent of their capacity that's coal-fired. Only 30  
11 percent of the capacity of my members is coal-fired, so,  
12 obviously, he knows more about this issue than I do, and I'm  
13 happy to defer to his comments.

14 I would just reinforce a comment that  
15 Commissioner Brownell made. There are a lot of ways to  
16 present figures, and when we present them in the aggregate,  
17 they may tell one story, for example, the billions of  
18 dollars invested in the railroads, year-by-year, tell you  
19 one thing; where those investments are made, may tell you  
20 something completely different.

21 Are they being made in regions where we have  
22 problems moving coal to maintain another critical  
23 infrastructure? And the railroads are certainly a critical  
24 infrastructure.

25 Or, are they being made in places that are much

1 more profitable, in terms of the rail traffic?

2 I would certainly second John's comment. I hope  
3 this is an ongoing discussion. I believe there are  
4 problems.

5 I believe the problems become more apparent as  
6 you dig through the numbers and look at situations of  
7 individual plants and individual regions of the country.

8 MR. MOHL: I'd just like to add to that. FERC  
9 regulates gas pipelines. They've done studies on natural  
10 gas supply. You've worked well with the NRC; you regulate  
11 hydro.

12 Coal-fired generation represents about 50 percent  
13 of the nation's energy supply. I don't see how you cannot  
14 monitor that and still understand what's going on in this  
15 industry.

16 I just really encourage you to move forward, so  
17 that we can work in a collaborative type approach with the  
18 railroads and yourself to address these reliability  
19 problems.

20 I really appreciate the opportunity to speak with  
21 you today.

22 COMMISSIONER KELLY: Thank you. I want to thank  
23 you all for coming today. You're the leaders of your  
24 industries; all the significant leaders of the industries  
25 are here with a representative.

1                   MR. ENGLISH: May I ask one thing? May we supply  
2 for the record, the provisions of the antitrust laws that do  
3 not apply to railroads?

4                   COMMISSIONER KELLY: Any of you that want to  
5 submit anything for the record, can do so.

6                   MR. ENGLISH: Thank you very much.

7                   COMMISSIONER KELLY: It was a significant event  
8 that we have had here today, and it's a significant problem.  
9 It's a very significant problem, looking at it from the  
10 energy side.

11                   The adequacy of coal for the nation's electric  
12 utilities, not only to meet their needs today, but to meet  
13 their needs in the future, is one of overwhelming national  
14 importance, so, to the extent that this problem cannot be  
15 solved collaboratively by you all, I suspect that government  
16 will intervene, because it's very significant.

17                   To the extent that FERC can provide a service by  
18 way of helping collaborative efforts, we've done in that in  
19 the past on some significantly intractable problems, and I  
20 obviously can't speak for the Chairman, but I would  
21 certainly advocate to the Chairman that we do that.

22                   No further questions, comments, statements?

23                   (No response.)

24                   COMMISSIONER KELLY: No? Thank you all very  
25 much. We're adjourned.

1                   (Whereupon, at 3:35 p.m., the hearing in the  
2 above-entitled matter was concluded.)  
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