

**Testimony of Terry Huval
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Lafayette, Louisiana**

**Before the
Subcommittee on Courts and Competition of the House Judiciary Committee**

**Hearing on H.R. 233,
the “Railroad Antitrust Enforcement Act of 2009”**

Mr. Chairman and Members of the Subcommittee, my name is Terry Huval, and I serve as the Director of the Lafayette Utilities System (“LUS”) in Lafayette, Louisiana. I am appearing here today on behalf of LUS and the American Public Power Association (APPA). Thank you for the invitation to participate in this hearing on H.R. 233, the Railroad Antitrust Enforcement Act of 2009.

LUS greatly appreciates the opportunity to appear today before the Subcommittee to discuss a matter of considerable importance to consumer protection and the public interest. We seek the removal of antitrust law immunities and outdated policies that have contributed to the current competitive problems confronting rail customers, including LUS, and that are producing significant marketplace harm. LUS and numerous other consumers across Louisiana and this Nation believe that H.R. 233 offers an important step in helping to address some of the competitive problems facing railroad customers today.

We are pleased that the House Judiciary Committee favorably reported identical legislation last year and that, earlier this year, the Senate

Judiciary Committee favorably reported companion legislation, S. 146, by a bipartisan recorded vote of 14-0. We respectfully urge this Subcommittee and the full House Judiciary Committee to report H.R. 233 favorably to the full House. We also respectfully urge Congress to pass this legislation this year. It is long past time for the railroad industry to be subject to all of the Nation's antitrust laws.

I. LUS AND ITS RELIANCE ON THE RAILROADS

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

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

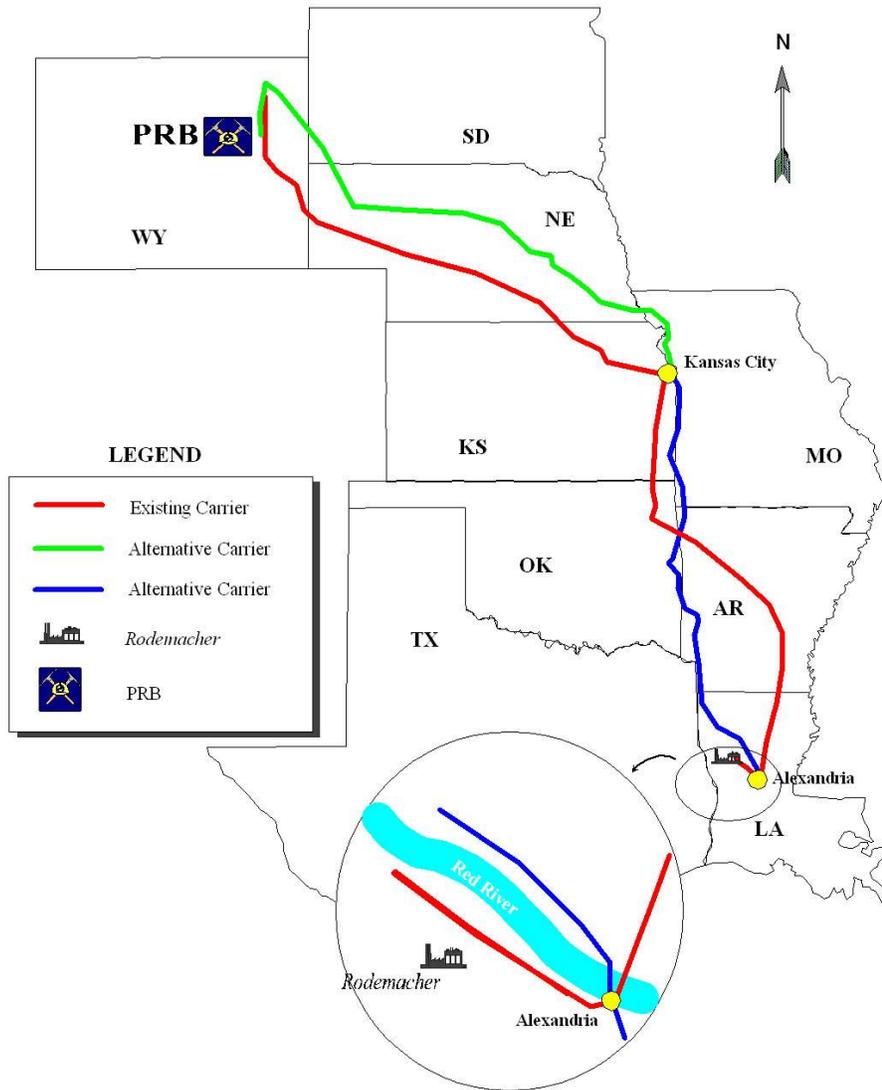
The Rodemacher plant's co-owners obtain the coal used at Rodemacher from mines in the Wyoming Powder River Basin (PRB) and collectively purchase approximately two (2) million tons of coal annually for use at Rodemacher. The only practical way to transport this coal from Wyoming to Rodemacher (a distance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

II. LUS' RAIL COMPETITION PROBLEM

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

The existing and possible alternative service routes to Rodemacher are set forth in the schematic below, which is also reproduced in the Attachment to this Testimony:

Selected Routes For PRB Coal Moving to Rodemacher



A review of this schematic would suggest that in a partially deregulated rail system where effective competition is intended to take the place of

government regulation, the Rodemacher plant would have two options: (1) a single rate on the UP from the PRB coal fields to the plant or (2) a competitive rate from either UP or BNSF/KCS to the junction point in Alexandria, then a rate from UP only from the junction to the plant. The second option would allow LUS to have railroad competition for all but the last 20 miles of our haul from the PRB to the Rodemacher plant.

Unfortunately, under the Surface Transportation Board's (STB's) ruling in 1996 in the so-called "Bottleneck Decision," the UP is not required today to provide a rate from the junction in Alexandria to the plant. Rather, the UP may only provide Rodemacher one rate from the PRB to the plant, making us captive – and paying high captive rail rates – from the PRB to our plant. Were we able to obtain a rate from the junction in Alexandria to our plant, then we would have a relatively short route where we have only one option and 1,480 miles, out of the total 1,500 mile haul, where we would have the chance of competition between the UP and the BNSF/KCS.

As discussed below, we believe our total rail bill should be substantially lower if we were able to obtain a rate from the UP that allowed us to access rail competition for 99% of the route to the Rodemacher plant and, as a result, the involved carriers effectively competed for this business.

LUS supports a strong national coal delivery network by rail, but it is in the Nation's interest to have a sound railroad system built on reasonable, not

predatory, pricing and service. Under the STB's interpretation of the law, UP may use its monopoly "bottleneck" control over rail line facilities at the plant destination to extend its 20 miles of monopoly power to the entire 1,500 miles of the route from the PRB to Rodemacher. In other words, UP's exclusive control of only 1 percent of the involved essential rail line to the Rodemacher plant enables UP to control 100 percent of the Rodemacher movement. This renders Rodemacher captive to UP for the entire origin-to-destination trip.

A. The Cost of Captivity

The cost of coal transportation is one of the single largest LUS electric generation expenses. Unfortunately, LUS pays substantially higher coal transportation prices than it would if we had access to effective origin-to-destination rail competition. For Lafayette, Louisiana, we believe this lack of railroad competition has translated into over \$65 million in "captivity payments" during the last ten years – the difference between what LUS has paid its existing rail carrier between 1999 and 2008 compared to what LUS estimates it would have paid if it had access to effective railroad competition. These higher payments are included in LUS customers' monthly electric bills and cause higher utility bills for all individuals and businesses in Lafayette.

To add insult to injury, our rail service has been inconsistent over the years, as UP has suffered well-documented PRB coal delivery problems, most recently in 2005-2006. In response to the 2005-2006 UP delivery failures, LUS

undertook extraordinary measures to ensure an adequate coal supply. More specifically, LUS had to buy barge-delivered coal from Venezuela and truck lignite from Northwest Louisiana to help shore-up fuel inventory. In addition, LUS decided to replace prematurely (before the end of their useful life) its steel railcars with new aluminum railcars, which can carry more coal per train run, in an effort to help ensure that LUS is in the best position possible to meet the Rodemacher plant's annual coal requirements, even with UP service failures.

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

1. Consumer Impacts

Very frankly, LUS customers must ultimately pay, in the form of higher electric rates, the \$65 million in extra captivity payments LUS has been required to pay. These overpayments are of critical importance to the City of Lafayette and its citizenry and businesses. Our customers care deeply about the cost of their electricity, and share LUS' concern about the need to ensure that our electric generation costs are kept as reasonable as possible.

For example, each year Lafayette educational institutions (e.g., the university, community colleges, trade schools, and all public and private schools) served by LUS consume approximately 10 percent of the total energy produced and purchased by LUS. Based on the aforementioned \$65 million in captivity payments to LUS' rail provider, these schools are in turn have paid approximately \$6.5 million extra in electricity costs as their share of LUS' cost of rail captivity. This \$6.5 million from school budgets are funds that could obviously be more productively used in educational programs for students.

Besides the schools, I can also assure the Committee that fixed income families and retirees care deeply about these added monthly expenses, as do cost-conscious Lafayette businesses who are some of the largest consumers of LUS-produced electricity. The cost of captivity certainly matters and it has a substantial impact on Lafayette and our local economy. So contrary to some statements made by the rail companies, it is the electric residential and business

consumer who pays 100 percent of all costs charged to us by the rail system, including premiums LUS is forced to pay due to rail captivity and those high costs have a direct impact on our community.

B. LUS Needs Effective Pro-Competitive Remedies to Protect Our Consumers

Something is clearly wrong with a legal system that allows railroads to extract huge captivity payments from bottleneck shippers. LUS needs meaningful pro-competitive remedies to protect its electricity consumers from this undue cost of captivity. Today, the railroads are exempt from many antitrust laws and the STB has already said it is fine for the UP to block LUS's access to competition through its ruling in the Bottleneck Decision.

LUS urges Congress to enact laws that encourage and require railroads to compete effectively and that accord rail shippers full legal recourse if railroads act in violation of the competition laws. For this reason, LUS supports H.R. 233, a bill designed and intended to bring the railroad industry into the 21st century by removing archaic antitrust "exemptions" that currently facilitate anticompetitive practices in the rail industry.

III. THE REMAINING RAILROAD ANTITRUST IMMUNITIES SHOULD BE REMOVED

Mr. Chairman, it seems extremely ironic that the railroads, whose abuses of market power in the late 1800's led to the enactment of our Nation's antitrust laws, are today exempt from many of those laws while their customers

are subject to the Nation's antitrust laws. One must wonder why the railroads would oppose the removal of antitrust exemptions, unless they feel that the exemptions shield otherwise anticompetitive behavior as part of their conduct of business. Such a position by the railroads should by itself elevate sufficient suspicion to justify the passage of the H.R. 233. We think the railroad industry's exemptions from the antitrust laws are particularly unsupportable in light of the lack of competition that exists in the railroad coal transportation markets and the STB's failure to adopt regulatory policies that encourage railroads to compete.

A large coalition of interests shares our views and supports making railroads fully subject to the antitrust laws. This coalition includes the Antitrust Modernization Commission, the American Bar Association's Section of Antitrust Law, the Consumers Union, the Consumer Federation of America, numerous trade associations and 20 State Attorneys General.

We believe that the removal of the current railroad antitrust exemptions would be very beneficial to rail shippers. Hopefully, with the exemptions removed, the railroad industry would voluntarily stop anti-competitive practices such as refusing to quote upstream rates to bottleneck shippers. But, if such practices continue, shippers could pursue antitrust remedies free from the limitations currently imposed by the exemptions. We also believe that enactment of H.R. 233 should lead the STB to re-examine its Bottleneck Decision and reach a pro-competitive solution.

We understand that the removal of existing antitrust immunities enjoyed by the railroads may not alone completely address or resolve the remaining competitive problems in the railroad industry or those being experienced by LUS. That is why we believe complementary reform legislation is needed with regard to the STB and its policies, because, until the STB reverses anti-competitive decisions, Lafayette citizens and businesses will continue to financially suffer from rail monopoly abuse. Subjecting the railroads to the antitrust laws can only improve the dismal competitive climate that exists today in the coal transportation marketplace and should send a strong statement that the Congress believes that promoting competition, and not fostering anti-competitive protectionism, is the right thing to do and is in the public interest.

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Mr. Chairman, thank you again for inviting me to testify. LUS commends H.R. 233 to your favorable attention and respectfully requests that the full Judiciary Committee favorably report the bill as soon as possible.

Selected Routes For PRB Coal Moving to Rodemacher

