

William L. Berg, President and CEO, Dairyland Power Cooperative
Statement to the Senate Judiciary Subcommittee on
Antitrust, Competition Policy and Consumer Rights
“An Examination of S. 772, the Railroad Antitrust Enforcement Act”
October 3, 2007

Chairman Kohl and members of the Subcommittee, my name is William Berg. I am President and CEO of Dairyland Power Cooperative, headquartered in La Crosse, Wisconsin. I appreciate the opportunity to testify today on the issue of railroad competition and S. 772, the Railroad Antitrust Enforcement Act.

Dairyland Power is a non-profit Generation and Transmission Cooperative supplying at wholesale the electricity needs of our 25 member distribution cooperatives, who in turn serve over 575,000 people living in Minnesota, Iowa, Illinois and Wisconsin. As a relatively small electric utility serving mostly rural residences and farms, we are very concerned about holding down costs because, ultimately, all the costs that we incur in the generation and distribution of electricity flow through to our members. Our largest single cost item in generating electricity is rail transportation, and, as I will explain, those costs have been increasing dramatically in recent years as dominant rail carriers have been imposing significant rate increases on us.

We annually use about 3.2 million tons of coal in three coal-fired plants in western Wisconsin. Three-quarters of that coal comes from the Powder River Basin in Wyoming. For the delivery of that coal, we are captive to and dependent upon the only two railroads currently serving the Powder River Basin, or PRB, as it is called. Because of the virtually unrestrained market power that these railroads have over PRB movements, we are in fact paying more and receiving less. In 2005, Dairyland

experienced a 13% shortfall of scheduled coal shipments, yet we were hit with rate increases averaging 93% beginning in 2006 -- resulting in more than \$35 million of increased annual costs.

These dramatic rate increases were the major factor in our Board's decision to increase electricity rates to our members by over 20% during 2006. Our members are truly suffering as a result of the railroads' predatory price increases, and we cannot tolerate a virtual doubling of rates, especially at a time when our service quality is actually declining. Moreover, these rate increases came at the end of a short-term three-year contract that already included annual escalations and provided adequate cost recovery.

We are certainly not alone in this situation. BadgerCURE, an organization of over 45 Wisconsin groups, businesses and organizations, has been formed to pursue sensible policies to help address railroad competition and service problems. The Government Accountability Office (GAO) is also concerned. In a report issued on August 15, 2007, the GAO found that rail prices are on the rise, and an increasing number of rail customers are paying more than three times what it costs the railroads to move their freight, a finding that was based on data through 2005 and prior to the many more recent rail rate increases.

Since utilities have no viable alternative to rail in moving coal from the Powder River Basin to their power plants, and since the two railroads now appear to have no incentive to improve the existing demand/supply imbalance, we cannot protect ourselves through normal business negotiations. At our largest plant, we have rail access from only one provider. At our other plants, which receive coal by barge, we must still secure rail

delivery to the barges. Although there may be more than one railroad for those hauls, the absence of competition and apparent allocation of markets have allowed the railroads to preserve market share even while eliminating performance guarantees and dramatically raising prices. The railroads seem to be able to exercise almost absolute market power, with little effective recourse by Dairyland or other, even much larger, railroad customers.

We strongly support S. 772, legislation that will provide for a more competitive landscape in the nation's freight railroad industry. Along with S. 953, the Railroad Competition and Service Improvement Act of 2007, which has been referred to the Senate Commerce, Science and Transportation Committee, we feel that true competition can once again be the driving force of the freight railroad industry. With the enactment of S. 772, rail customers will have the full range of the nation's antitrust laws to help deal with anticompetitive railroad actions, and the legislation may help serve as a deterrent to future anti-competitive behavior. For instance, S. 772 may help deter the following competitive problems:

- Bottlenecks. Dairyland is a "bottleneck" utility: that is, the last segment of the trip to our unit-train plant is served by only one railroad. Railroads often refuse to quote rates for shipments to or on the bottleneck segment, denying the benefits of competition on other segments of the journey.
- Paper barriers. Major railroads have spun off or leased segments of their tracks to short line carriers with contractual terms that prohibit the acquiring carrier from competing with the major railroads. These "paper barriers" are a further barrier to real competition, thereby increasing costs.

- Public pricing. Dairyland traditionally received coal transportation via confidential contracts. Now, approximately two-thirds of our rail business moves under so-called “public pricing” documents manufactured by the railroads. We are concerned that high public rail prices provide signals between these western carriers regarding elevated pricing aspirations for Dairyland’s traffic.
- Refusal to bid. Even in what should be considered “competitive” situations where two railroads are able to serve a property, increasingly we do not see competitive bids. For example, coal we receive by barge is theoretically competitive, since there are several rail-to-barge transloading facilities in different locations. Our experience is that one railroad offers public pricing, while the other railroad offers nothing. Competition does not work in a duopoly market if one of the duopolists refuses to bid.

In response to recent legislation, rail representatives suggest that legislative relief is “re-regulation.” We disagree. We have also heard the railroads state that this legislative relief would result in their decision not to add infrastructure. We understand the railroads need a reasonable profit to operate, and they must have enough capital to make needed improvements. However, the rate increases to Dairyland have no correlation to improved service and infrastructure improvements. Of necessity, we are going to be partners for many decades to come but I question whether the railroads will ever have an incentive to improve service, properly maintain and grow infrastructure, and effectively compete for service unless changes are made by Congress.

Railroads also use aggregate numbers as they defend themselves from the issue of high rates. Aggregate numbers do not show the real individual impact to captive shippers like Dairyland who have had their rates dramatically increased and who have been scrambling to get deliveries of a vital resource. The bottom line is this: every month Dairyland has to pay millions of dollars more because of rail rates that have nearly doubled, and as a cooperative, every single cent of that has to come out of our members' pockets.

In light of the current consolidated state of the railroad industry, and the problems we are experiencing in obtaining competitive rail service, Dairyland respectfully submits that the Committee got it right when it recently approved S. 772, and we urge the full Senate to pass this important bill as soon as possible.

Thank you again for the opportunity to testify.