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SURFACE TRANSPORTATION BOARD**

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**Ex Parte No. 711 (Sub-No. 1)**

**RECIPROCAL SWITCHING**

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**OPENING COMMENTS OF CSX TRANSPORTATION, INC.**

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**I. INTRODUCTION.**

The Board has proposed a momentous and dangerous change in course, and it is imperative that it stop to consider the serious consequences of the Notice of Proposed Rulemaking (“Notice”). The proposal in the Notice would seriously undermine a successful regulatory framework in which rates are constrained by settled and economically sound methodologies designed to balance railroads’ need for adequate revenues and shippers’ need for reasonable rates. In its place, the Notice would allow shippers to drive rates below reasonable levels by giving shippers a virtually unconstrained right to create artificial “competition” on demand. The proposal is unlawful and unwise, and the Notice should be withdrawn.

For over 30 years, the Board has viewed its authority to order reciprocal switching as a remedy to be used when “some competitive failure occurs,” *Midtec Paper Corp. v. Chicago & NW Transp. Co.*, 3 I.C.C. 2d 171, 174 (1986), and a carrier abuses its market power and engages in an anticompetitive act. *See* 49 C.F.R. § 1144.2. The Board would, for example, order reciprocal switching if a bottleneck

carrier “has exploited its market power by providing inadequate service over its own lines or foreclosing more efficient service over another carrier’s lines.” *Cent. Power & Light Co. v. Pac. Transp. Co.*, 1 S.T.B. 1059, 1068 (1996) (“*Bottleneck I*”). The Board would also act to remedy “classical categories of competitive abuse,” including “foreclosure, refusal to deal, or ‘other recognizable forms of monopolization or predation.’” *Id.* (quoting *Midtec*, 3 I.C.C. 2d at 173-74). And the Board would act when needed to provide adequate service or efficient routes. *Bottleneck I*, 1 S.T.B. at 1068. But where the bottleneck carrier has not anticompetitively exploited its market power, the Board has refused to order reciprocal switching as an indirect way to reduce rates that are reasonable and permissible under the Act. *Chi. & Nw. Transp. Co.*, 1 I.C.C. 2d 362, 365 (1985) (“a mere preference for the opportunity to obtain lower rates is not sufficient”).

Courts have reaffirmed the *Midtec* rule, concluding that its limitation of reciprocal switching to cases of competitive abuse is consistent with the Interstate Commerce Act. In contrast, courts have found that the statutory scheme “obviously does not ensure that captive shippers will pay only those rates that would obtain under ‘perfect competition.’” *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988). If the Board could prescribe reciprocal switching “whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the [Board] in this way to conform the industry more closely to a model of perfect competition.” *Id.*

The Board is now proposing radically to expand the circumstances under which it will order reciprocal switching. It has proposed a rule that would give every shipper served by only one Class I railroad a right to switch its traffic from the “bottleneck” carrier to another carrier whenever there is a lack of effective competition, and the switching could be done safely and practicably and without impairing the carrier’s ability to serve other customers. *See* Proposed Rule § 1145.2(b). In addition, the proposed rule would also make switching available to shippers who *do* benefit from effective intermodal or intramodal competition if they can persuade the Board, based on any factor the Board may deem to be relevant, that the potential benefits outweigh the potential detriments, and the switching could be done safely and practicably and without impairing the carrier’s ability to serve other customers. *See* Proposed Rule § 1145.2(b).

The Board’s proposal would undermine the fundamental regulatory structure that has successfully governed the industry for decades. In place of the economically sound framework that recognizes that differential pricing is essential to a healthy railroad industry so long as maximum rail rates are constrained by economically sound constraints, the Board proposes a regime in which the mere fact that a shipper is served by a market dominant railroad is sufficient to warrant a government order to force “competition” into that location. This would effect a sea change in how railroads are regulated.

To be sure, there are times when regulatory sea changes are warranted. For example, when open routing rules and similar misguided attempts to equalize rates

for all shippers crippled the American rail industry, Congress saw that a regulatory sea change was needed to restore the rail industry to financial health. But a regulatory sea change should only be made when there is a clear need for it and clear authorization from Congress for such a change. Neither is present here. Indeed, justification for a sea change is particularly important because railroads have relied on the existing regulatory regime to develop and rationalize their current networks. The Board bears a heavy burden to justify upsetting those reliance interests, which it cannot meet.

The proposed regulations suffer from five fundamental problems.

First, the proposed switching rule violates the Interstate Commerce Act because it blindly focuses on the words of Section 11102(c)(1) without considering either the established meaning of those terms at the time Congress adopted them or the overall design and structure of the statute. For one thing, the Board's proposed "public interest" avenue for involuntary switching ignores the longstanding ICC interpretation that involuntary switching would only be in "the public interest" if the requesting party showed "some actual necessity or compelling reason" for the arrangement—even though Congress specifically adopted the public interest standard in Staggers. The proposed "necessary for competitive service" prong is similarly inconsistent with the statute. The Board insists that involuntary switching orders will not create effective competition for purposes of Section 11704. If that is so, then how can an involuntary switching order be "necessary for competitive rail service"? Moreover, the notion that a shipper can obtain

involuntary switching by doing nothing more than demonstrating that it is served by a market dominant railroad is inconsistent with the statute and with the D.C. Circuit's decision in *Midtec*, which rejected an interpretation of the Interstate Commerce Act that would allow the agency to order involuntary switching whenever such an order could enhance competition between rail carriers. And the Board ignores the evidence that Congress specifically considered and ratified the *Midtec* rule limiting the scope of involuntary reciprocal switching orders.

Second, even if the Board had discretion to adopt the proposed rule, it would constitute an unlawful departure from the STB's longstanding interpretation of the Interstate Commerce Act and undermine important statutory policies like differential pricing, protection of railroads' long-haul, and the elimination of unnecessary terminal facilities and promotion of single-line service. The Board does not even attempt to reconcile its proposed rule with these statutory policies. And the Board's stated justifications for changing the rules are contradicted by the evidence. Neither a lack of cases, nor the alleged difficulty of rate remedies, nor mergers, nor the improved financial health of the industry are reasons to alter the rules.

Third, the Board has failed to consider evidence about the harmful impact of its proposal. It ignores the substantial evidence in the record that increased involuntary switching will have significant negative effects on the rail industry, both by creating operational inefficiencies and by discouraging capital investment. After the Board recognized and requested evidence on the empirical effect of

changing involuntary switching rules, railroads prepared extensive evidence that showed the negative impacts that changing the rules would have on operations and investment. The Board completely ignores all this evidence about an issue that it indicated in 2013 was essential to understanding the effects of a policy change. Failure to consider the costs of the rule and to balance those costs against the claimed benefits is inherently arbitrary and constitutes poor public policy.

These comments are supported by verified statements that again present compelling evidence of the harmful effect that the proposed rules could have on railroad operations and investments. Michael Ward, Chairman and Chief Executive Office of CSX Corp., has submitted a verified statement that describes the threat that the proposed rules pose to railroad capital investment. As Mr. Ward explains, the Board's proposal to make it easier for shippers to obtain involuntary reciprocal switching could significantly hamper CSXT's ability to make needed capital investments going forward and strand investments that were made in reliance on the regulatory landscape that has been in place for thirty-five years.

CSXT's Executive Vice President and Chief Operating Officer, Cindy Sanborn, has also submitted a verified statement that discusses the harms that the proposed involuntary switching rule could cause to railroad operations. Ms. Sanborn's statement explains that the Board's involuntary switching proposal would undermine many of the initiatives that have enabled CSXT and other railroads to achieve marked improvements in transit time and service reliability — including concentrating traffic flows in larger trains over high-capacity routes and

major hump yards, pre-blocking cars to eliminate handlings at congested terminals, and run-through trains and power sharing arrangements. Adoption of the proposed regulations would result in a significant degradation of service for all shippers.

The Board's failure to consider the consequences of its proposal for railroad operations and investments is just the tip of the iceberg. The Notice also ignores evidence about the financial repercussions of the involuntary switching rule and its potential impact on revenue adequacy. It ignores the disparate impact of its proposal and the significant questions about the terms on which it would grant involuntary switching. The Notice ignores the substantial environmental impacts from an approach that will increase switching activities and decrease operational efficiency in a way that will increase emissions and decrease the competitiveness of rail with trucking. It is silent about how it will deal with the potential labor protections that it is statutorily required to consider when ordering involuntary switching.

All of these issues were identified in Ex Parte 711 as fundamental issues that must be resolved before adopting any involuntary switching order. None were addressed in the Notice. This is not how reasoned decisionmaking works.

Fourth, the Board ignores other arbitrary and capricious aspects of its rules. The proposed rule expands potential reciprocal switching to interchanges a "reasonable distance" from terminal areas—despite strong statutory evidence that reciprocal switching should be limited to terminal areas. The standardless "public interest" test of Proposed Rule Section 1145.2(a)(1) is impermissibly vague and

raises serious due process concerns. And the proposed rule's abandonment of the standing requirement in the current competitive access rules is unwarranted.

Finally, the Board proposes access price methodologies that would violate the fundamental economic principles of the statutory scheme by undermining differential pricing. Professor Robert Willig, Professor Emeritus of Economics and Public Affairs in the Economics Department and the Woodrow Wilson School of Public and International Affairs of Princeton University, explains in an attached verified statement that it is crucial for the Board to price access in an economically coherent manner that preserves railroads' differential pricing ability and accords with the principles of Constrained Market Pricing and Efficient Component Pricing. Professor Willig shows that the current proposals offered by the Board do not meet this standard and should not be implemented unless modifications are made. The Board should instead adopt principles that would allow full recovery of all direct operating costs, allow demand-based differential pricing to recover the costs of bottleneck facilities, and permit a reasonable amount of lost contribution. In adopting these principles, the Board should not forget that a Board order requiring a railroad give a third party access to its property for less than the fair market value of that access would violate the Fifth Amendment's takings clause.

## **II. THE PROPOSED RECIPROCAL SWITCHING RULE VIOLATES THE STAGGERS RAIL ACT.**

The Board should withdraw the proposed reciprocal switching rule because it exceeds the Board's authority to establish reciprocal switching agreements where such agreements are "practicable and in the public interest, or . . . necessary to

provide competitive rail service.” 49 U.S.C. § 11102(c)(1). It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). A statute should be interpreted “as a symmetrical and coherent regulatory scheme,” in which all parts fit “into an harmonious whole.” *Id.* And where Congress enacts a statute against a regulatory background in which terms have an established meaning, it is presumed that the statute incorporates the “settled judicial and administrative interpretation” of those terms. *Comm’r v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993); *see also Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 992-93 (2005) (same).

The Notice ignores these principles. It proposes a rule that construes Section 11102 in a manner that contradicts the established meaning of critical terms and is “inconsisten[t] with the design and structure of the statute as a whole.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). In particular, the first prong of the proposed rule (proposed Section 1145.2(a)(1)) would authorize the Board to order reciprocal switching whenever it believes the benefits outweigh the costs. This plainly exceeds the Board’s authority under Section 11102. The ICC’s prior interpretation, the legislative history, and the judicial case law all demonstrate that Congress intended the Board to find reciprocal switching to be in the “public interest” under Section 11102 only when there is some actual necessity or compelling reason for additional rail service. *See infra* § II.A. The second prong

of the proposed rule (proposed Section 1145.2(a)(2)) is also contrary to the Staggers Act because it establishes an irrebuttable presumption that switching is “necessary to provide competitive rail service” within the meaning of 49 U.S.C. § 11102(c)(1) whenever a shipper is served by one railroad and lacks effective intermodal competition. That presumption is contrary to the statute and cannot justify the proposed rule because it is contradicted by the Notice’s own finding that the presence of intramodal options do not always result in “effective competition.” See *infra* § II.B.

Both prongs of the proposed rule are contrary to the Staggers Act for two additional and independent reasons. First, the proposed rule would violate the Staggers Act and the D.C. Circuit’s decision in *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988), by authorizing the Board to provide rate relief to shippers whose rates are otherwise reasonable and not subject to regulation under the Act. See *infra* § II.C. Second, Congress ratified the *Midtec* interpretation of Section 11102 when it enacted the ICC Termination Act of 1995 (“ICCTA”), and the Board thus lacks the authority to adopt a different construction now. See *infra* § II.D. For all of these reasons, the interpretation of Section 11102 set forth in the Notice “is not permissible,” and the proposed rule cannot lawfully be adopted. *UARG v. EPA*, 134 S. Ct. 2427, 2442 (2014).

**A. Proposed Section 1145.2(a)(1) Exceeds the Board’s Authority to Establish a Reciprocal Switching Arrangement Where “Practical and in the Public Interest.”**

When Congress included in the Staggers Rail Act a provision giving the ICC the authority to order reciprocal switching agreements when such agreements are

“practicable and in the public interest,” it was not writing on a blank slate. The Transportation Act of 1920 used that same phrase to define the scope of the ICC’s authority to require that terminal facilities owned by one rail carrier be used by another rail carrier. *See* 49 U.S.C. § 3(4) (1920). The ICC then interpreted the “expression ‘in the public interest’” to mean “more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable for them.” *Jamestown, N.Y., Chamber of Commerce v. Jamestown, Westfield & Now. R.R. Co.*, 195 I.C.C. 289, 292 (1933). The ICC reasoned that to require a railroad to open its trackage facilities to a competitor so the competitor can divert traffic from the railroad is to take “something substantial” from the railroad. *Id.* Therefore, “some actual necessity or some compelling reason must first be shown before we can find such action in the public interest.” *Id.* Where the original rail carrier is providing good freight rail service, the “desirability, but not the necessity, of the additional operation of a joint terminal freight station” is not sufficient to show that the public interest requires such joint terminal access. *Id.*

The ICC followed *Jamestown* in the decades that followed and continued to require “a complainant seeking terminal trackage rights to demonstrate ‘some actual necessity or compelling reason’ for such relief.” *Midtec Paper Co.*, 857 F.2d at 1502; *see also Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 677-78 (7th Cir. 1985) (citing “pre-Staggers Act cases” that are “joint use cases that describe the public interest standard in terms” similar to the “compelling need” test articulated in *Jamestown*). When Congress enacted the Staggers Act in 1980, it not only

preserved the ICC’s power to order a rail carrier to provide terminal access when such access is in the “public interest,” *see* 49 U.S.C. § 11102(a), but also clarified the ICC’s regulatory power by expressly authorizing the agency to require railroads to enter into reciprocal switching agreements when such agreements are “practical and in the public interest.” 49 U.S.C. § 11102(c); *see generally Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 113 (D.C. Cir. 1987) (discussing agency’s statutory authority to compel reciprocal switching). It is therefore presumed that Congress intended the ICC to apply the same “public interest” standard the agency had long applied to requests for compelled terminal access to requests to compel reciprocal switching. *See, e.g., Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (where Congress uses terms “obviously transplanted from another legal source, . . . it brings the old soil with it”).<sup>1</sup> And lest there be any doubt, the legislative history makes it clear that Congress intended the “standard ‘practical and in the public interest’” that governs requests “to require railroads to enter into reciprocal switching” to be the “same standard the Commission has applied in considering whether to order the joint use of terminal facilities.” H.R. REP. NO. 1430, 96th Cong., 2d Sess. 116 (1980); *see also Cent. States*, 780 F.2d at 677-78 (same).

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<sup>1</sup> *See also Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 992 (2005) (because “Congress passed the definitions in the Communications Act against the background of this regulatory history,” courts will assume “parallel terms” in the statute “substantially incorporated” their regulatory meaning); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (where “Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed”).

Indeed, that is what the ICC itself understood the statute to mean. In a brief filed with the Seventh Circuit in the *Central States* case, the Board stated that “the need to show inadequacy of service as a prerequisite for a[n] award of either joint terminal use or reciprocal switch is dictated by the legislative history of Section 11103(a) [now Section 11102] and precedent.” Joint Brief of the Interstate Commerce Commission and the United States of America, *Central States v. ICC*, No. 84-2005, at 37 n.31 (7th Cir., Nov. 15, 1984). It is therefore clear that the “public interest” standard does not give the Board authority to order reciprocal switching arrangements whenever the Board believes that switching would be desirable because the “benefits” outweigh the “detriments.” Instead, the “public interest” standard is met—and the Board may compel reciprocal switching—only when there is a “compelling need” because the existing rail service is inadequate. Proposed Section 1145.2(a)(1)(iii) is contrary to the statute and should not be adopted.

**B. Proposed Section 1145.2(a)(2) Exceeds the Board’s Authority to Establish a Reciprocal Switching Arrangement Where “Necessary to Provide Competitive Rail Service.”**

The statute is also irreconcilable with the second prong of Proposed Rule Section 1145.2, which allows reciprocal switching to be imposed without proof that it is in the public interest. Under current law switching will be found to be “necessary to provide competitive rail service” if a railroad is abusing its market power to extract unreasonable terms or otherwise is engaging in anticompetitive conduct. *See Midtec*, 3 I.C.C.2d at 176, 181; 49 C.F.R. § 1144.2(a)(1). But under the proposed rule, “the Board will find a switching arrangement to be necessary to

provide competitive rail service” whenever a shipper is served by one Class I railroad, and there is a lack of effective intermodal and intramodal competition for the movements at issue. See Proposed Section 1145.2(a)(2). It thus establishes an irrebuttable presumption that switching is “necessary to provide competitive rail service” for every shipper that is served by one railroad and lacks effective intermodal competition. 49 U.S.C. § 11102(c)(1).

In the first place, the Board’s reading fails on its own terms, because it asserts that the Board can impose switching solely to “provide competitive rail service” when the Board itself refuses to recognize switching orders as effective competition. Specifically, the Notice states that there is “no support” for a claim “that reciprocal switching would automatically be a source of *effective* competition,” for purposes of 49 U.S.C. § 10707(a), and thus that the availability of reciprocal switching might not foreclose a shipper’s ability to file a rate reasonableness case. Notice at 23 (emphasis in original). But how can a switching agreement be “*necessary* to provide competitive rail service” within the meaning of Section 11102(c)(1) (emphasis added) if the Board will not say that such an agreement results in effective competition under Section 10707(a)? The Board’s admission that it will not assume that reciprocal switching agreements provide effective intramodal competition means that it has no basis to impose such agreements “to provide competitive rail service.”

The more fundamental problem with Proposed Rule Section 1145.2(a)(2), however, is that it makes a mere determination of market dominance, as applied in

rate reasonableness cases, sufficient for the Board to impose involuntary switching. One is hard pressed to find recent examples of sole-served shippers in rate cases where the Board found a lack of market dominance, even in the face of evidence that the shipper had access to alternative transportation (and often where the shipper had used alternative transportation for the very shipment for which it claimed the railroad had market dominance).<sup>2</sup> If Congress's intent was to provide virtually all sole-served shippers with involuntary switching as a "right," it would have made that kind of sea change abundantly clear. The rail industry served many sole-served shippers then, just as it does now, and nowhere is there evidence of Congressional intent that the mere fact that a shipper is solely-served is a competitive problem that makes it "necessary to provide competitive rail service." In short, something more than the Board's market dominance test (such as anticompetitive conduct) is required before any order of involuntary switching may be imposed.

It is also the case that the circumstance giving rise to an involuntary switching complaint typically would be a shipper who may be dissatisfied with the rate charged by the originating carrier. That shipper could get the Board to order

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<sup>2</sup> *E.I. du Pont de Nemours & Co. v. Norfolk So. Ry. Co.*, Docket No. 42125, at 29-30 (Mar. 24, 2014) ("*DuPont*") (holding that under Limit Price Test railroad had market dominance over all but four of the 100 challenged rates); *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, Docket No. 42121, at 2, 29 (May 31, 2013) (holding that under Limit Price Test railroad had market dominance over all but 12 of the 84 challenged rates); *M&G Polymers USA, LLC v. CSX Transp., Inc.*, Docket No. 42123, at 2, 21 (Sept. 27, 2012) ("*M&G*") (holding that under Limit Price Test railroad had market dominance over 36 of the 42 challenged rates).

the carrier to enter into a reciprocal switching arrangement with another carrier and potentially have the Board set the compensation for the so-called “reciprocal switching” service at a rate that is substantially lower than the originating carrier would receive if it provided the entire origin-to-destination service. This cannot be reconciled with the statute’s recognition that the Board may not use a finding of market dominance to presume that a rate is unreasonable. *See* 49 U.S.C. § 10707(b) (“a finding of market dominance does not establish a presumption that the proposed rate is unreasonably high”). The Board may not use involuntary switching as a mechanism to artificially reduce rates that have not been shown to be unreasonable.

Moreover, holding that a shipper who satisfies existing market dominance standards for rate cases can automatically obtain involuntary switching ignores the significant shortcomings of those standards. The Board’s standards intentionally omit consideration of known competitive forces like product and geographic competition,<sup>3</sup> and even refuse to consider whole-route competition between a shipment’s actual origin and actual destination on the wrongheaded belief that such direct competition is “geographic” competition.<sup>4</sup> And the Board continues to use the deeply flawed “Limit Price Test” for assessing qualitative market dominance by making mechanical comparisons to a carrier’s RSAM number.<sup>5</sup> The Board’s

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<sup>3</sup> *Market Dominance Determinations—Product & Geographic Competition*, 3 S.T.B. 937, 950 (1998) (“*Product & Geographic Competition*”).

<sup>4</sup> *See DuPont* at 26-29 (affirming *DMIR* holding that whole-route competition would not be considered in market dominance inquiry).

<sup>5</sup> *E.g.*, *DuPont* at 18-21 (using Limit Price Test to resolve market dominance issues); *TPI* at 4-29 (same); *M&G* at 13-21 (same). CSXT has addressed the legal and policy problems with the Limit Price Test on multiple occasions. *See* CSXT Comments at

justification for many of these simplifications is that market dominance is a threshold jurisdictional inquiry that should not be unduly complicated.<sup>6</sup> But the Board now proposes to reduce rates by introducing artificial competition without any further finding of unreasonableness.

As the D.C. Circuit held in *Midtec*, the statute does not give the Board that authority. It is simply not the case that a carrier's ability to charge a supposedly "captive shipper" rates "above the levels that would obtain if additional carrier service were introduced offends the competition policies of the Staggers Act or is otherwise anticompetitive." *Midtec*, 857 F.2d at 1505. The D.C. Circuit rejected that argument, which was advanced by *Midtec* as a reason that the Board should order reciprocal switching to "move the national rail system toward a regime more like perfect competition" and give shippers an "alternative means of obtaining rate relief." *Id.* The D.C. Circuit held that the statutory scheme "obviously does not ensure that captive shippers will pay only those rates that would obtain under 'perfect competition.'" *Midtec*, 857 F.2d at 1507. Instead, the statute establishes the general rule that a rail carrier "may establish any rate for transportation or

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21-29, *M&G* (filed Nov. 28, 2012); CSXT Pet. for Reconsideration at 1-17 (filed June 20, 2013); CSXT Reply at II-B-54-76, *Consumers Energy v. CSX Transp., Inc.*, Docket No. 42142 (filed Mar. 7, 2016).

<sup>6</sup> See, e.g., *DuPont* at 27 ("Limiting the inquiry to alternative transportation covering the origin and destination of the bottleneck segment will significantly decrease the burden, time, and expense of performing the market dominance inquiry"); *M&G* at 3 ("There is a compelling need for an objective approach to resolving this issue given the rapidly escalating complexity of the market dominance inquiry in rate cases."); *Product & Geographic Competition*, 3 S.T.B. at 938 (excluding product and geographic competition was consistent with "long-standing Congressional intent that market dominance be a practical determination made without delay").

other service” that the market will bear. 49 U.S.C. § 10710(a)(c). The Board is permitted to intervene and regulate the rate only when “a rail carrier has market dominance over the transportation to which a particular rate applies,” and then only to ensure that the rate charged is “reasonable.” 49 U.S.C. §§ 10701(c), (d)(1). The Board’s authority is limited in this manner because the “primary goal of the Act was to revitalize the railroad industry by reducing or eliminating regulatory burdens.” *Midtec*, 857 F.2d at 1506 (quoting *Coal Exps. Ass’n v. United States*, 745 F.2d 76, 80-81 (D.C. Cir. 1984)). The statute was intended to “end for most rail service decades of ICC control over maximum rates and to permit carriers not having market dominance to set rates in response to their perception of market conditions.” *Id.*

If, however, the Board could prescribe reciprocal switching “whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry.” *Id.* at 1507. As the D.C. Circuit held in *Midtec*, there is not “even the slightest indication that Congress intended the [Board] in this way to conform the industry more closely to a model of perfect competition.” *Id.* On the contrary, mandated reciprocal switching will contravene the national rail policy by leading to greater intervention by the Board in the setting of rates. As the D.C. Circuit explained in *Midtec*, the “carrier favored by mandated reciprocal switching may have every incentive to avoid agreement on switching rates, and to petition the Commission to fix the compensation” so the switching carrier will “lose[] the ability to price its portion of the through service in response to the varying demands for

different commodities or movements.” *Id.* at 1501. This type of regulatory intervention would “be in tension, if not outright conflict,” with the statutory policy “to allow, to the maximum extent possible, competition, and the demand for services to establish reasonable rates for transportation by rail.” *Id.* (quoting 49 U.S.C. § 10101a(1)).

Moreover, the *Midtec* decision shows that allowing access in situations where a railroad faces intermodal competition cannot be squared with the statutory scheme, because that would permit the Board to mandate access where a railroad already faces effective competition from alternative transportation modes such as barge and trucking. *Id.* at 1514 (“The practice of considering *only* intramodal competition, to the exclusion of other market forces that constrain a railroad’s market power, is inherently illogical and was congressionally disapproved.”). That exact scenario is contemplated by the Board’s proposal, because the presence of effective competition is a precondition to relief only under the “competition” prong, and not under the “public interest” prong. *See* Notice at 17-19.

Where the party seeking a reciprocal switching order already has the benefit of effective competition, the Board would be ordering reciprocal switching (or the compensation for reciprocal switching) upon terms that are *better* than those made by the participants in effectively competitive markets. The Board does not—and cannot—advance any non-arbitrary explanation about how that result can be consistent with the statute. As the D.C. Circuit held in *Midtec*, such an argument “leads to the improbable conclusion that Congress contemplated that a market

could be both ‘effectively competitive,’ so as to preclude direct rate regulation, and yet insufficiently competitive to require indirect rate regulation through compelled competitive access.” *Midtec*, 837 F.2d at 1507.

**C. Congress Ratified the *Midtec* Interpretation of Section 11102 in ICCTA, and The Board Does Not Have Authority to Adopt a New Interpretation.**

When Congress enacted ICCTA, it ratified the interpretation of Section 11102 that underlies the Board’s current reciprocal switching regulations and was affirmed by the D.C. Circuit in *Midtec*. See Pub. L. No. 104-88, 109 Stat. 103 (1995). The Board thus has no authority to change that interpretation and adopt the reciprocal switching rule proposed here. The Notice’s assertion that ratification did not apply because the legislative history record contains no evidence that Congress “even mentioned” the agency’s reciprocal switching regulations is wrong. Notice at 11. The evidence is clear and compelling that Congress was aware of the ICC’s *Midtec* interpretation and affirmatively acted to ratify that interpretation rather than accepting proposals that would do exactly what the Notice proposes to do. Multiple parties presented evidence of this congressional ratification in Ex Parte 711,<sup>7</sup> and that evidence is again recounted below.

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<sup>7</sup> See, e.g., *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Opening Comments of CSX Transp., Inc., at 11-21 (filed Mar. 1, 2013) (“CSXT Comments”) (attached as Ex. 1); *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Reply Comments of CSX Transp., Inc., at 76-79 (filed May 30, 2013) (“CSXT Reply Comments”) (attached as Ex. 2); *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Comments of Norfolk Southern Ry. Co., at 23-28 (filed Mar. 1, 2013) (“NS Comments”).

The Supreme Court has long presumed that Congress is “aware of an administrative or judicial interpretation of a statute” and “adopt[s] that interpretation when it re-enacts a statute without change.”<sup>8</sup> *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2000) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). The Court has reasoned that “once an agency’s statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.” *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). The agency must then follow that legislative intent and is not free to change the interpretation that Congress ratified. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (NLRB “is not now free” to change interpretation of Act after interpretation was ratified by, inter alia, re-enactment of statute without change); *United States v.*

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<sup>8</sup> *See, e.g., FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) (“When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)); *United States v. Bd. of Comm’rs*, 435 U.S. 110, 134 (1978) (“When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation”); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-66 (1951) (where “Congress considered in great detail” the NLRB’s prior application of the statute, “it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts”); *Nat’l Lead Co. v. United States*, 252 U.S. 140, 146-47 (1920) (re-enactment “amounts to an implied legislative recognition and approval of the executive construction of the statute . . . for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government”).

*Leslie Salt Co.*, 350 U.S. 383, 396-97 (1956) (Commissioner of Internal Revenue could not revise interpretation of statute because reenactment of provision without change indicated congressional acquiescence to that interpretation).<sup>9</sup>

Following the Supreme Court’s precedents, the D.C. Circuit has held that the doctrine of legislative ratification precludes an agency from changing its interpretation of a statute if three elements are present: (1) Congress re-enacted the statute without change; (2) Congress was made aware of the administrative interpretation; and (3) there is an “affirmative indication” that the re-enactment was intended to ratify the interpretation. *AAR v. ICC*, 564 F.2d 486, 493-94 (D.C. Cir. 1977). All three elements are present here.

**1. Congress re-enacted the reciprocal switching provision of the Staggers Act as part of the overhaul of the Interstate Commerce Act in 1995.**

There is no question that Congress reenacted the relevant statutory language without change. Congress enacted ICCTA to “significantly reduce[] regulation of surface transportation industries in this country.” S. REP. NO. 104-176 at 2 (1995). Among other things, ICCTA eliminated the ICC and created a new agency, the STB, to regulate the railroad industry pursuant to statutory provisions that were intended to “preserve the careful balance put in place by the 4R Act and the

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<sup>9</sup> The Notice cites *Jama v. Immigration & Customs Enft*, 543 U.S. 335, 349 (2005) for the proposition that ratification requires an interpretation “so broad and unquestioned” as to permit an assumption that Congress knew of and endorsed the interpretation. But that is precisely the situation here. Unlike in *Jama*, where there were conflicting judicial interpretations, there was and still is no question as to the interpretation, meaning, and effect of the *Midtec* standard. Congress was not presented with any competing or contradictory views about the ICC’s interpretation when it passed ICCTA and clearly understood what the ICC had done.

Staggers Act that led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests.” *Id.* at 1-2 & 6. With respect to reciprocal switching and trackage rights, Congress re-enacted in ICCTA the identical language from the Staggers Act. *Compare* Staggers Act § 223, 94 Stat. at 1924 (Staggers Act version of then-§ 11103) *with* ICCTA § 102(a), 109 Stat. at 831 (identical language in current § 11102). It is particularly significant that Congress re-enacted the reciprocal switching provision without modification, because ICCTA was a significant revision and overhaul of the Interstate Commerce Act as a whole. Congress’s “selectivity” in modifying some provisions and not others “strongly suggests” that Congress intended to ratify the existing interpretation of the provisions it re-enacted without modification. *Lorillard*, 434 U.S. at 582.

**2. Congress was well aware of the *Midtec* interpretation when it re-enacted the statute.**

At the time Congress re-enacted the reciprocal switching provision of the Staggers Act in ICCTA, it was well aware of the ICC’s interpretation because the agency had submitted to Congress the *ICC Regulatory Responsibilities Study*, a comprehensive report describing its view of its responsibilities under the Staggers Act.<sup>10</sup> That *ICC Regulatory Responsibilities Study* described the way the ICC had interpreted the reciprocal switching and access provisions of the Staggers Act in the *Midtec* and *Intramodal Rail Competition* proceedings. It advised Congress that

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<sup>10</sup> See Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (Oct. 25, 1994), available at 1994 WL 639996 (“*ICC Regulatory Responsibilities Study*”).

“[t]he Commission will force such arrangements only where necessary to redress anticompetitive actions,” and it cited *Midtec* to support the statement. *ICC Regulatory Responsibilities Study* at \*25 & n.152. The *ICC Regulatory Responsibilities Study* thus gave Congress clear notice of both the *Midtec* decision and the agency’s determination that competitive access remedies should be available only “to address a carrier’s anticompetitive actions.” *Id.* at \*26.

In the congressional hearings that preceded the enactment of ICCTA, several witnesses representing various shipper constituencies claimed that the ICC had misinterpreted the Staggers Act, and they asked Congress to amend the statute to make it easier for shippers to obtain agency-mandated reciprocal switching or terminal access. The National Industrial Transportation League (“NITL”) asked Congress to “guarantee . . . competitive switching rates” in order to “create more rail-to-rail competition.”<sup>11</sup> NITL claimed that the ICC had misinterpreted the Staggers Act and urged Congress “to enact specific changes to the statute” that would “encourage rail-to-rail competition.”<sup>12</sup> In a similar vein, the Chemical Manufacturers Association urged that “[a]ny new legislation must encourage greater rail-to-rail competition than currently exists. All shippers must have the right of access to two or more railroads at reasonable rates and service.”<sup>13</sup> U.S. Clay

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<sup>11</sup> See *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearing Before the Subcomm. on Railroads of the H. Comm. on Transportation*, 104th Cong. (Jan. 26 & Feb. 22, 1995) (hereafter “*ICC Authority Hearings*”) at 183-84.

<sup>12</sup> *Id.* at 259-60.

<sup>13</sup> *Id.* at 534.

Producers likewise asked Congress to enact “statutory requirements and procedures for competitive access through switching, trackage rights, or otherwise, so that shippers served by only one Class I railroad are assured of access to other Class I railroads with reasonable rates and routes.”<sup>14</sup>

In those same hearings, Congress heard from witnesses urging it to retain the ICC’s interpretation. The Department of Transportation recommended “no change” to the current rules under which the ICC “can order access under certain conditions” and “on a very limited basis.”<sup>15</sup> Many shippers also urged Congress to retain the ICC’s interpretation of its access authority and to reject suggestions to impose “a new scheme to force railroads to allow competitors to use their facilities.” *Id.* at 486 (statement of over 400 shipper members of Committee Against Revising Staggers).

In light of the presentation of views both for and against the ICC’s view that access should be ordered only to redress a carrier’s anticompetitive actions, there can be no question that Congress was “aware of the administrative interpretation” of the reciprocal switching provision of the Staggers Act at the time it enacted ICCTA. *AAR*, 564 F.2d at 493.

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<sup>14</sup> *Id.* at 493-94; *see also id.* at 496 (“A prompt and effective approach must be provided in the statute so that all shippers are permitted access to more than one Class I rail carrier upon reasonable request”).

<sup>15</sup> *Id.* at 17-18 (testimony of J. Canny, Deputy Assistant Secretary of Policy, U.S. Dep’t of Transp.); *see also id.* at 221 (written statement from the Department of Transportation reiterating that that the agency’s “competitive access authority should be retained in its current form” and that such authority “must be exercised judiciously”).

**3. The legislative history shows that Congress intended to ratify the *Midtec* interpretation.**

The legislative history also shows that Congress made an affirmative decision to ratify the interpretation of the reciprocal switching provision adopted by the ICC in *Midtec*. The Senate Report accompanying ICCTA acknowledged the shipper arguments for broader “market access” rules, but Congress elected instead to follow the recommendation of the Department of Transportation and to re-enact the existing statutory provision that the ICC interpreted in *Midtec* to authorize access only to address a carrier’s anticompetitive actions. The Senate Report explained that:

The Committee recognizes that certain affected [shipper] groups—most notably smaller shippers and smaller railroads—believe that further legislative changes are necessary or desirable to more fully protect their interests. However, the Committee is concerned that such additional measures would necessarily cast an overly broad regulatory net and even then might be ineffective to solve the underlying concerns (e.g. car supply, market access, etc.).

S. REP. NO. 104-176, at 9-10 (1995); *see also id.* at 5 (“Many broader transportation policy proposals viewed by the Committee to be re-regulatory were not included in this bill.”). The Conference Report reiterated Congress’s intention to ratify “existing standards” for reciprocal switching and terminal access. H.R. REP. NO. 104-311, at 84, reprinted in 1995 U.S.C.C.A.N. 793, 796 (ICC functions including “terminal trackage rights and reciprocal switching jurisdiction” would be “transferred . . . under existing standards with minor modifications for large Class I railroads’ transactions”).

Indeed, the Conference Report on ICCTA shows that Congress was not reticent to direct the interpretation and application of an access standard when it chose to do so and when it thought the agency needed clarification. For example, the Conference Report specifically stated that local transportation authorities “could invoke the remedies of [the statute providing access to terminal facilities] ... based on the existing public interest standard” and “a local transportation authority’s request would virtually always satisfy the public interest standard.” *Id.* at 184. In contrast, Congress re-enacted the reciprocal switching statute and *Midtec*’s “existing standards” with no further comment or direction. The Chairman of the House Transportation and Infrastructure Committee, Congressman Bud Shuster, confirmed that there was to be no change to the “existing standards” in his remarks seeking adoption of the Conference Report by the House.

Some people are claiming that the conference report vastly expands the capability of freight railroads to obtain access to other railroads’ facilities. This is incorrect. The statement of managers is intended to provide clarification specifically for certain railroads owned or operated by public authorities.<sup>16</sup>

The Notice is thus wrong to say that the legislative history shows only “[m]ere reenactment” of the reciprocal switching provision and not “approval” of the ICC’s administrative interpretation. Notice at 11. That assertion ignores that the ICC advised Congress of its interpretation of the reciprocal switching provision in the Staggers Act and that Congress held hearings at which there were demands that Congress overturn *Midtec* “so that all shippers are permitted access to more

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<sup>16</sup> 141 Cong. Rec. 15600, December 22, 1995.

than one Class I railroad.”<sup>17</sup> It ignores that USDOT specifically urged Congress to make “no change” to existing rules that allowed access “on a very limited basis.”<sup>18</sup> And it ignores Congress’s explicit rejection of calls to amend the statute to allow greater “market access” and its determination instead to maintain “existing standards.”<sup>19</sup>

In this context, Congress’s choice to re-enact the Staggers Act provision verbatim and to reject broader “market access” proposals is fairly understood as ratifying the ICC’s interpretation. *See AAR*, 564 F.2d at 494 (where Congress reenacted statutory language in spite of pleas to repeal the agency’s interpretation of that language, Congress was deemed to have “affirmatively intended to adopt the Commission’s well-established interpretation,” and the “Commission was thus precluded . . . from radically changing its interpretation of that provision”).

Finally, the conclusion that Congress ratified the *Midtec* interpretation in the ICCTA is further confirmed by the fact that since Congress enacted the ICCTA in 1995, there have been at least 18 bills introduced in the House or Senate that would have lowered the standard for obtaining an order to force reciprocal switching or terminal access.<sup>20</sup> None passed. And these bills were not left to languish by an

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<sup>17</sup> *See infra* at 24 (quoting *ICC Authority Hearings* at 259-60, 534, 496)

<sup>18</sup> *See infra* at 25 (quoting *ICC Authority Hearings* at 17-18, 221).

<sup>19</sup> *See infra* at 66 (quoting S. REP. NO. 104-176, at 9-10 (1995); H.R. REP. NO. 104-311, at 84, reprinted in 1995 U.S.C.C.A.N. 793, 796).

<sup>20</sup> *See, e.g.*, Rail Shipper Fairness Act of 2015, S. 853, 114th Cong., Section 3 (2015) (overturn *Midtec* and require competitive switching in certain circumstances); Surface Transportation Board Reauthorization Act of 2011, S. 158, 112th Cong., Section 302 (2011) (overturn *Midtec*); Surface Transportation Board

uninterested Congress. Numerous hearings were held on these bills over the past 17 years.<sup>21</sup> Government Accountability Office Reports and Congressional Research Service Reports were commissioned.<sup>22</sup> And there were consistent efforts by proponents and opponents of the legislation to present their respective positions to Congress.

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Reauthorization Act of 2009, S. 2889, § 303 (2009); Railroad Competition and Service Improvement Act of 2007, S. 953, 110th Cong., § 104 (2007); Railroad Competition and Service Improvement Act of 2007, H.R. 2125, 110th Cong., § 104 (2007); Railroad Competition Improvement and Reauthorization Act of 2005, H.R. 2047, 109th Cong., § 5; Railroad Competition Act of 2006, S. 2921, 109th Cong., § 104 (2006); Railroad Competition Act of 2005, S. 919, 109th Cong., § 102 (2005); Railroad Competition Act of 2003, H.R. 2924, 108th Cong., § 5 (2003); Railroad Competition Act of 2003, S. 919, 108th Cong., § 5 (2003); Surface Transportation Board Reform Act of 2003, H.R. 2192, 108th Cong., § 104 (2003); Railroad Competition Act of 2001, S. 1103, 107th Cong., § 103 (2001); Surface Transportation Board Reform Act of 2001, H.R. 141, 107th Cong., § 104 (2001); Railroad Competition and Service Improvement Act of 1999, H.R. 2784, 106th Cong., § 7 (1999); Railroad Competition and Service Improvement Act of 1999, S. 621, 106th Cong., § 7 (1999); Surface Transportation Board Reauthorization Act of 1999, H.R. 3163, 106th Cong., § 6 (1999); Surface Transportation Board Reform Act of 1999, H.R. 3446, 106th Cong., § 104 (1999); Surface Transportation Board Modernization Act, H.R. 3398, 106th Cong., § 12 (1999).

<sup>21</sup> See, e.g., *Railroad Shipper Concerns: Hearing Before the Subcomm. on Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong. (July 31, 2011); *Rail Competition and Service: Hearing Before the House Comm. on Transp. and Infrastructure*, 110th Cong. (Sept. 25, 2007); *Oversight Hearing on the Surface Transp. Bd.: Hearing Before the Subcomm. On Surface Transp. and Merchant Marine of the Senate Commerce Comm.*, 107th Cong. (Mar. 21, 2001).

<sup>22</sup> See e.g., GAO Reports GAO-07-94, *Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity and Should Be Addressed* (Oct. 6, 2006); GAO/RCED 99-46, *Railroad Regulation: Current Issues Associated with the Rate Relief Process* (Apr. 29, 1999); CRS Reports For Congress RL30180, *Surface Transportation Board Authorization and Rail Competitive Access: Current Law Compared with S. 98, S. 621, and S. 747* (May 20, 1999); RL34186 *Rail Transportation of Coal to Power Plants: Reliability Issues* (Sept. 26, 2007); RL34117, *Rail Access and Competition Issues* (Jan. 10, 2008).

Still further evidence of Congress’s ratification of the current standards can be found in its enactment of the STB Reauthorization Act of 2015. The STB Reauthorization Act itself made no changes to Section 11102. But in passing the new legislation, Congress chose to ignore another bill then also pending (and still pending in the current Congress) which would have essentially overturned *Midtec* and allowed the Board to do what it is now considering.<sup>23</sup> If Congress wished to modify the current standard, it had a clear opportunity to do so by incorporating language from another pending bill that had already been introduced. Instead, it left the existing standards in place.

Although courts are reluctant “of attributing significance to Congress’ failure to act, a refusal by Congress to overrule an agency’s construction of legislation” is evidence that the agency’s construction is the one Congress intended, “particularly where the administrative construction has been brought to Congress’ attention through legislation specifically designed to supplant it.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

In short, the Board has no statutory authority to issue the proposed rule based on a construction of the statute that is fundamentally at odds with the *Midtec* construction that Congress ratified in ICCTA and has repeatedly refused to change in the decades since that ratification.

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<sup>23</sup> S. 853, The Rail Shipper Fairness Act of 2015.

### **III. THE PROPOSED RECIPROCAL SWITCHING RULE WOULD BE AN UNLAWFUL DEPARTURE FROM THE STB'S LONGSTANDING INTERPRETATION OF THE STAGGERS RAIL ACT.**

Even if the Board did have statutory authority to promulgate the proposed rule, the rule would still be an unlawful and unexplained departure from the Board's longstanding interpretation of the Staggers Act. An "agency cannot silently depart from previous policies or ignore precedent. [A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Community for Cmty. Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (citation omitted). The Notice does not meet that standard. Although it acknowledges that the Board is proposing to change the reciprocal switching rule, it ignores that the current rule is based on the same policies that animate other rules that together establish the central features of the Staggers Act regulatory scheme. The Notice wholly fails to acknowledge, let alone explain, how the proposed rule is consistent with the Board's broader policies and holistic interpretation of the Act. *See WLOS TV, Inc. v. FCC*, 932 F.2d 993, 998 (D.C. Cir. 1991) (reversing agency that "failed to explain or even recognize its departure from agency precedent"). No such explanation is possible. As explained below, the proposed rule is fundamentally at odds with the policies that underlie three central features of the Staggers Act regulatory scheme.

#### **A. The Notice Departs From Longstanding Congressional and Agency Policy Supporting Differential Pricing.**

First and foremost, the proposed rule is at odds with the core regulatory principle that railroads must be permitted to engage in differential pricing. The

Board (and the ICC before it) have long recognized that “the cost structure of the railroad industry necessitates differential pricing of rail services,” *Coal Rate Guidelines*, 1 I.C.C. 2d 520, 526 (1985), and that the Staggers Act gives railroads “considerable freedom to employ demand-based differential pricing provided that such rates [are] reasonable,” *Duke Energy Co. v. Norfolk S. Ry. Co.*, 7 S.T.B. 89, 95 (2003). Indeed, the Board has said that it is a “core regulatory principle in the rail industry” that “a railroad must be able to engage in some form of demand-based differential pricing to have the opportunity to earn adequate revenues.” *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657, at 20 (Sub-No. 1) (STB served Oct. 30, 2006). As the Board has recognized, “[t]he need for such demand-based differential pricing is due to the presence of traffic with competitive alternatives. If the carrier were required to charge all its shippers the same markup over cost, the competitive traffic with lower-cost alternatives would be diverted to those other transportation alternatives.” *Id.*<sup>24</sup>

The Board has therefore consistently held that it is reasonable for rail carriers to charge higher rates on routes where demand is less elastic because the shipper has fewer transportation options, and it has adopted a rate reasonableness methodology that constrains the rates that can be charged for such routes while also

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<sup>24</sup> See also *Amstar Corp. v. ATSF*, 1995 ICC LEXIS 256, at \*12-13 (Sept. 15, 1995) (“there is a large amount of common (unattributable) costs inherent in the railroad industry cost structure, and the mix of competitive and captive traffic handled by railroads prevents a carrier from being able to recover a pro rata portion of those common costs from all traffic. Therefore, railroads must be able to price their services differentially so as to recover a greater percentage of their common costs from traffic with a greater degree of captivity (*i.e.*, less demand elasticity)).”

ensuring that the railroads earn adequate revenues. *See Coal Rate Guidelines Nationwide*, 1 I.C.C. 2d 520 (1985); *Rate Guidelines—Non-Coal Proceedings*, 1 S.T.B. 1004 (1996). This methodology is based on sound economic principles and has been upheld by the courts. *See, e.g., BNSF Ry. Co. v. STB*, 526 F.3d 770 (D.C. Cir. 2008); *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). The proposed rule is flatly inconsistent with these principles.

The Notice presumes that the supply and demand for transportation services is causing rail rates for some shippers to be too high—a premise in direct conflict with the principle that railroads may engage in demand-based differential pricing. And it presumes that existing rate regulation does not provide adequate protection to shippers who do not have the benefit of effective intramodal or intermodal competition—a premise in direct conflict with the Constrained Market Pricing principles the Board uses to set the limits of reasonable rates.

The Notice nowhere explains why either of these presumptions is correct. It never explains why existing rate regulation is not adequate to protect shippers without effective competition.<sup>25</sup> And it never explains why any shippers should get an exemption from the general rule of demand-based pricing. In fact, the Notice *expressly concedes* that making an exception for a subgroup of shippers “would lead to problems regarding fairness among different categories of shippers.” Notice at 13. That is why the Notice proposes a rule that would make the reciprocal

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<sup>25</sup> InterVISTAS, *An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification*, at 134 (Sept. 14, 2016) (“In sum, the STB’s Full-SAC method has stood the test of time as a maximum rate reasonableness methodology”) (“InterVISTAS Report”).

switching “remedy” available to “*all shippers*” on a “case-by-case basis.” *Id.* at 13 (emphasis added). But that wholly fails to address the fundamental question of why there needs to be *any* exception to the general rule that railroads may engage in demand-based differential pricing, subject to the Board’s authority to ensure the reasonableness of the rates charged to shippers without effective competition.

**B. The Notice Departs From Congressional and Agency Policy Allowing Railroads to Protect Their Long Hauls.**

Relatedly, the proposed rule is inconsistent with the Board’s prior decision to interpret the “competitive access” provisions of the Staggers Act—the provisions governing through rates and reciprocal switching—in a manner that protects a carrier’s right not to be short-hauled and enables railroads to earn adequate revenues. Specifically, the Board has long interpreted the statute as allowing carriers generally to “protect their single-line or existing through routes by declining to establish other possible through routes” unless it can be shown, under the current rules, that “the alternative routes sought are more efficient, or that the carriers have exploited their market power by providing inadequate service over their existing through routes.” *Bottleneck I*, 1 S.T.B. at 1066. At the same time, the Board rejected an argument that the statute was “meant to require the government to create additional, competitive rail through routes simply upon demand.” *Id.* at 1067. Instead, the statute “provides maximum rate regulation that would act to protect shippers against excessive rates.” *Id.* at 1067, n.17.

Protecting the bottleneck carrier’s long haul rates, the Board explained, “assists carriers in achieving revenue adequacy.” *MidAmerican Energy Co. v. STB*,

169 F.3d 1099, 1107 (8th Cir. 1999). As a result, the Board has refused to use reciprocal switching as an indirect way for a shipper to obtain lower rates. *Midtec Paper Corp. v. ICC*, 1 I.C.C. 2d 362, 365 (1985) (“a mere preference for the opportunity to obtain lower rates is not sufficient”). If rates are too high, shippers can use the rate regulation provisions to ask the Board to order rates that are “reasonable,” 49 U.S.C. § 10704(a). But an order for reciprocal switching is only to be used “to remedy or to prevent an act [that is] contrary to the competition policies of Section 10101a, or is otherwise anticompetitive,” *Intramodal Rail Competition*, 1 I.C.C. 2d at 830; *see supra*.

The proposed rule is inconsistent with these precedents. It gives shippers that are served by one railroad and lack effective competition the right to force open interchanges and obtain what is effectively a regulated rate on the small “bottleneck” segment—a result that is in direct conflict with the Board’s “bottleneck” precedents that protect a carrier’s long haul unless it engages in anticompetitive conduct. Indeed, the proposed rule goes even farther, holding out the possibility that even shippers that have the benefit of effective intermodal competition may still be able to obtain a reciprocal switching order to break up the originating carrier’s long haul and obtain even lower rail rates. *See Proposed Rule § 1145.2(a)(1)*. Unless the Board adopts an appropriately compensatory pricing methodology that includes lost contribution (*see infra* at § VII), Board-ordered reciprocal switching will result in the substantial revenue shortfalls that the bottleneck precedents and the current rate regulatory scheme were designed to

avoid. That revenue shortfall, in turn, will lead either to *higher* rail rates for those shippers that do not have lower-priced intermodal alternatives, or to cuts in rail investment or rail service.<sup>26</sup> The Notice wholly fails to explain why the proposed rule will not have this effect, even though it acknowledges that the expanded use of Board-ordered reciprocal switching to benefit some shippers “could have adverse effects” on shippers that do not receive similar reciprocal switching orders. Notice at 14-15.

**C. The Notice Departs From Agency Policy Promoting the Elimination of Unnecessary Terminals and End-to-End Service.**

The proposed rule is also inconsistent with the Board’s view that elimination of unnecessary terminal facilities is in the public interest and that it is ordinarily more efficient for a single carrier to provide end-to-end service than for it to switch with other carriers. Significantly, the Board’s view is the product of the negative consequences that ensued in the decades before the enactment of the Staggers Act when the ICC followed the opposite policy. At that time, the ICC required rail carriers to maintain “all existing routes and gateways” when they merged. *See Traffic Protective Conditions*, 366 I.C.C. 112, 114 (1982). Experience showed, however, that this requirement prevented carriers from “winnowing out inefficient routes” and undertaking efforts “to rationalize their systems.” *Id.* at 112, 114. But instead of making the railroad industry more competitive, these open access

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<sup>26</sup> *See, e.g.,* Lauritis R. Christensen Associates, Inc., *An Update to the Study of Competition in the U.S. Freight Railroad Industry: Final Report*, at ii (Jan. 2010) (reiterating “one of our original conclusions: providing significant rate relief to some shippers will likely result in rate increases for other shippers or threaten railroad financial viability”).

provisions impeded railroads from competing effectively with other modes of transportation. *Id.* The Department of Justice urged the ICC not to impose them, saying they “lead to a wasteful allocation of resources and prevent the lowering of rates.” *Id.* at 137. The ICC agreed, concluding that requiring carriers to keep open routes “prevent[s] market forces from efficiently allocating railroad resources.” *Id.* at 130.

In the decades that followed, the ICC and the Board repeatedly approved of end-to-end transactions, and refused to restrict many mergers of railroads that provide end-to-end service, because single-line service is more efficient than multi-line service.<sup>27</sup>

The reasons why single-line service is efficient and provides benefits to shippers include:

- “A single-line route can make more efficient use of equipment. It can have a more efficient fleet exhibiting faster turnaround time and improved loading ratios. These efficiencies are achieved by the elimination of interchanges, a common equipment placement program,

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<sup>27</sup> See, e.g., *Kansas City Southern-Control-The Kansas City Southern Ry. Co. et al.*, STB Finance Docket No. 34342, slip op. at 17 (served Nov. 29, 2004) (approving an end-to-end transaction and noting that the transaction will “benefit shippers by enabling KCS to offer expanded single-line service”); *Union Pac. Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co.- Control and Merger – S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Sw. Ry. Co., SPCSL Corp., and the Denver and Rio Grande W. R.R. Co.*, 1 S.T.B. 233, 535 (1996) (Vice Chairman Simmons, Commenting) (“Furthermore, on the whole, divestiture would not benefit shippers, inasmuch as many current single-line moves would become two-line or three-line moves, wiping out the efficiencies of single-line service.”); *Union Pacific Corp., Union Pac. R.R. Co. and Missouri Pac. R.R. Co. – Control – Chicago and North Western Transp. Co. and Chicago and North Western Ry. Co.*, 1995 ICC LEXIS 37, at \*\*181-82 (1995) (“We find that common control will enable UP and CNW to improve railroad service in new as well as existing markets. There are substantial efficiencies in single-line service compared to joint-line service.”).

more accurate and responsive monitoring of the fleet, and the pre-blocking of cars, as well as a quicker response to equipment supply problems that may develop.”

- “A single-line route can provide more consistent and reliable service, which accrues to the benefit of shippers and consumers.”
- “Shippers will benefit because improved efficiency and shorter transit times will allow them to reduce their inventories and thereby lower their operating costs and increase their efficiency.”
- “Single-line operation is more efficient than multi-line operation.”

*Rio Grande Indus., Inc. SPTC Holding, Inc. and the Denver and Rio Grande W. R.R. Co. – Control – S. Pac. Transp. Co.*, 41 I.C.C. 2d 834, 894-96 (1988).

The forced reciprocal switching authorized by the proposed rule would negate all of the efficiencies of single-line operations. Under the proposed rule, the Board would order potentially costly and unnecessary traffic exchange even where the service at issue could be more efficiently provided on an end-to-end basis by a single carrier. The Notice wholly fails to acknowledge that forced reciprocal switching will create these inefficiencies, much less explain why the Board is adopting a rule that would break up the efficient single-line service the Board has encouraged for decades as beneficial to the railroad industry and the public it serves.

#### **IV. THE BOARD’S CITED REASONS FOR CHANGING THE RECIPROCAL SWITCHING REGULATION ARE ARBITRARY AND CONTRADICTED BY THE EVIDENCE.**

Even assuming the Board has the statutory authority to alter fundamentally the regulatory regime that has governed the industry for decades (which, as explained above, it does not), the change would be lawful only if the agency can “show that there are good reasons for the new policy.” *FCC v. Fox Television*

*Stations, Inc.*, 556 U.S. 502, 515 (2009). In addition, the agency may not rely “on factors which Congress has not intended it to consider,” fail “to consider an important aspect of the problem,” or offer “an explanation for its decision that runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass’n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And when, as here, the new policy rests “upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests,” the agency must provide a more substantial justification. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209-10 (2015) (quoting *Fox Television Stations*, 556 U.S. at 515-16). The Notice wholly fails to meet that heightened burden.

The Notice fails to address the serious reliance interests that have developed under the Board’s prior interpretation. As CSXT’s CEO Michael Ward explains in his verified statement (attached hereto), CSXT has made massive investments in railroad infrastructure in reliance on the Board’s established policies.<sup>28</sup> There is already significant risk in any investment including market-based risk and the existing regulatory risk.<sup>29</sup> But CSXT and other railroads are able to balance those risks within the existing regulatory regime. Specifically, the Board’s authorization of reasonable differential pricing provides CSXT and other railroads a meaningful ability to recover those enormous fixed and sunk costs.<sup>30</sup> This ability enables both

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<sup>28</sup> See Ward V.S. at 3-8 (describing \$2.7 billion in overall capital spending in 2016 and specific current and recent capital projects throughout the network).

<sup>29</sup> See *id.* at 8-10.

<sup>30</sup> See *id.* at 11 (“CSXT and its shareholders and investors have long relied upon a stable regulatory regime, which includes the ability to differentially price.”).

significant past investments like the acquisition of Conrail and present and future investments in capacity enhancements and terminal facilities.<sup>31</sup> CSXT and other railroads have made investments and business decisions in reliance on the existing, successful regulatory framework. The Notice does not contain any adequate justification for upsetting those reliance interests.

Further, the reasons the Board cites for changing the reciprocal switching regulation are contradicted by the record, by basic economic principles, and by numerous prior findings of the Board that underlie the current regulations. *See infra* §§ IV.A – IV.C. The proposed rule is therefore arbitrary and capricious and should not be adopted by the Board. *See, e.g., Graphic Commc’ns Int’l Union, Local 554 v. Salem-Gravure*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) (an agency acts arbitrarily and capriciously when it departs from “precedent without a reasoned explanation”); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (“where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious”).

**A. The Fact that Shippers Have Not Filed Petitions for Reciprocal Switching in Many Years Is Not a Sufficient Reason to Change the Current Rule.**

The Notice states that the current rule needs to be changed because the requirement that the originating carrier has engaged in “anticompetitive conduct” has “proven, over time, to set an unrealistically high bar for shippers to obtain reciprocal switching, as demonstrated by the fact that shippers have not filed

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<sup>31</sup> *See, e.g., id.* at 11-13 (discussing CSXT rationale for investing in the Conrail acquisition).

petitions for reciprocal switching in many years, despite expressing concerns about competition.” Notice at 8. That rationale is based on premises that are inconsistent with two principles that are fundamental to the regulatory scheme established by the Staggers Act.

As a matter of logic, the fact that shippers are not filing reciprocal switching petitions does not demonstrate that the current rule sets “an unrealistically high bar.” Instead, the logical inference is that shippers are not filing petitions for reciprocal switching because they do not have evidence that railroads are engaging in anticompetitive conduct. That inference is supported by the fact that the current rule allows petitions to be filed by *other rail carriers* as well as by shippers. *See* 49 C.F.R. § 1144.2(a)(2) (discussing facts that complaining shipper or complaining carrier must show). If originating carriers are abusing their market power and refusing to deal with other carriers to offer more efficient through routes to various destinations, the other carriers that serve those destinations would have the ability and incentive to file their own petitions seeking relief under the reciprocal switching regulations.

The lack of reciprocal switching petitions thus shows that the shippers’ expressed “concern” about “competition” is not a concern that any rail carrier is doing anything to *suppress or impair* competition. It is instead an expression of dissatisfaction with their competitive position in the market and their inability to negotiate rates “equal to the average ‘competitive rate’” that would result from “full competition.” Notice at 8, n.7 (quoting NITL Hearing Presentation). But, as

explained above, the Staggers Act is built on the premise that rail carriers will engage in differential pricing, and thus that shippers with limited transportation options will pay higher rates than shippers with more transportation options. *See supra* pp. 31-34. Differential pricing is not a problem that the Board needs to fix. It is rather a cornerstone of railroad economics—a cornerstone that Congress itself laid. The statutory protection for shippers without effective competitive options is rate regulation to ensure that their rates are “reasonable,” 49 U.S.C. § 10701(d), not a competitive switching remedy so they can attempt to lower their rates to the “competitive” rate or “reduced competition” rate the shippers desire.

Some shippers have complained that it is too expensive or time-consuming to challenge their rates, and they want the Board to alter the reciprocal switching rule so that Board-mandated reciprocal switching can become a cheaper, easier way to get regulatory intervention that lowers their rates. That approach, however, is foreclosed by the STB Reauthorization Act of 2015, Pub. L. No. 114-110, which addressed shippers’ concerns about the cost and complexity of rate cases. The solution Congress chose was not to instruct the Board to order reciprocal switching to lower rates. Congress instead instructed the Board to “maintain procedures to ensure the expeditious handling of challenges to the reasonableness of railroad rates,” and imposed statutory deadlines for the completion of discovery, the development of the record, the closing of briefing, and the issuance of the Board’s decision. Pub. L. No. 114-110, § 11(b)(2), 129 Stat. 2228, 2233 (codified at 49 U.S.C. § 10704(d)). And for “those cases in which a full stand-alone cost presentation is too

costly, given the value of the case,” Congress directed the Board to “maintain 1 or more simplified and expedited methods for determining the reasonableness of challenged rates.” Pub. L. No. 114-110, § 11(a), 129 Stat. at 2233 (codified at 49 U.S.C. § 10701(d)(3)).

At the same time, Congress made clear that rates can be reasonable even if they are higher than the rates that would obtain if there were more competition. The Senate Report expressly acknowledged that the Staggers Act permits “railroads to charge lower rates to their customers who operate in a competitive environment and higher rates to customers who are ‘captive’ to one railroad carrier for transportation service (*i.e.*, demand-based differential pricing).” S. REP. NO. 114-52, 114th Cong., 1st Sess. 2 (2015). Nothing in the STB Reauthorization Act of 2015 changes that. Quite the contrary, Congress in that statute “clarif[ied] that a carrier’s capability to meet its current and future service needs is relevant when considering revenue adequacy.” *Id.* at 8. It therefore amended the statute to state expressly that carriers should be permitted to earn revenues adequate “for the infrastructure and investment needed to meet the present and future demand for rail services,” Pub. L. No. 114-110, § 16, 129 Stat. at 2238, as well as to “cover total operating expenses . . . , plus a reasonable and economic profit or return (or both) on capital deployed in the business.” 49 U.S.C. § 10704(a)(2).

The Board has no authority to substitute a reciprocal switching remedy for the rate regulation remedy chosen by Congress or to impose a reciprocal switching charge that impairs the carrier’s ability to attain revenue sufficiency.

**B. Consolidation in the Railroad Industry Is Not a Sufficient Reason to Change the Current Rule.**

The Notice is also wrong to suggest that increased consolidation in the Class I railroad sector could justify the proposed rule. *See* Notice at 9.

First, the Notice cites no evidence that increased consolidation in the Class I railroad sector has caused shippers to incur price increases. The update to the *Christensen Report*, which the Board itself commissioned, dispels any such suggestion. It concluded that price increases were the result of changes in railroad costs, not in market power. *See* Christensen, *An Update to the Study of Competition in the U.S. Freight Railroad Industry*, at pp. 4-7.

Second, the Notice cites no evidence that merger activity has increased the number of shippers that are served by only one railroad and need the protection of mandated reciprocal switching. In fact, the Board routinely requires divestitures or grants trackage rights in instances where a merger would reduce a shipper's rail transportation options from two to one. *See, e.g., W. Coal Traffic League v. Surface Transp. Bd.*, 169 F.3d 775, 777 (D.C. Cir. 1999).

Third, the proposed rule cannot be justified by the supposed reduction in "competitive options for some shippers" occasioned by the "consolidation of Class I carriers and the creation of short lines that may have strong ties to a particular Class I." Notice at 9. Even assuming that this consolidation "reduces the chance of naturally occurring reciprocal switching as carriers seek to optimize their large networks," *id.*, it does not justify the Board issuing a reciprocal switching order to break up this consolidation.

The Board's assertion that "consolidation" has harmed shippers flies in the face of the Board's express findings in each of these mergers that they were in the public interest. In assessing a merger, the Board must find that the merger is consistent with the "public interest." 49 U.S.C. § 11344(c). Further, it must consider whether the merger "would have an adverse effect on competition among rail carriers." 49 U.S.C. § 11234(b)(5). If it does, the Board's policy is impose merger conditions to remedy any potential harms. *See* 49 U.S.C. § 11324(c); 49 C.F.R. § 1180.1(d). Specifically, the Board has, since at least 1980:

Consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis. The overall result, so far, has been that railroads have continued to face effective competition, either from other railroads or other modes, that has forced them to pass on the preponderance of the significant efficiency gains that they have achieved (through mergers and other means) to the shippers that they serve.

*Major Rail Consolidation Procedures*, 5 S.T.B. 539, 548-49 (2001). It is not open to the Board now to claim, without any analysis whatsoever, that the "consolidation" the Board approved as being in the public interest has instead resulted in a reduction of rail competition that harms the public interest.

Every one of the decisions approving railroad mergers and consolidations involving Class I carriers since enactment of the Staggers Act has included detailed analyses of the impacts of the proposed transaction on competition and on essential services to rail customers:

- BN-Frisco: “Approval of this merger, as conditioned, will have a beneficial effect on the adequacy of transportation to the public.... Clearly, the merger will heighten intramodal competition.”<sup>32</sup>
- Chessie and Seaboard System Railroads: “We believe the consolidation will have some procompetitive effects. Increased competition will result from the combination of Family Lines and Chessie routes and existing traffic flows, greatly increasing the territorial penetration of both systems.”<sup>33</sup>
- Norfolk & Western-Southern: “The NS consolidation enhances competition. Indeed, the record before us would not permit any other conclusion.”<sup>34</sup>
- UP-MP-WP: “The public benefits of this consolidation are attributable to service improvements, cost reductions resulting from operating efficiencies, *enhanced competition*, and a stronger financial position for the consolidated system.”<sup>35</sup>
- UP-MKT: “[T]he transaction, as conditioned herein, will not significantly reduce competition in any market.”<sup>36</sup>
- BN-SF: “The evidence demonstrates that common control of BN and Santa Fe will be in large part pro-competitive: it will stimulate price and serve competition in markets served by the merged carrier, and shippers will experience lower rates and improved service over many routes. The evidence further demonstrates that, with the competitive conditions we are imposing, common control will result in no meaningful reduction in transportation competition, and that

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<sup>32</sup> *Burlington Northern, Inc. – Control and Merger – St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788 at 935, 939 (1980).

<sup>33</sup> *CSX Corp. – Control – Chessie Sys., Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521, 574 (1980).

<sup>34</sup> *Norfolk Southern Corp. – Control – Norfolk and Western Ry. Co. and Southern Ry. Co.*, 366 I.C.C. 173, 216 (1982).

<sup>35</sup> *Union Pac. Corp., Pac. Rail Sys., Inc. and Union Pac. R.R. Co. – Control – Missouri Pac. Corp. and Missouri Pac. R.R. Co.*, 366 I.C.C. 459, 489 (1982)(emphasis added).

<sup>36</sup> *Union Pacific Corp., Union Pacific R.R. Co. and Missouri Pac. R.R. Co. – Control – Missouri-Kansas-Texas R.R. Co., et al.*, 4 I.C.C. 2d 409, 520 (1988).

transportation competition will be as robust and effective following the merger as it is presently.”<sup>37</sup>

- UP-SP: “The conditions we are imposing will effectively mitigate the competitive harms of the merger while preserving its benefits...the merger as conditioned clearly will be pro-competitive in the sense that it will stimulate price and service competition in markets served by the merged carriers.”<sup>38</sup>
- Conrail: “Because the transaction as conditioned will result in no instances of significant competitive harm, and will significantly increase competition for many shippers, *the clear impact of this transaction is to create a substantial increase in rail-to-rail competition, and not a reduction.*”<sup>39</sup>
- CN-IC: “[T]he transaction, as conditioned, will result in no competitive harm. It will not diminish competition among rail carriers either in the affected region or in the national rail system. Indeed, the transaction should enhance competition, especially for north-south traffic.”<sup>40</sup>

Courts have repeatedly upheld the Board’s findings of pro-competitive effects of mergers in the rail industry. For example, in upholding the Board’s approval of the Burlington Northern and Santa Fe merger, the D.C. Circuit found that “the Commission’s findings as to competitive harm [are] supported by substantial

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<sup>37</sup> *Burlington Northern Inc. and Burlington Northern R.R. Co. – Control and Merger-Santa Fe Pac. Corp. and The Atchison, Topeka and Santa Fe Ry. Co.*, 10 I.C.C. 2d 661, 733 (1995).

<sup>38</sup> *Union Pac. Corp., Union Pacific R.R. Co., and Missouri Pac. R.R. Co. – Control and Merger – Southern Pac. Rail Corp., Southern Pac. Transp. Co., St. Louis Sw. Ry. Co., SPCSL Corp., and The Denver and Rio Grande W. R.R. Co.*, 1 S.T.B. 233, 375 (1996).

<sup>39</sup> *CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp.*, 3 S.T.B. 196, 248 (1998).

<sup>40</sup> *Canadian Nat’l Ry. Co., Grand Trunk Corp., and Grand Trunk W. R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago, Cent. and Pac. R.R. Co. and Cedar River R.R. Co.*, 4 S.T.B. 122, 143 (1999).

evidence” and engaged in an extensive review of the competitive analysis undertaken by the Board.<sup>41</sup>

Simply stated, no Class I rail merger or consolidation in at least the past 36 years has resulted in an unremedied reduction in intramodal competition. It is simply inaccurate to state that such consolidations, in conjunction with the creation of short lines that “may have strong ties to a particular Class I” carrier, “could lead to reduced competitive options for some shippers.” Notice at 9. Transactions resulting in “reduced competitive options” have been conditioned where appropriate in the decisions approving them, and Board oversight and monitoring in virtually all of those transactions has ensured that conditions imposed to address loss of direct rail competition have been effective.

Nor can the proposed rule be justified on the implicit assumption that consolidation harmed shippers by eliminating “competition” for a portion of a move by allowing an originating carrier to merge with the only carrier providing service to a destination, thereby allowing it to provide single-line service from origin to destination. Any such justification would be flatly inconsistent with the Board’s prior refusal to impose trackage rights in that situation because the “merger would

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<sup>41</sup> *W. Resources, Inc. v. Surface Transp. Bd.*, 109 F.3d 782 (D.C. Cir. 1997); *see also* *W. Coal Traffic League v. Surface Transp. Bd.*, 169 F.3d 775, 780 (D.C. Cir. 1999) (upholding STB’s approval of the UP/SP merger and the Board’s determination that the merger would expand source competition). *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 247 F.3d 437, 445 (2d Cir. 2001) (upholding the Board’s determination that the NS/CSXT Conrail acquisition would improve competition); *Kansas City S. Indus., Inc. v I.C.C.*, 902 F.2d 423, 432 (5th Cir. 1990) (upholding the ICC’s finding that the merger of the Rio Grande and Southern Pacific would result in “unquantifiable benefits of increased competition in the Central Corridor”).

have no adverse effect on shippers even if the resulting single-line carrier . . . were to foreclose competition from the remaining independent origin carriers.” *W. Resources, Inc. v. STB*, 109 F.3d 782, 787 (D.C. Cir. 1997). The “one-lump theory” explains why this type of merger—which allows the newly merged carrier to provide more efficient single-line end-to-end service—does not have an adverse effect on railroad customers.

Under the “one-lump theory,” “there is only one monopoly profit to be gained from the sale of end-product or service.” *Id.* The reason is that “[b]ecause a monopolist at the end stage of production is in a position to capture that entire profit, integration backwards upstream, even when accompanied by monopolization of the earlier stages . . . normally does not enable it to raise the profit-maximizing price and thus inflicts no harm on the ultimate consumer.” *Id.*

The ICC also rejected the shippers’ prediction that the consolidated railway “would bar unaffiliated origin carriers from participating in traffic movement, regardless of their relative efficiencies. It reasoned that if an independent origin carrier could transport coal at a lower incremental cost, then the bottleneck railway would have an incentive to choose that carrier over its own, affiliated carrier, just as firms in the rest of the economy make ‘make or buy’ decisions for all elements of their production.” *Id.* The D.C. Circuit affirmed this decision as economically sound and consistent with the Staggers Act. *Id.*

The Notice does not acknowledge any of these precedents or explain how the Notice can be reconciled with economic theories that the agency and courts have

long accepted. Nor does the Notice explain why the public interest or the need for competitive rail service requires the Board to use compelled reciprocal switching to break up mergers the Board previously found to be in the public interest and not harmful to railroad customers.

**C. The Improved Economic Health of the Railroad Industry Is Not a Sufficient Reason to Change the Current Rule.**

Finally, the fact that the “overall economic health of the rail industry” has improved since the 1980s when the current reciprocal switching rule was promulgated (Notice at 9) is no reason to change the rule now. The opposite is true.

The Notice properly acknowledges that “[i]n the 1980s, the rail industry was reeling from decades of inefficiency and serial bankruptcies.” *Id.* It fails to acknowledge, however, that this was because of over-regulation by the ICC that forced rail carriers to keep open inefficient routes and deprived carriers of the ability to engage in differential pricing.<sup>42</sup>

The current reciprocal switching regulations, along with the bottleneck and differential pricing precedents discussed above, and together with sound rate regulation are an important reason why the “U.S. freight railroad industry has undergone a remarkable transformation since the enactment of the Staggers Rail Act of 1980.” S. REP. NO. 114-52, at 1. These rules and precedents allow carriers to

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<sup>42</sup> See, e.g., S. REP. NO. 114-52, at 1 (“In the decades preceding the enactment of the Staggers Act, railroads experienced traffic losses due in part to regulatory policies and procedures that prevented railroads from easily adjusting their rates to reflect changing market or cost environments”); *Baltimore Gas*, 817 F.3d at 111 (discussing how pre-Staggers Act “regulatory barriers” made it “very difficult” for railroads “to adjust prices in accordance with costs” and to “compete with other modes of transportation such as trucks, barges and pipelines”); *supra* pp. 31-34.

protect their long-hauls and to set prices that the market will bear, unless the carriers abuse their market power by providing inadequate service or engaging in anticompetitive acts.

It is the height of arbitrary action to say that because these rules and precedents have restored economic health to an industry that had been subjected to inefficient and costly regulation, they can now be jettisoned and replaced with a new regulatory reciprocal switching mandate that will increase carriers' costs, impair their efficiency, and reduce their revenues.

**V. THE BOARD HAS FAILED TO CONSIDER EVIDENCE ABOUT THE NEGATIVE IMPACT OF THE PROPOSED RULE.**

In response to the Board's specific request for evidence on the empirical effects of NITL's petition for rulemaking, many parties filed comments with the Board and testified at the Board hearing on the petition. The comments and testimony contained lengthy and detailed discussion regarding the adverse effects an involuntary switching regime would create.<sup>43</sup> Indeed, the Ex Parte 711 record contains compelling evidence that making involuntary switching widely available would adversely affect operational efficiency and capital investment.

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<sup>43</sup> See, e.g., *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Opening Comments of the Association of American Railroads, at 17-21; Verified Statement of William J. Rennie Partner Oliver Wyman, Inc. (filed Mar. 1, 2013) ("AAR Comments, Oliver Wyman Statement"); NS Comments at 71-80; CSXT Comments at 24-47; *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Opening Comments and Evidence of Union Pacific R.R. Co., at 22-57 (filed Mar. 1, 2013) ("UP Comments"); *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Reply Comments of the Kansas City Southern Ry. Co., at 25-30 (filed May 30, 2013) ("KCS Reply Comments"); CSXT Reply Comments at 29-47.

Yet the Notice does not grapple with these adverse effects. The Notice acknowledges that the Board was presented with evidence “that the proposal would have serious, adverse effects on rail service, carrier revenues, network efficiency, and incentives to invest in the rail network.” Notice at 7. But these issues were then ignored. The Board failed to do any cost-benefit analysis or other comparison to weigh the purported benefits of the proposed rule to the severe negative consequences described in the existing record. Moreover, the Board has entirely failed to give any consideration to issues that it statutorily must account for in adopting involuntary switching rules, including revenue adequacy, environmental impacts, and labor protections.

**A. Involuntary Switching Would Degrade Service Quality and Reliability.**

The Ex Parte 711 record contained extensive evidence from multiple parties about the detrimental effect that an involuntary switching regime would have on railroad operations, including service to customers. CSXT submitted detailed evidence about the kinds of operational disruptions that could be expected from the proposal. The Board’s Notice contains nothing that allays these concerns. As the attached verified statement of CSXT’s Chief Operating Officer Cindy Sanborn shows, the negative operational impacts of involuntary switching orders include increased car handlings, disrupted network planning, and reduced predictability of traffic.

## 1. Involuntary Switching Will Increase Car Handlings.

As Ms. Sanborn explains, the fewer the number of handlings and interchanges, the more efficient and reliable the service.<sup>44</sup> Decreasing the number of handlings and interchanges has proven critical to improving transit times and reducing the possibility of errors that can cause lengthy and costly delays to customers. Involuntary switching would, by definition, increase the number of handlings for every forced switch.<sup>45</sup> In addition to slowing down any train affected by that extra handling—which often will include cars destined for numerous shippers and destinations and not only traffic for the shipper seeking involuntary switching<sup>46</sup>—increased handlings would decrease the overall fluidity of the network which would affect customers across the entire rail network.

The concerns voiced by Ms. Sanborn are not new. CSXT previously explained that an “overall increase in the number of required car handlings . . . would consume valuable track and yard capacity that would otherwise be available to accommodate future growth in the demand for rail service.”<sup>47</sup> Moreover, CSXT

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<sup>44</sup> See Sanborn V.S. at 3-4. In particular, Ms. Sanborn demonstrates that “there is a direct correlation between the number of times that a rail car must be switched (or otherwise handled) during its journey across the rail network and the time that it takes to complete the movement of the car from origin to destination.” *Id.* at 4.

<sup>45</sup> See *id.* at 8. Indeed, “each additional car handling would increase the transit time for that shipment by one to two full days.” *Id.* at 9.

<sup>46</sup> *Id.* 9-10 (involuntary switching “would impose significant adverse service consequences on other shippers as well. . . . Such additional stops, and the time required to switch out cars for pickup by the alternate carrier, would add to the transit time experienced by all of the cars moving in the train (thereby degrading service for shippers of all of those cars)”).

<sup>47</sup> See CSXT Comments at 35.

explained that an involuntary switching regime would increase the minimum number of car handlings required to serve the shipment from four to at least seven.<sup>48</sup> This increase “would have a significant negative impact on train service and transit time.”<sup>49</sup> Each additional car handling “could delay the arrival of such cars at their ultimate destination by 24 hours or more.”<sup>50</sup> And these delays would not merely affect the eligible shipper asserting its “right” to involuntary switching, they would affect all rail customers because all cars on a train would be affected and any traffic moving through a facility would be slowed.<sup>51</sup> These increased car handlings “result in longer transit time and poor asset utilization.”<sup>52</sup> CSXT submitted a video exhibit which demonstrated the circuitous routings and other inefficiencies that would develop from involuntary switching orders.<sup>53</sup>

Other railroads likewise warned of the negative effects that involuntary switching would have by increasing car handlings and harming network fluidity. For example, Norfolk Southern observed that involuntary switching would increase the number of handlings and “impose unnecessary operating costs onto the railroad.”<sup>54</sup> The increased handlings “would decrease shipment velocity” and reduce

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<sup>48</sup> *See id.* at 41.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 42.

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 43.

<sup>53</sup> *See* CSXT Reply Comments at Ex. 1.

<sup>54</sup> NS Comments at 74.

line-haul miles per day.<sup>55</sup> Union Pacific explained that involuntary switching “would require additional handling, and thus [Union Pacific] would need more terminal capacity, as well as more locomotives and crews to handle traffic in yards and on local trains that would be needed to move the traffic to additional interchange locations.”<sup>56</sup> KCS explained that “increased car handling will translate into added costs for shipper and carrier alike.”<sup>57</sup> AAR presented evidence that the rail network’s historic increase in productivity was because of the reduction in car handlings and that involuntary switching “would fundamentally reverse this pattern and introduce operational network complexity.”<sup>58</sup>

In short, the evidence that involuntary switching orders increase car handlings and harm the fluidity of the rail network is overwhelming, and it was completely ignored in the discussion supporting the Notice.

## **2. Involuntary Switching Will Undermine Network Planning.**

Ms. Sanborn also explains that involuntary switching would undermine network planning and rationalization, including CSXT’s adherence to a “scheduled” train service incorporated in its operating plan.<sup>59</sup> CSXT has managed to achieve

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<sup>55</sup> *Id.* at 75-76.

<sup>56</sup> UP Comments at 24-25.

<sup>57</sup> KCS Reply Comments at 27.

<sup>58</sup> AAR Comments, Oliver Wyman Statement at 7-8. *See also id.* at 16 (“Eliminating car handlings is critical, because each time a car is handled at an interchange location or in an intermediate classification yard there is a possibility of a delay that would cause the car to misconnect, delaying its planned arrival time.”).

<sup>59</sup> *See Sanborn V.S.* at 7.

service improvements system-wide by consolidating traffic onto efficient, high-volume routes<sup>60</sup> and concentrating classification and switching activity at hump yards, which allows for the efficient practice of “blocking” cars for movement across the network and even “pre-blocking” cars destined for interchange with other carriers.<sup>61</sup> But involuntary switching would undermine this planning by requiring additional switching at interchange points not designed for high-volume switching activity and by mandating less efficient routings. Indeed many interchanges cannot function as classification yards because of space and equipment. Many forced switch movements, as Ms. Sanborn discusses, would require more circuitous and inefficient routings to take interchanged traffic to a classification yard.<sup>62</sup> The use of involuntary switching would also “lock in” particular switching arrangements at particular interchanges and would make it more difficult for CSXT to improve its overall service plan or to respond to service problems that may arise.

As with increased handlings, the Board has previously been presented extensive evidence about how involuntary switching hampers network planning and rationalization. None of that evidence is addressed in the Notice. CSXT raised the issue of network planning in the earlier stages of the proceeding. CSXT previously explained that CSXT and other railroads “have rationalized their physical plant and

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<sup>60</sup> *See id.* at 4 (“An essential feature of that operating plan is to consolidate traffic flows over a small number of efficient, high-volume routes.”).

<sup>61</sup> *See id.* at 5-6.

<sup>62</sup> *See id.* at 12-13 (describing shipments being shifted to more circuitous routes that would even require some cars to move long distances in the “wrong” direction away from their final destination).

adopted more efficient operating practices, in order to reduce costs and to improve the quality and reliability of rail service.”<sup>63</sup> Involuntary switching, however, “threatens to undermine and undo the rail service efficiencies and productivity gains that have resulted from rail system rationalizations.”<sup>64</sup> Other railroads likewise showed that the adoption of involuntary switching “would reverse regulatory policies that encouraged . . . railroads to rationalize their networks, eliminate inefficient routes and interchanges, and provide more shippers with the benefits of single-line service.”<sup>65</sup> Indeed, an outside consultant for the Board, InterVISTAS, recently recognized that the rationalization of the overall network helps the industry “better match capacity in the market.”<sup>66</sup>

### **3. Involuntary Switching Reduces Predictability.**

Predictability is also one of the keys to modern and efficient rail operating practices and allows CSXT to offer the best possible service to the greatest number of shippers.<sup>67</sup> But as Ms. Sanborn discusses, involuntary switching would decrease

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<sup>63</sup> CSXT Comments at 45.

<sup>64</sup> CSXT Reply Comments at 23.

<sup>65</sup> UP Comments at 2; *see also* AAR Comments, Oliver Wyman Verified Statement at 3. *See also id. at 7* (“Under the regulatory regime in place over the past three decades, the railroad industry has been permitted to rationalize its physical plant and simplify its operations.”); *id. at 10* (“The primary driver [of improved operating and financial performance], however, has been the ability of the railroads to rationalize their networks and simplify their operations”).

<sup>66</sup> InterVISTAS Report at 2; *id. at 12* (rationalizing the network “allowed railroads to reduce their costs and increase their productivity by focusing on higher density and longer haul traffic” and “eliminating small, inefficient and costly segments.”).

<sup>67</sup> *See* Sanborn V.S. at 7 (“The key to the success of these modern rail operating practices is predictability.”). *See also* Ward V.S. at 16 (describing predictability’s importance to customer service).

that predictability. Currently, CSXT and other carriers know the shipment patterns and service requirements of their customers and this allows them to develop train schedules that offer the best possible service to the greatest number of shippers.<sup>68</sup> The use of involuntary switching would decrease predictability and create “pop-up” traffic that could appear or disappear at any time.<sup>69</sup> On its own network, CSXT is able to monitor traffic in real time and coordinate its train and yard service accordingly. But the carrier has reduced visibility into traffic moving on other railroads’ networks, reducing the window of advance notice for any shipment. Indeed, in some cases CSXT may not know traffic will need to be interchanged until it arrives.<sup>70</sup>

#### **4. Involuntary Switching May Increase Labor Costs.**

Another operational impact of involuntary switching will be an increase in labor costs. Increasing handlings, more switching, and circuitous routings will have the overall effect of slowing trains down. For railroads this means more crew

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<sup>68</sup> See, Sanborn V.S. at 14-15 (“CSXT’s yard blocking plans are developed on the basis of steady, predictable traffic flows between various origins, destinations, and interchange points along the CSXT network.”).

<sup>69</sup> See, e.g., *id.* at 15 (“Constant fluctuation in the number of cars destined to particular destinations and interchange points (as a result of shippers changing the routing of their traffic) would make it difficult to predict the size of the blocks to be built for outbound trains—or, for that matter, whether a particular block would be needed at all.”).

<sup>70</sup> CSXT Comments at 46 (showing that “[t]he unpredictability of daily traffic flows and loss of ‘visibility’ of incoming interchange traffic...would impair the ability of CSXT and other railroads to develop and adhere to efficient yard operating plans.”); *id.* at Exhibit 1 (using the example of Jacksonville to demonstrate the effect a lack of predictability in one location would have on the entire network).

changes. Federal law limits train crews to 12 consecutive hours.<sup>71</sup> Slowing trains will likely increase the number of crews that “die on the law”—meaning a new crew will be needed during a movement—which in turn will increase crew costs. Not only does this include the cost of paying more crew hours, but also the logistical issues of crew calling and movement to the correct location.<sup>72</sup> As Ms. Sanborn explains, this is a particular problem for local train service. Adding “new interchange points and switching work to the assigned duties of local trains that operate between two terminals would, in many instances, make it impossible for them to complete their runs with a single crew.”<sup>73</sup>

**5. The Board Must Address the Cumulative Effect of Its Policy Change.**

The Proposed Rule suggests that the Board may consider the adverse operational consequences of involuntary switching when considering individual requests for switching orders. But the Board has an obligation to consider the overall effects on the rail network of the inefficiencies that its proposal will introduce. The operational impact of individual involuntary switching orders will not be limited to the customer seeking the order, or the area around the interchange, or even just the shippers whose cars move through nearby yards or facilities. These inefficiencies will have a cascading effect across the entire rail

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<sup>71</sup> See 49 U.S.C. § 21103.

<sup>72</sup> AAR Comments, Oliver Wyman Verified Statement at 80 (explaining likelihood that involuntary switching could lead to increased crew costs).

<sup>73</sup> Sanborn V.S. at 10-11. Ms. Sanborn also notes that involuntary switching could lead to a reduction in local service. *Id.* at 11.

network. Multiple involuntary switching orders will slow velocity across the network and hurt service, harming all customers and making it more difficult for railroads to compete with modal alternatives.<sup>74</sup>

The Board knows about the potential ripple effects of “localized” issues. In 2013 and 2014, a significant service disruption occurred across the country because of congestion in Chicago.<sup>75</sup> In the late 1990s, the entire western United States was engulfed in a “rail service crisis” which was “caused, in large measure, by severely congested UP/SP lines in the Houston Gulf Coast region.”<sup>76</sup> Multiple involuntary switching orders will have a similar effect and slow velocity across the entire network, harming rail carriers as well as their customers.

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<sup>74</sup> See CSXT Reply Comments at 2 (public “would have to deal with the cascading effects of a less efficient rail system that would be less competitive”); NS Comments at 14 (“forced interchange would generate serious adverse network effects.”); UP Comments at 34-35 (increasing interchange traffic at just one yard could lead to congestion with the “potential to cascade through [the] network.”).

<sup>75</sup> See, e.g., *United States Rail Service Issues-Data Collection*, STB Docket No. Ex Parte 724 (Sub-No. 3), at 4 (STB served Oct. 8, 2014) (“At both hearings, carriers cited congestion in Chicago as one significant cause of the service problems.”); *United States Rail Service Issues-Performance Data Reporting*, STB Docket No. Ex Parte 724 (Sub-No. 4), at 17 (STB served Apr. 29, 2016) (“[R]ailroads cited congestion in Chicago as one significant cause of network service problems. While congestion in the area was particularly acute during the winter of 2013-14, it has been a recurring problem at this crucial network hub. Chicago is an important hub in national rail operations, and extreme congestion there has an impact on rail service in the Upper Midwest and beyond.”).

<sup>76</sup> *Union Pac. Corp., Union Pac. R.R. Co., and Missouri Pac. R.R. Co. – Control and Merger – S. Pac. Rail Corp., S. Pac. Transp. Co., St. Louis Southwestern*, STB Finance Docket No. 32760 (Sub-No. 21), at 5 (STB served Mar. 31, 1998).

**B. Involuntary Switching Will Also Remove Incentives To Invest.**

More generally, the Board also fails to consider evidence that was presented to the Board about the impact of involuntary switching orders on railroad incentives to make capital investments. CSXT explained in its Ex Parte 711 comments that a significant impact of involuntary switching “would be to create uncertainty that produces a disincentive for capital investments that are essential for the viability of the rail network and the national economy as a whole.”<sup>77</sup> There would be a “chilling effect on capital investment” and “stranded capital investments” making it more difficult for railroads to “justify future investments for traffic that may be at risk of a future involuntary switching order.”<sup>78</sup> Other commenters agreed that “reduction of capital investment” was the “most predictable consequence of adopting” involuntary switching because it “would increase the need for capital spending while eliminating means for making, and the incentives that usually drive, capital investment.”<sup>79</sup> As the Board’s own independent economists observed in their report on competition in the rail industry, “opening up networks to competition typically slows down the incumbent’s investment in situations where rivals cannot pre-empt

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<sup>77</sup> CSXT Comments at 47.

<sup>78</sup> *Id.* at 47-48. *See also* CSXT Reply Comments at 24 (involuntary switching reduces the incentive for investment).

<sup>79</sup> UP Comments at 67; *see also* NS Comments at 79-80 (involuntary switching could require railroads to build “additional infrastructure to prevent forced access movements from hurting service to other customers” and potentially stranding existing infrastructure).

the incumbent's investment (the most likely situation where rivals are not likely to duplicate the network)."<sup>80</sup>

CSXT is submitting with these opening comments the verified statement of its Chairman and CEO, Michael Ward, to once again explain the risk to investment caused by involuntary switching. If traffic can be shifted to a different carrier at anytime, without the carrier or shipper making any investment, the incumbent will have no business justification or incentive to continue to invest in maintenance or new infrastructure at many locations.<sup>81</sup> Indeed, involuntary switching would create uncertainties about current and future volume and capacity needs, making it increasingly difficult to plan for capital investments.

As Mr. Ward explains, CSXT and its shareholders rely upon a stable regulatory regime when making decisions as to capital investments. Significant changes in the regulatory regime will "inject uncertainty into the market."<sup>82</sup> Indeed, even the threat of a regulatory change can stifle investment.<sup>83</sup>

Railroads have acted in reliance on the fact that they can recover investments under the existing regulatory regime. For example, CSXT purchased

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<sup>80</sup> Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, at 22-11 (2008).

<sup>81</sup> *See Ward V.S.* at 13 ("Involuntary switching as proposed by the Board would create uncertainties about current and future traffic that would decrease CSXT's incentive to invest in the rail network.").

<sup>82</sup> *See id.* at 11 ("The proposed changes in the regulatory regime that have prevailed since the enactment of the Staggers Act would inject uncertainty into the market.").

<sup>83</sup> *See id.* ("Indeed, even the threat of this type of significant regulatory change could stifle investment.").

Conrail (along with Norfolk Southern) and invested not only the funds to purchase the railroad, but substantial resources to integrate CSXT's existing network with Conrail. That investment was only made because CSXT believed it could recover that substantial investment under a regulatory framework that allowed differential pricing to solely-served customers.

Were involuntary switching to be enacted, it could “result in stranded assets that are no longer needed—and could become worthless—because the asset supported a customer who has diverted traffic through involuntary switching to a competitor.”<sup>84</sup> This could, indeed, be almost a self-fulfilling prophecy. If a railroad invests in infrastructure and seeks to recapture that cost from the shipper using the asset, the shipper may seek involuntary switching to avoid that cost. Such a possibility makes it difficult to determine where the railroad should invest in their network and will make it challenging to justify investments to shareholders, who justifiably expect a market return on investment.<sup>85</sup> Investors will not support capital expenditures for assets that could be threatened by the Board's changing access regulations. The uncertainty created by the proposed regulations that would require railroads to share their privately-owned assets with their competitors will reduce incentives for future capital investments and could impair the access of CSXT and other carriers to capital markets.

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<sup>84</sup> *See id.* at 14

<sup>85</sup> *See id.* at 15 (involuntary switching “would make it difficult for railroads to know where they should invest in their networks and will make it challenging to justify such investments to shareholders who justifiably expect a market return on their investment.”).

Involuntary switching may lead to a situation where one railroad has maintenance responsibility for a segment while another carrier claims the lion's share of revenue through involuntary switching.<sup>86</sup> Separation of the maintenance responsibility and revenue in this fashion would create poor incentives that could lead to a reduction in necessary maintenance, to say nothing of potential infrastructure enhancements. Why would a track owner continue to adequately maintain a track or yard when the only compensation it is receiving is a government mandated charge that there is currently no assurance will be adequate? This incentive misalignment is well understood. One set of authors who have considered the issue recognized that “the incentives of network owners to make upgrades and maintain existing tracks will be negatively affected by” forced access or switching.<sup>87</sup>

**C. The Notice Fails To Consider The Board's Own Independent Studies of Its Competitive Policies.**

The Board also neglected to consider independent studies that the Board itself commissioned to review the competitive state of the industry<sup>88</sup> and to evaluate

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<sup>86</sup> See *id.* at 14 (describing the situation where the railroad responsible for maintenance and upkeep would no longer be benefiting from the line).

<sup>87</sup> T. Randolph Beard, Jeffrey Thomas Macher, and Chris Vickers, “This Time Is Different (?): Telecommunications Unbundling and Lessons for Railroad Regulation,” 49 *Review of Industrial Organization*, at 305 (Sept. 2016). See also Ward V.S. at 13-14 (“[D]isconnect between ownership and benefit will harm any incentive for future capital investments.”).

<sup>88</sup> See Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition* (2008); Laurits R. Christensen Associates, Inc., *An Update to the Study of Competition in the U.S. Freight Railroad Industry* (2010).

the Board’s existing methodologies for railroad rate regulation, including an investigation into “the possibility of providing an additional path to potentially lower rates through competitive access.”<sup>89</sup> Neither study concluded that an overhaul of the Board’s regulatory policies was appropriate. In fact, the most recent InterVISTAS Report concluded that “the research has not pointed to a simpler methodology than the three CMP methods that assess rate reasonableness consistent with the statutory requirement to take into account carrier revenue adequacy and encourage achievement of the highest possible level of economic efficiency/economic welfare.” InterVISTAS Report at 130. The InterVISTAS Report also failed to call for any changes to the Board’s competitive access regulations, noting that the adoption of a competitive access regime “could undermine economic efficiency and revenue adequacy” and could cause regulated entities “to incur stranded costs.” *Id.* at 84, 91.

The Board invested considerable time and effort into these studies. It recently held a roundtable on the InterVISTAS report and has indicated that it plans to hold a public hearing.<sup>90</sup> And it similarly took public comments on the Christiansen report. Given the importance and credibility of these independent reports, the failure to even mention them in a Notice that proposed such a fundamental change to the regulatory landscape is concerning. The Board is

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<sup>89</sup> InterVISTAS Report at vi.

<sup>90</sup> *InterVISTAS Study*, Ex Parte 736 (Oct. 12, 2016) (announcing Oct. 25, 2016 roundtable and stating that “Board also intends to hold a public hearing”).

obligated to consider the conclusions of these studies before proposing to replace the established regulatory framework with an involuntary switching regime.

**D. The Board Fails To Consider The Effects Of Involuntary Switching On Revenue Adequacy.**

Revenue adequacy is an essential statutory goal of the Interstate Commerce Act.<sup>91</sup> The Board should not be making significant changes to the reciprocal switching regulations without assessing the likely impact on railroad revenues. The Board is required by 49 U.S.C. § 10704 to “maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers” that are “adequate, under honest, economical, and efficient management, for the infrastructure and investment needed to meet the present and future demand for rail services and to cover operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business.” Indeed, the STB’s predecessor agency warned the D.C. Circuit about the serious financial repercussions that would result if involuntary switching was used to provide rate relief to captive shippers, rather than to remedy anticompetitive conduct. According to the ICC:

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<sup>91</sup> See, e.g., S. REP. NO. 96-1430, at 80 (1980) (“The overall purpose of the Act is to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system.”); *id.* at 89 (“The Conference substitute adopts the language from the House bill that in determining rate reasonableness the Commission must recognize the policy of this Act that carriers must earn adequate revenues. The difficult economic situation of much of the railroad industry is one of the reasons for this legislation, and the Commission is required to make efforts to ensure that rail carriers earn adequate revenues.”).

The majority of the shippers in this country that receive rail service are served directly by a single rail carrier. Ample testimony to that fact is provided in the Certificate as to Parties, p. v, vi, and vii, in intervenors' brief. Thus, granting relief under Section 11103(c) whenever a shipper could benefit by the services of an additional rail carrier could have a *very substantial negative impact on the financial viability of the nation's rail carriers*. Carrier incentive to invest in new lines (or restore existing lines) could be destroyed if other carriers could freely use those facilities without making a similar capital investment.<sup>92</sup>

In *MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999), shippers were asking the Board to order railroads to provide separate local rates for “bottleneck” segments of long hauls (and then appealing the Board’s denial). As the Court recognized, the parties were really seeking to prevent railroads from “exploiting bottlenecks and charging rates up to SAC for complete origin-to-destination services.” *Id.* at 1109. The Board had rejected the shippers’ proposal because, in part, it “would impede the industry’s efforts to achieve revenue adequacy, which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system.” *Id.* The Board has no justification for ignoring the interplay of its proposed new standards with revenue adequacy now.

The imperative that the Board must weigh the effect of its proposed rule on revenue adequacy is particularly acute because the proposed rule expressly states that “the overall revenue inadequacy of the railroad will *not* be a basis for denying the establishment of a switching agreement.”<sup>93</sup> If the Board intends to preclude evidence about a railroad’s overall revenue adequacy in considering individual

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<sup>92</sup> I.C.C. Respondents’ Br. at 17, n.11, *MidAmerican* (emphasis added).

<sup>93</sup> Proposed Rule § 1145.2(b)(2) (emphasis added).

petitions for involuntary switching, it is incumbent on the Board in this proceeding to explain how its proposal can be reconciled with the statutory mandate that the Board regulate in a way that allows railroads to meet the goal of revenue adequacy.

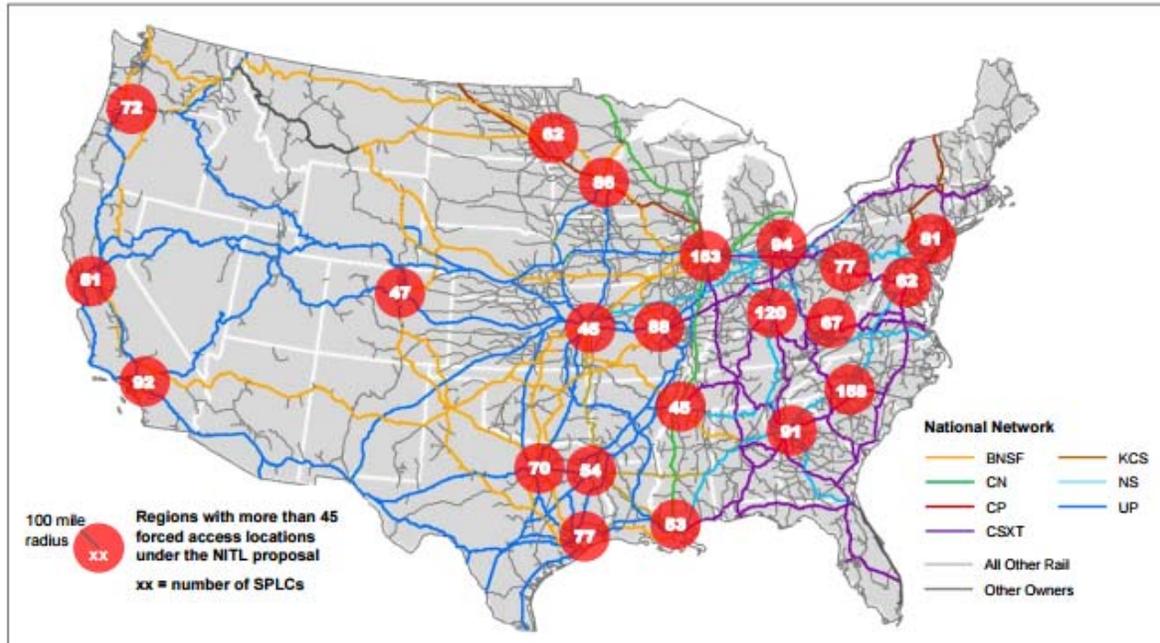
**E. The Notice Fails to Consider Disparate Impacts.**

The Notice also fails to consider how its proposed rule will affect differently situated Class I railroads. While the Board exempts Class II and Class III railroads from involuntary switching, it treats all Class I railroads the same. *See* Notice at 2-21 But there are important distinctions that the Board fails to address. One is geographical. As the below map from the Ex Parte 711 record shows graphically,<sup>94</sup> some regions of the country have far more potential interchanges than other and thus a much higher potential for involuntary switching orders and resulting service disruptions.

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<sup>94</sup> The map is reproduced from the AAR Comments, Oliver Wyman Verified Statement at 97.

**Exhibit VII-3: Regions Most Susceptible to Service Breakdowns under the NITL Proposal<sup>82</sup>**



Some regions of the country and some Class I railroads therefore face an elevated risk of involuntary switching orders and resulting operational problems. But the Notice does not acknowledge or consider these differences.

Similarly, as discussed above, the Notice insists that evidence of a carrier's progress toward revenue adequacy may not be introduced in individual cases. But in adopting this prohibition, the Board fails to consider its own annual revenue adequacy determinations, which show differing amounts of progress among Class I railroads toward the statutory goal of long-term revenue adequacy. CSXT, for example, has been revenue inadequate in every year of the 29 years for which such

a determination has been made.<sup>95</sup> CSXT's revenue inadequacy is particularly significant because flaws in those annual calculations overestimate a railroad's actual progress toward revenue adequacy.<sup>96</sup> But the Notice does not consider how involuntary switching might differently affect individual railroads that have made differing levels of progress toward long term revenue adequacy

**F. The Board Is Obligated To Weigh Costs And Benefits.**

The Board has an obligation to consider all of the above-detailed costs of its proposed rule. Indeed, the costs of less-efficient railroad operations and lessened incentives for railroad investment will not only be borne by railroads. They will be borne by all stakeholders, including many shippers who will experience worse service from a less efficient rail network. It would be arbitrary and capricious for the Board to alter its existing rules without weighing these substantial costs against whatever benefits it believes the rules would create.

The Board recognized the need to consider costs and benefits when it originally initiated a proceeding on NITL's petition. In its Notice, the Board said that "[i]n addition to the benefit-to-shippers analysis, this Board must consider the impact of the proposal on the financial health of the railroad industry."<sup>97</sup> Other

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<sup>95</sup> See CSXT Reply Evidence at IV-34-38, *Consumers Energy Co. v. CSX Transp., Inc.*, Docket No. 42142 (filed Mar. 7, 2016) (including detailed accounting of ICC and STB annual findings that CSXT was not revenue adequate).

<sup>96</sup> As CSXT and other railroads demonstrated in Ex Parte 722, the Board's annual revenue adequacy findings understate CSXT's true revenue needs to maintain and replace its existing network because the findings are based on depreciated historic costs, not on the current value of CSXT's network.

<sup>97</sup> *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Docket No. Ex Parte 711, at 7 (STB served July 25, 2012).

potential costs of the Board's proposal raised in that original notice were whether "the remaining captive traffic would likely be charged to make up for the revenues that would otherwise be lost to the carriers"<sup>98</sup> and whether "increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations."<sup>99</sup> Finally, the Board recognized that it must "ensure the rail industry is able to continue to invest adequately in rail network infrastructure improvements."<sup>100</sup>

The railroads provided extensive evidence that the proposal would impose substantial costs. *See supra* at 51-64. But the Board in the Notice nowhere examines or quantifies these costs and benefits, let alone in sufficient detail to support a conclusion that the purported benefits outweigh these factually supported costs.

It is arbitrary for the Board to fail to do an analysis that it acknowledged was critical to determining whether the new rule was in the "public interest." When an agency changes course, it must at least "provide reasoned explanation for its action." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). And an agency "must show that there are good reasons for the new policy." *Id.*

Moreover, the agency has an obligation to consider the costs and benefits of its proposed regulation. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 8.

<sup>100</sup> *Id.* at 7.

ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.). As the Supreme Court explained, “[o]ne would not say that it is even rational, never mind ‘appropriate,’ to impose billions of dollars in economic costs in return for a few dollars” in benefits. *Id.* at 2707. No regulation could be in the “public interest” if it “does significantly more harm than good.” *Id.* The Board has to weigh the costs of its policy change against its claimed benefits before it can change course in such a dramatic way.

**G. The Board Failed To Address Significant Questions Raised About the Terms Of Involuntary Switching Orders.**

The Ex Parte 711 record also contains extensive evidence developed to illustrate some of the potential questions that the Board would have to answer about the terms of any involuntary switching orders.<sup>101</sup> Once again, the Notice simply ignores the questions. But the Board has an obligation to think about the specific terms that would apply to involuntary switching orders before proposing to open the floodgates for involuntary switching. And the Board has an obligation to inform stakeholders of how it intends to approach these issues so that they have a fair opportunity to comment.

Some examples of these unaddressed issues include:

- **Provision of Cars:** If the Board requires involuntary switching for a shipper using railroad-owned cars, which railroad has the duty to provide the cars?
- **Priority:** Is a railroad subject to an involuntary switching order required to give equal priority to switching cars for its competitor? And

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<sup>101</sup> *See, e.g.*, CSXT Comments at 52-53.

if so, how would the Board resolve disputes about whether a railroad is giving appropriate priority to involuntary switching traffic?

- **Passenger Delays:** Who will be deemed responsible if involuntary switching causes delays for Amtrak or commuter trains? Will it be the incumbent being forced to undertake an inefficient switching arrangement, the new entrant, or the shipper customer who requested involuntary switching?
- **Liability:** Who is liable for accidents that occur while a railroad is involuntarily switching cars for a competitor as the result of a government order?

The Notice’s failure to consider any of these questions suggests that the Board may not appreciate the many disputes and complications that would be triggered by a new regulatory regime. Moreover, the Notice’s silence makes it impossible for parties to offer appropriate comments on the full scope of what the Board is proposing. The Board has an obligation to fully explain how it plans to implement its proposal in a way that gives stakeholders a fair opportunity to comment.

#### **H. The Board Failed To Consider The Significant Environmental Impact Of Changing The Rules For Involuntary Switching.**

The Notice also makes no mention of the potential environmental impact of involuntary switching orders or of how the Board plans to consider that impact. Federal law and Board rules require an environmental impact analysis of agency rulemakings that constitute a major federal action. The National Environmental Policy Act (“NEPA”)<sup>102</sup> applies to all federal agencies, including the Board, and requires consideration of potential effects on the human environment that would

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<sup>102</sup> 42 U.S.C. §§ 4321 *et seq.*

result from proposed agency action.<sup>103</sup> To implement NEPA, the Board has adopted regulations that provide for the preparation of an Environmental Impact Statement (“EIS”) for “a major Federal action significantly affecting the quality of the human environment,” 49 C.F.R. § 1105.4(f), or an Environmental Assessment (“EA”), 49 C.F.R. § 1105.4(d), which can be used to determine if an EIS is necessary or a finding of no significant environmental impact can be made.

As described above, involuntary switching and the consequences of it will lead to more handlings, yard activity, and transit delays, which means more emissions and greater environmental impact. Moreover, decreasing the efficiency of railroads will harm the carriers’ ability to compete with trucks for time-sensitive traffic, increasing the use of less environmentally friendly modal alternatives.<sup>104</sup> These are the sorts of environmental impacts that often trigger NEPA obligations.

In its rules, the Board relies on the Council of Environmental Quality’s (“CEQA’s”) definition of “major Federal action,” a definition that includes rulemakings.<sup>105</sup> But the Notice is entirely silent on the issue of environmental analysis.

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<sup>103</sup> 42 U.S.C. § 4332.

<sup>104</sup> See, e.g., Federal Railroad Administration, Comparative Evaluation of Rail and Truck Fuel Efficiency on Competitive Corridors, at 4 (Nov. 19, 2009) *available at* <https://www.fra.dot.gov/eLib/details/L04317> (“For all movements, rail fuel efficiency is higher than truck fuel efficiency in terms of ton-miles per gallon.”).

<sup>105</sup> See 49 C.F.R. § 1105.5(a), which refers to 40 C.F.R. § 1508.18(b)(1) (“Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act”).

While it is possible that the Board intends to defer consideration of NEPA issues to future specific requests for involuntary switching, that would be insufficient here. The cumulative environmental effect of adopting a regulatory regime that will lead to more handlings, yard activity, and transit delays will far outweigh the effect of any individual switching order. The Board has an obligation to consider the overall environmental effect of a rule change that it has good reason to believe will change train operations in a way that impacts the environment.<sup>106</sup> A programmatic EA potentially would be an appropriate course. CEQA has issued guidance regarding the use of programmatic NEPA reviews, which set “out the broad view of environmental impacts and benefits for a proposed decision. That programmatic NEPA review can then be relied upon when agencies make decisions” on the basis of a “subsequent—tier—NEPA review.”<sup>107</sup> “Tiering is “an approach where federal agencies first consider the broad, general impacts of . . . [a] policy . . . and then conduct subsequent, narrower, decision focused reviews.”<sup>108</sup> Here, the Board should address the serious environmental questions from an involuntary switching regime through a programmatic EA that would assess the full range of potential adverse impacts that could flow from this new regime. Then, if the Board chooses to continue to pursue this ill-advised proposal, it could prepare individual

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<sup>106</sup> *Coal Rate Guidelines* was accompanied by a full environmental impact statement considering the effects of the rule. See 1 I.C.C. 2d at 548.

<sup>107</sup> Council on Environmental Quality, *Effective Use of Programmatic NEPA Reviews*, at 6-7 (Dec. 18, 2014) *available at* [https://www.whitehouse.gov/sites/default/files/docs/effective\\_use\\_of\\_programmatic\\_nepa\\_reviews\\_18dec2014.pdf](https://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf).

<sup>108</sup> *Id.* at 7, n.8.

EAs that are “tiered” to the case-by-case individual switching application proceedings contemplated by the proposed rule.

**I. The Board Also Fails To Address How It Will Deal With Labor Impacts.**

The Notice also fails to address how the Board will apply labor protections for involuntary switching orders. In practice, Board orders for involuntary switching would often have the effect of shifting work from one carrier’s employees to another carrier’s employees. This could have a substantial effect on both carriers’ employees.

There are many unanswered questions about labor protections in this context. First and foremost, if there are labor protections for employees of a host railroad who are displaced because another railroad has taken business through a mandatory involuntary switching arrangement, it is unclear who would pay for those protections: the host railroad, the entrant railroad, or even the shipper that requested involuntary switching. It would certainly be unfair for the host railroad to both lose the business and have to pay labor protections for the affected employees, particularly because the host railroad has no control over the decision of the shipper to shift carriers. Second, the Board must determine what conditions to impose. How the Board resolves these questions would have a significant impact on how involuntary switching arrangements might affect the involved railroad employees, host railroads, entrant railroads, and shippers. It is therefore incumbent upon the Board to explain how it intends to address these issues and then to allow parties to comment on that aspect of this involuntary switch proposal.

**VI. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS IN SEVERAL OTHER RESPECTS.**

The proposed rule should also be rejected because it is arbitrary and capricious in three other respects: (1) it authorizes the Board to order reciprocal switching for a “reasonable distance” outside the terminal area and thus directly conflicts with Section 11102(c), which confines the Board’s authority to mandating reciprocal switching within a terminal area; (2) the “public interest” test of Proposed Rule Section 1145.2(a)(1) is impermissibly vague; and (3) the elimination of the standing requirement in Proposed Rule Section 1145.2(a)(1) is arbitrary and capricious.

**A. The Board Has No Authority to Order Reciprocal Switching Outside a Terminal Area.**

The proposed rule is unlawful because it purports to authorize the Board to order reciprocal switching *outside* of a terminal area. *See* Proposed Rule §§ 1145.2(a)(1)(ii), 1145.2(a)(2) (allowing a shipper to obtain an order of reciprocal switching as long as the shipper’s facility is “within a reasonable distance” of what “is or can be a working interchange”). The statute, however, does not give the Board the authority to order reciprocal switching outside of a terminal area. This is clear from both the text of Section 11102 and its place in the regulatory structure established by the Staggers Act.<sup>109</sup>

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<sup>109</sup> Whether a particular area is a terminal and how to define the boundaries of a terminal are fact-specific determinations that require the Board to evaluate a number of factors. *See, e.g., Midtec*, 3 I.C.C.2d at 179. But as discussed in this section, the statute only permits reciprocal switching orders for switching within an area that the Board finds to be a terminal area.

The text of Section 11102 draws a distinction between the Board’s authority to require terminal access and its authority to mandate reciprocal switching. With respect to terminal access, Section 11102(a) authorizes the Board to order a rail carrier to allow another carrier to use its “terminal facilities, including main-line tracks *from a reasonable distance outside a terminal.*” 49 U.S.C. § 11102(a) (emphasis added). But the reciprocal switching provision, Section 11102(c), does not authorize the Board to order reciprocal switching for a “reasonable distance outside the terminal.” That language is omitted from Section 11102(c), which only authorizes the Board to “require rail carriers to enter into reciprocal switching agreements” if certain findings are made. *Id.* § 11102(c). The inclusion of the “reasonable distance” language in one subsection of § 11102 but not another is powerful evidence that Congress did not intend reciprocal switching arrangements to extend to a “reasonable distance outside the terminal.” *See, e.g., City of Chicago v. Env’tl. Def. Fund*, 511 U.S. 328, 338 (1994) (“[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.”).

In addition, the term “reciprocal switching” is a term that has long been understood by the agency and the railroad industry—both before and after the enactment of the Staggers Act—to describe the movement and interchange of rail cars *within a terminal area*. Nearly a decade *before* the enactment of the Staggers Act, the ICC acknowledged this accepted meaning of the term “reciprocal switching,” saying

[i]t has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry.

*Switching Charges and Absorption Thereof at Shreveport, La.*, 339 I.C.C. 65, 70 (1971). Reciprocal switching thus was understood to occur in “commonly served terminal areas” and “within the terminal area.” *Id.* As explained in Section II.A above, when a statute contains a term with a well-established meaning, it is presumed that Congress intended the term to have that established meaning.<sup>110</sup>

That is also the way the ICC interpreted its authority to order “reciprocal switching” under what is now Section 11102(c) *after* the passage of the Staggers Rail Act. In one case, for example, the ICC denied a shipper’s request to order reciprocal switching where the shipper sought to “extend reciprocal switching arrangements at a common station . . . to a local station *outside* the existing switching limits of that station.” *Cent. States Ents.*, 780 F.2d at 675 (quoting ICC decision) (emphasis in original). The ICC explained that “[r]eciprocal switching occurs at stations or terminals served by more than one carrier. A common station or terminal area is, therefore, a prerequisite for such switching.” *Id.*; *cf. Midtec Paper Corp.*, 3 I.C.C. 2d at 179-80 (Board has authority to order reciprocal

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<sup>110</sup> See *Comm’r v. Keystone Consol. Indus., Inc.*, 508 U. S. 152, 159 (1993); *Brand X Internet Servs.*, 545 U.S. at 992-93.

switching between two rail carriers that both have rail yards in the same terminal area).

Finally, redefining reciprocal switching to cover movements outside a terminal area would subvert statutory provisions designed to protect railroad long haul rights. The proposed rule effectively gives shippers that originate traffic within an unspecified “reasonable distance” of an interchange the right to limit an originating carrier’s 49 U.S.C. Sections 10702 and 10703 rights to establish routes, rates, and through routes by forcing the originating carrier to carry the traffic for switching to another carrier at a designated interchange. While the Interstate Commerce Act does give the Board some authority to limit an originating carrier’s routing choices and rates, it principally does so by giving the Board the authority to prescribe through routes and to regulate the resulting joint rates, *see* 49 U.S.C. § 10705, not by mandating reciprocal switching under Section 11102(c).

Section 10705 contains multiple protections for originating carriers. For example, it protects an originating carrier’s right to carry traffic over the long haul route from origin to destination by authorizing the Board to order a through route only in limited circumstances, such as when the originating carrier’s route is “unreasonably long” or the prescribed through route is “needed to provide adequate, and more efficient or economic transportation.” 49 U.S.C. § 10705(a)(2). Section 10705 also requires the Board to “give reasonable preference” to the “carrier originating the traffic.” *Id.* § 10705(a)(2)(C). The Board cannot deprive originating carriers of these statutory protections for their long haul routes and rates by forcing

the carrier to enter a reciprocal switching agreement with another carrier at a terminal a “reasonable distance” from the point of origin and calling the service provided by the originating carrier “reciprocal switching.” *Accord Union Pac. R.R. Co. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989) (“form must yield to substance,” and the ICC cannot avoid the statutory limitations on its authority to regulate rates by claiming that it is instead regulating an “unreasonable practice”).

**B. The Public Interest Test Is Unacceptably Vague and Arbitrary and Capricious.**

It is arbitrary and capricious for the Board to adopt an interpretation of the “public interest” test for ordering a reciprocal switching arrangement that is so open-ended and vague as to be essentially standardless. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999) (even where statute gives an agency discretion to set a standard, the agency must “apply some limiting standard, rationally related to the goals of the Act,” and Court will not sustain the agency’s interpretation when “it has simply failed to do” so). Proposed Rule Section 1145.2(a)(1) is such a rule because the “public interest” test it puts forth is so open-ended as to provide no standard at all.

The proposed rule says that the test is that the Board find the “potential benefits” outweigh the “potential detriments,” but it provides no real guidance or explanation as to how the Board will do that balancing. The proposed rule contains a list of factors, but it is not an exclusive list. Any other “relevant factor” may be considered. *Cf. Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993) (“The uncertainty facing a [regulated party] . . . is all the greater when [open-ended

factors] are considered in combination, according to some undisclosed system of relative weights.”). And the proposed rule nowhere explains the criteria the Board will use to balance the innumerable “relevant factors.”

In the same vein, the Board fails to provide any concrete ideas of what principles it would use to decide requests for it to set access prices. One of the Board’s options is a mere list of factors that it says it might consider, with no explanation of how it would weigh them. *See* Notice at 25. The other is a proposed “variant” of the SSW Compensation methodology from trackage rights cases, which is offered with no specific proposal or explanation of how the Board would alter the methodology. *Id.* Rather than itself proposing a clear approach and then letting parties comment on that approach, the Board leaves it to parties to explain “whether and how” it could develop an access pricing methodology from SSW Compensation. *Id.* at 25-26.

The proposed rule therefore fails to provide railroads and shippers with any notice of how the Board would resolve any request for reciprocal switching. The proposed rule also fails to provide any meaningful standards to guide the exercise of the Board’s discretion and to ensure that reciprocal switching orders would be the product of reasoned decisionmaking and not caprice. And it gives no concrete guidance about how the agency proposes to resolve access pricing questions. The proposed rule thus raises serious due process concerns. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“*Fox II*”) (agency violates due process when it “fails to provide a person of ordinary intelligence fair notice of what is

prohibited” and “is so standardless that it authorizes or encourages seriously discriminatory enforcement”); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (vague rules impermissibly permit “basic policy matters” to be decided in enforcement actions brought “on an ad hoc and subjective basis”).

But even beyond the due process concerns, the lack of any standards for when reciprocal switching will be ordered is particularly troubling, because the vague proposed rule would replace a rule with specific standards that have been in place for over 30 years. For the Board to tell the public that the current rule is too stringent, but then provide no guidance as to how the Board will relax the rules is not a lawful exercise of rulemaking authority. “A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”<sup>111</sup>

### **C. The Proposed Rule’s Elimination of the Standing Requirement is Arbitrary and Capricious.**

The proposed rule is also arbitrary and capricious because it eliminates the “standing” requirement in the current competitive access rule—specifically, the requirement in current Section 1144.2(a)(2) that the *complaining shipper has used or would use the reciprocal switching* arrangement to meet a “significant portion of

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<sup>111</sup> *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997), *overruled on other grounds*, *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015); *Timpinaro*, 2 F.3d at 460 (reversing agency rulemaking for failing to consider providing regulated parties more concrete guidance).

its current or future railroad transportation needs,” or that the complaining carrier has used or would use the switching for a “significant amount of traffic.”

The amount of traffic that the party seeking switching would use is one of the main factors the Board says it will consider in doing its “public interest” balancing test (Proposed Section 1145.2(a)(1)(iii)(G)). But there is no explicit requirement for a shipper to demonstrate standing under that prong. And under the “necessary for competitive rail service” prong, there is no requirement that the shipper commit to use the switching arrangement it is asking the Board to compel. That is arbitrary and, indeed, it impairs a carrier’s ability to oppose a reciprocal switching order on the ground that it would be impractical or impair service to other shippers. Without knowing how much traffic the shipper intends to route via its non-serving carrier if the reciprocal switching agreement is ordered, it will be difficult for the serving rail carrier to show that the switching is practical or whether it will impair service to other shippers.

This aspect of the proposed rule also serves to underscore how unmoored the Board’s approach is from the statutory scheme and its precedents. Without the standing requirement, a reciprocal switching order would obligate railroads to offer permanent open access to all shippers who might wish to use switching at a location. Any shipper at any time for any reason can demand competitive access, even if it has no particular plans to utilize that movement. The Notice does not—and cannot—explain why such mandated competitive access is not the very type of

“open access routing” that the Notice itself admits Congress enacted the Staggers Act to eliminate. *See* Notice at 15.

## **VII. THE BOARD’S ACCESS PRICING PROPOSALS ARE FLAWED.**

The Board requested that the parties comment on two alternative approaches to access pricing: a proposal to consider various “factors” and a proposed modification of the SSW Compensation methodology. Notice at 25. As these comments and the attached verified statement of Professor Robert Willig demonstrate, neither approach is sufficiently detailed for CSXT to fully and adequately comment. What can be gathered from what information the Board did provide, however, demonstrates that both approaches are deeply flawed and that they run the significant risk of undermining railroads in their pursuit of revenue adequacy and their incentive to make capital investments. Compelling access at such noncompensatory rates would raise serious constitutional issues.

For all the reasons discussed previously, the Board should withdraw the proposed rule. But if the Board insists on moving forward with this ill-advised change to its regulations, it should not adopt either of the approaches in the Notice. Indeed, because the statute requires the Board to first allow the affected railroads to attempt to negotiate an access price before the Board may weigh in, the Board should forbear from developing its own specific access pricing methodology. Instead, the appropriate access price can be determined in individual cases should the Notice’s ill-conceived rules be adopted. CSXT proposes three economic principles that should guide access pricing.

**A. Congress Mandated A Narrow Role For The Board In Setting Compensation.**

The Board's statutory authority to set compensation was narrowly drawn by Congress in the Staggers Act and that narrow standard was maintained in ICCTA. The reciprocal switching provision prioritizes mutual and voluntary agreements by the parties in setting reciprocal switching compensation even when the Board orders such switching.<sup>112</sup> If the carriers agree to a switch charge, the Board has no further role.

The Board should respect its narrow statutory role and describe a set of sound economic principles sufficient to promote voluntary and mutual resolution by the parties negotiating switching fees. Indeed, the Board's assumption should be that the parties can work out these matters without agency involvement. The Board has long made clear its preference for voluntary resolution of disputes.<sup>113</sup> That approach is consistent not only with Board precedent, but also Congress' explicit statutory command in Section 11102(c) that the Board only involve itself if the parties cannot agree.

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<sup>112</sup> See 49 U.S.C. § 11102(c)(1) (“The rail carriers entering into such an agreement shall establish the conditions and compensation applicable to such agreement, but, if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation.”).

<sup>113</sup> *CSX Corp. et al – Control and Operating Leases/Agreements – Conrail Inc. et al.*, 3 S.T.B. 196, 357 (1998) (encouraging railroads and communities “to negotiate private solutions to environmental issues” because “these agreements are more effective, and in some cases, more far-reaching, than environmental mitigation options we could impose unilaterally”); see e.g., *AEP Texas North Co. v. BNSF*, STB Docket No. 41191 (Sub-No. 1), at 1 (STB served Oct. 3, 2003) (“The Board prefers privately negotiated settlements”); *Western Fuels Ass’n, Inc. v. BNSF*, STB Docket No. 42088, at 1 (STB served Dec. 23, 2004) (same).

**B. Any Pricing Principles Articulated By The Board Must Rest On A Solid Economic Foundation.**

Any access pricing methodology must rely on a solid economic foundation, because failure by the Board to adhere to its economic principles could have lasting negative implications for the railroads and customers. Indeed, the U.S. Constitution forbids a noncompensatory access pricing regime, because a government order that a railroad grant access to its property for less than the fair market value of that access would violate the Fifth Amendment's takings clause.

The attached verified statement of Professor Robert Willig describes the principles for economically sound access pricing. Professor Willig is a Professor of Economics and Public Affairs at Princeton University and a preeminent scholar in railroad economics whose work forms the basis for much of the Board's regulatory framework. Professor Willig explains that the "fundamental objective in regulation of rates and regulation of access is to allow incumbent railroads to price in accord with market demand in a manner that promotes the recovery of full economic costs, including the costs of capital."<sup>114</sup> Since 1985, the Board and its predecessor have used Constrained Market Pricing ("CMP") to ensure that objective is achieved. CMP limits the price of the final product (*i.e.*, the through rate from origin to destination) but not the prices of individual components.<sup>115</sup> Nor does it drive all prices down to marginal or incremental costs.<sup>116</sup> If railroads were constrained in

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<sup>114</sup> Willig V.S. at 2.

<sup>115</sup> *Id.* at 9-10.

<sup>116</sup> *Id.* at 10.

that fashion, “they would not be able to recover any of the fixed costs of their networks” which would ultimately lead to the degradation of the infrastructure and viability of the industry.<sup>117</sup> CMP is also central to the proper regulation of so-called bottlenecks through Efficient Component Pricing (“ECP”), which holds that bottleneck inputs must be priced in a competitively neutral matter at rates equal to the price the incumbent railroad charges its own customers for use of that input.<sup>118</sup> On the other hand, “cost-based bottleneck pricing would completely undermine the landlord railroad’s ability to execute differential pricing on shipments from origin-to-destination.”<sup>119</sup> The only viable method for “pricing the bottleneck segment that preserves railroads’ ability to recover the total fixed costs of the O-D move *requires* that the price for the bottleneck segment covers the total costs of providing the bottleneck service *and* to cover the fixed costs of the competitive segment.”<sup>120</sup>

As Professor Willig explains, neither of the Board’s two pricing proposals “sufficiently protects railroads’ ability to recover their full fixed and common costs.”<sup>121</sup> Both approaches “seem to be embracing the mistaken idea that it is appropriate to limit the price of bottleneck services to some measure of replacement costs (including some ‘reasonable’ return) for the bottleneck asset.”<sup>122</sup> But there are long-term adverse implications of a regulatory approach that only compensates

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 11.

<sup>119</sup> *Id.* at 13.

<sup>120</sup> *Id.* at 14.

<sup>121</sup> *Id.* at 15.

<sup>122</sup> *Id.* at 16.

railroads for the costs—plus a reasonable rate of return—for providing bottleneck services.<sup>123</sup> Currently, intramodal competition on the non-bottleneck portion of a move pushes its price to incremental cost, leaving the recovery of fixed costs for a movement’s whole route to the charge on the bottleneck segment.<sup>124</sup> Without the ability to price in that fashion, as railroads have been doing for decades, carriers will be unable to recoup those fixed costs.<sup>125</sup> The ensuing harm to revenue adequacy from that inability would also hinder the capacity of railroads to attract necessary capital.<sup>126</sup> In order for railroads to continue to provide service at reasonable prices for all customers while still attracting capital, “access prices *must* include a mechanism that compensates the incumbent railroad for their full lost contribution and that preserves the railroad’s ability to recover fixed costs.”<sup>127</sup>

### **C. The Board’s Vague Proposals Are Irreparably Flawed.**

The Board’s two proposed approaches to access pricing are laden with ambiguity, appear premised on a flawed foundation, and will promote discord rather than voluntary agreements. The Board should abandon its two options in favor of an approach that better factors in the economics of forced switching and the need to recover all costs.

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<sup>123</sup> *See Id.*

<sup>124</sup> *See Id.*

<sup>125</sup> *See Id.*

<sup>126</sup> *Id.* at 16-17.

<sup>127</sup> *Id.* at 17.

The first alternative put forth by the Board would set “access pricing based on a specified set of factors.” Notice at 25. The Board relied upon the ICC’s decision in *Switching Charges & Absorption Thereof at Shreveport, La.*, 339 I.C.C. 65 (1971), to suggest factors that include the geography of where the proposed switch would occur, the distance between the shipper/receiver and the proposed interchange, the cost of the service, the capacity of the interchange facility, and other case specific factors. *Id.* The *Shreveport* decision used some of these factors to apply what was later described as a fully-allocated cost approach.

But the fully-allocated cost approach in *Shreveport* has been soundly discredited because it does not capture all costs of a movement, just of a segment. In *Switching Charges on Iron or Steel Scrap at Stockton, Cal.*, 356 I.C.C. 634, 638 (1977), the ICC explained that the simple fact that a proposed rate “exceeds the fully allocated cost level, does not, in itself, justify a finding that the charge is in excess of a maximum reasonable rate.” Indeed, in *Kansas City Power & Light Co. v. Kansas City Southern Ry. Co.*, 361 I.C.C. 308, 323 (1978), the ICC rejected the use of a fully allocated cost approach and stated plainly that the agency has “recognized that the mere circumstance of a switching rate exceeding fully allocated cost does not by itself justify a finding of unreasonableness.” The ICC went on to hold that it would be “unwise to hold carriers” to fully allocated costs on switching movements. *Id.* In *Intramodal Rail Competition*, 1 I.C.C. 2d 822, 835 (1985), the Commission explained that it had “rejected the use of fully-allocated cost standard for pricing railroad service as arbitrary and economically unsound.” The Commission

elaborated that it rejected the approach because it had “not been able to determine a satisfactory accounting method of allocating the substantial joint and common costs experienced in the rail industry.” *Id.*

As Professor Willig explains, the fully-allocated cost approach is inadvisable. The approach would, “in theory, compensate railroads for the full costs of providing the bottleneck service” but there is “no mechanism for compensating the incumbent for the lost contribution to overall fixed and common costs.”<sup>128</sup> In addition to the general unsoundness of the cost allocation approach and the significant and missing cost component Professor Willig has identified, the Board has left open the possibility of additional, unexplained factors that could be included in its analysis. Moreover, it has not explained how those factors would be used to actually set a switching rate, leaving a general amorphous standard that presents at least two problems. First, the lack of a coherent standard will make it much harder for the parties to engage in private resolution of switching disputes and leaves any such resolution to the vagaries of the Board, which will also be unbound by any articulated standard. Second, the amorphous approach gives the railroads and their investors no certainty about what costs will be covered by an access fee, threatening the incentive for any investment in railroad capital needs.

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<sup>128</sup> Willig V.S. at 15.

The second alternative offered by the Board would be to adopt a variation of the agency's *SSW Compensation* methodology.<sup>129</sup> As with the first alternative, however, the Board's proposal is only vaguely explained, and insufficient guidance is provided as to how it would apply this new methodology. As Professor Willig explains, the second alternative also contains the same central failing as the first alternative: it does not compensate the incumbent railroad for the lost contribution to overall fixed costs of a through movement.<sup>130</sup> The Board's narrow focus on only the operating and capital costs employed in the switching area would undermine—if not utterly destroy—the differential pricing model railroads have relied on for decades. The financial rebirth of the railroads since the Staggers Act would be placed in serious jeopardy by the proposed regulatory disruption.

**D. CSXT Proposes Three Sound Economic Principles To Determine Access Pricing.**

CSXT encourages the Board to consider three sound economic principles that would both promote voluntary resolution of compensation disputes and allow railroads to recover the significant fixed and common costs of the network. Full and adequate compensation will enable railroads to maintain service and capital investment necessary for their customers. That is the entire purpose of differential pricing and, as the Board has explained, “demand-based differential pricing” is “the

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<sup>129</sup> See Notice at 25. See also *St. Louis S.W. Ry. Compensation – Trackage Rights*, 1 I.C.C. 2d 776, 786 (1984); 4 I.C.C. 2d 668 (1988); 5 I.C.C. 2d 525 (1989); 8 I.C.C. 2d 80 (1991); 8 I.C.C. 2d 213 (1991).

<sup>130</sup> Willig V.S. at 16.

core regulatory principle in the rail industry.”<sup>131</sup> The three principles CSXT supports are full recovery of operating costs, full recovery of capital costs of bottleneck facilities, and recovery of lost contribution to the core network.

First, any access price should contain full recovery of all direct operating costs. The Board’s two proposed approaches do support that general concept, but it is imperative that operating costs include *all* operating costs. For example, the Board’s proposal does not address the issue or costs of labor protections that could be implicated by forced switching. The costs of labor protections and any other operating costs need to be included as part of any access price.

Second, access pricing should reflect demand-based differential pricing to recover the capital costs of bottleneck facilities at the replacement cost level. The Board has long recognized the economic necessity of using replacement costs.<sup>132</sup> And using replacement costs is particularly important here, where compensation must be sufficient to provide incumbent carriers with the incentives to maintain bottleneck infrastructure.

Third, access pricing must compensate the incumbent for the amount of lost contribution to the core network portion of the through route. As explained above and in Professor Willig’s verified statement, a compensation methodology that

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<sup>131</sup> *Major Issues* at 20.

<sup>132</sup> *See, e.g.*, Rate Guidelines - Non-Coal Proceedings, 1987 LEXIS 390, at \*8 (Mar. 23, 1987) (“One of the major reasons for developing CMP was to provide railroads the opportunity to earn adequate revenues and replace assets expended in the provision of rail service at a current cost level. In describing the SAC test of maximum reasonableness in our Guidelines decision, we therefore emphasized that current replacement costs were to be used in the calculation of any proposed SAC test.”).

includes lost contribution is necessary for railroads to recover their fixed and common costs and to the long-term financial stability of the industry.

**E. An Access Pricing Regime That Fails to Provide Just Compensation Is Unconstitutional.**

The three principles proposed above are not simply required by sound economics and wise regulatory policy. They are the bare minimum required by the Constitution. For all the reasons detailed above, the Board should not proceed down the unwise path proposed in the Notice. But if the Board is determined to upend the regulatory order despite the Notice's irreconcilability with the statute and the overwhelming evidence that the damage caused by the Board's proposal will vastly outweigh its purported benefits, at a minimum the Board must ensure that it sets an access price that comports with the Fifth Amendment to the U.S. Constitution.

The Fifth Amendment generally entitles a party to the fair market value of the property taken from them by the government. U.S. Const., amend. V ("nor shall private property be taken for public use, without just compensation"). So when the government takes private property by eminent domain, it must pay the owner what a private party would have had to pay for the same property rights according to an objective measure of its value. *See, e.g., Kelo v. City of New London*, 545 U.S. 469, 477 (2005). Whether or not regulation that interferes with the use of private property can constitute a taking is a fact-specific question in which it is of "particular significance" to consider "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with

distinct investment-backed expectations.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). For the reasons described above and in the verified statement of Michael Ward, CSXT has considerable investment-backed expectations in the current regulatory framework, and adoption of a regulatory regime in which CSXT could no longer recoup its investments would have a significant negative economic impact.

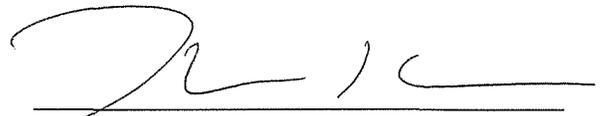
When a government regulation would effect a taking of private property, the government is required to compensate the owner for the fair market value of the property rights being taken. *Roberts v. City of New York*, 295 U.S. 264, 284 (1935) (“the owner is entitled to . . . the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact”). So here, a willing railroad seller of access to a particular shipper would not be willing to sell that property right to a willing buyer without being compensated for the potential contribution that the seller would be losing. That potential contribution is not limited to the bottleneck segment on which the switching would be performed; it also would include the seller’s lost contribution from long haul service to the shipper. A selling railroad would not willingly sell switching access to a competitor unless it was compensated for (1) all operating expenses it would incur to provide the switching; (2) an appropriate share of the fixed costs for the facilities used to provide the switching service; and (3) the lost contribution for the long haul service that the seller would be giving up. Any access pricing regime that does not compensate a railroad for these elements of the fair

market value of access to a shipper is noncompensatory and would violate the Takings Clause.

### VIII. CONCLUSION.

For the foregoing reasons, the Board should withdraw the Notice and reaffirm its existing, successful, and lawful policies for considering reciprocal switching cases.

Respectfully submitted,



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October 26, 2016

**Exhibit 1**  
**to**  
**Opening Comments of**  
**CSX Transportation, Inc.**

**Ex Parte No. 711 (Sub-No. 1)**  
***Reciprocal Switching***

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 711**

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**PETITION FOR RULEMAKING TO ADOPT REVISED  
COMPETITIVE SWITCHING RULES**

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**OPENING COMMENTS OF CSX TRANSPORTATION, INC.**

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CSX Transportation, Inc. (“CSXT”) respectfully submits these Opening Comments in response to the Board’s July 25, 2012 order requesting comments on the National Industrial Transportation League’s (“NITL’s”) Petition for a rulemaking to consider changes to the Board’s rules for considering reciprocal switching requests (“NITL Petition”). The Board should reject NITL’s proposal that the Board commence a rulemaking to consider a misguided forced switching<sup>1</sup> rule that would have severely deleterious effects on shippers, the railroad industry, and the United States transportation network as a whole. The NITL proposal would replace the settled, successful regulatory regime created by the Staggers Rail Act of 1980<sup>2</sup> and the Interstate Commerce Commission Termination Act of 1995<sup>3</sup> with a risky new experiment in which many shippers could obtain forced switching orders virtually on demand, as a result of the expansive “conclusive presumptions” that NITL proposes. NITL’s assumption that widespread forced switching would be easy to administer and relatively costless is deeply misguided. As demonstrated below and in the Opening Comments of the Association of American Railroads (“AAR”), this experiment would have significant negative impacts on service and fluidity for all shippers in the rail network, and it would burden the Board with waves of new regulatory litigation presenting novel and fact-intensive issues.

NITL admits that its proposal would “establish a new regulatory regime,” NITL Petition at 1, but claims that the Board should remake the regulatory system because NITL members would “prefer[]” to obtain lower rates through forced access orders rather than rate cases. *See*

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<sup>1</sup> As the agency has recognized, the term “reciprocal switching” in 49 U.S.C. § 11102 is a misnomer, for if the switching arrangement is created by government fiat it is “forced switching” and plainly not “reciprocal.” *Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171, 176 n.13 (1986).

<sup>2</sup> Pub. L. No. 96-448, 94 Stat. 1895 (hereafter “Staggers Act”).

<sup>3</sup> Pub. L. No. 104-88, 109 Stat. 103 (hereafter “ICCTA”).

Ex Parte 705 Hearing Tr. at 61 (June 22, 2011) (testimony of C. Warfel for NITL) (“Although a shipper may file a rate case at the Board in hopes of achieving reduced rates, for most, this is not the preferred solution.”). NITL claims that such a step would “minimize the need for federal regulatory control” by providing an alternative to rate reasonableness litigation for shippers seeking a rate reduction. *Id.* But the NITL proposal would plainly increase regulation of the rail industry—and the Board’s docket of regulatory litigation—by significantly degrading the standards for shippers to obtain forced switching orders. If adopted, NITL’s proposal would create a massive volume of new litigation for the agency, much of which would require careful, fact-specific examination of complex issues such as access pricing, agreement terms, yard and line capacity, service levels, routing issues, labor protection, and environmental impacts. And unlike rate reasonableness litigation, which is governed by established standards that have been refined through decades of agency and judicial precedent, procedures to govern forced switching cases would have to be painstakingly developed by the agency from scratch. Adoption of NITL’s proposal would not reduce regulation in any way; rather, it would make another regulatory option available for a shipper that thinks its rate is too high.

The Board’s current regulatory regime provides ample remedies to shippers who believe that their rates are unreasonably high, and it permits resolution of those disputes in a way that does not negatively impact other shippers or the rail network as a whole. In contrast, NITL’s proposal would risk the efficiency, health, and financial viability of a rail system that benefits thousands of customers, employees, and consumers, all because of a shortsighted demand by a subset of shippers for lower rates by any means necessary. There is no justification for the Board to adopt a sweeping and dangerous regulatory restructuring for the alleged benefit of a small group of shippers that have ready access to tested rate reasonableness remedies.

The Board’s July 25, 2012 Order in this proceeding asks commenters to provide “empirical evidence on the impact of the proposal.” *Petition for Rulemaking To Adopt Revised Competitive Switching Rules*, Ex Parte No. 711, at 2 (July 25, 2012) (“July 25 Decision”). The ambiguity of NITL’s proposal, however, makes it impossible to provide reliable data to respond fully to each of the Board’s requests in the July 25 Decision. As a partial response to the Board’s requests, CSXT refers the Board to the initial comments of AAR on the proposal, which contain analyses that respond to many of the Board’s questions and explain why further, more detailed analysis is not possible. Additionally, in response to the Board’s request for “more empirical evidence” about the impact of the NITL proposal on network efficiency, CSXT provides with these comments some examples of the likely network inefficiencies and operational problems that would result from NITL’s proposal. *See infra* at § III. As demonstrated below, adoption of the NITL proposal would generate significant additional operational costs and take a high toll on network fluidity.

\* \* \*

Section I explains that the Interstate Commerce Act does not allow the Board to implement a forced switching proposal like the NITL proposal, because NITL’s plan to use forced switching as a remedy for allegedly unreasonable rail rates is inconsistent with the governing statutory scheme and agency precedent, and because Congress’s decision in ICCTA to reject forced switching proposals like those advocated by NITL and instead ratify the ICC’s “existing standards” for reciprocal switching precludes the Board from second-guessing that congressionally-approved policy and interpretation. Section II shows that, even if the Board had authority to change the established interpretation of § 11102, NITL has failed to articulate any sound justification for the Board to change its competitive access rules. Section III details some

of the significant operational problems that would result from adoption of the NITL Proposal. Section IV describes the deleterious impact that adoption of the NITL proposal would have on railroads' capital spending. Finally, Section V explains some of the complex issues that would have to be resolved in forced switching litigation, thus debunking NITL's claim that its proposal would reduce regulation.

**I. THE INTERSTATE COMMERCE ACT DOES NOT ALLOW THE BOARD TO IMPLEMENT NITL'S PROPOSAL FOR FORCED SWITCHING ON DEMAND.**

NITL's proposal should be rejected because it is at odds with the language and purpose of the Interstate Commerce Act. The record in Ex Parte 705 contains detailed arguments about the scope of the Board's authority and the proper interpretation of the statute, and CSXT will not reiterate all the arguments it made in that proceeding regarding the governing legal framework and the lack of a legal basis to adopt the sort of sweeping regulatory changes that NITL seeks.<sup>4</sup> But the NITL Proposal creates three particular conflicts with the Interstate Commerce Act and the established regulatory regime that should not go unmentioned, and that each require rejection of the proposal: (1) the inconsistency of NITL's proposed "new regulatory regime" of forced switching with the regulatory regime established by Congress in the Staggers Act and ICCTA; (2) the irreconcilability of NITL's claim that blanket requirements of open interchanges are pro-

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<sup>4</sup> CSXT hereby incorporates by reference the legal arguments submitted in its Opening, Reply, and Supplemental Comments in Ex Parte 705. In particular, CSXT refers the Board to its Ex Parte 705 comments on the lack of basis for sweeping regulatory change (*see* CSXT Opening Comments at 11-20 (filed Apr. 12, 2011)); the substantial evidence that Congress's repeated failure to act on legislation that would ease standards for forced switching indicates its approval of the Board's current policies (*see* CSXT Opening Comments at 9-10; CSXT Reply Comments at 27-29 (filed May 27, 2011)); the sufficiency of the Board's rate reasonableness procedures for resolving complaints about unreasonably high rates (*see* CSXT Reply Comments at 8-11; CSXT Supplemental Comments at 9-19 (filed July 25, 2011)); and the fact that adoption of a forced switching regime for the benefit of individual shippers likely constitutes a taking for a private purpose that is forbidden by the Constitution and that at the very least would oblige the government to pay substantial compensation to carriers (*see* CSXT Opening Comments at 20-21).

competitive with the agency’s previous conclusion that they are not; and (3) the fact that Congress specifically approved of the current interpretation of § 11102 when it enacted ICCTA over the objections of parties who had asked Congress to legislatively overrule *Midtec*. Even if the NITL proposal were wise as a matter of policy—and it plainly is not—the Interstate Commerce Act does not permit the Board to create this “new regulatory regime” unless directed to do so by Congress.

**A. NITL’s Desire to Use Forced Switching Orders As a Remedy For Unreasonable Rates Is Inconsistent With the Statute.**

NITL and other advocates of forced switching have made clear that their primary motivation for proposing forced switching orders is their belief that rail rates are “too high” and their view that forced access would be a “preferred solution” to filing a rate reasonableness case. *E.g.*, Ex Parte 705 Hearing Tr. at 61 (June 22, 2011) (testimony of C. Warfel for NITL); *id.* at 252 (testimony of W. Hurst for Nat’l Ass’n of Wheat Growers that “better rates” are the “bottom line”). Under the “new regulatory regime” that NITL proposes, the standards for shippers to obtain forced switching orders would be lowered so that such orders would be an alternative remedy for shippers who wanted to secure lower rates without filing a rate case. While NITL’s apparent belief that forced switching litigation would be simpler and more efficient than rate litigation is simply wrong,<sup>5</sup> the more fundamental problem is that NITL’s proposal to create a forced switching alternative for rate relief is inconsistent with the statutory scheme.

Indeed, NITL all but admits that one motivation of its proposal is to create a regulatory remedy for shippers who think their rates are “too high” that does not require those shippers to present rigorous evidence that the railroad possesses market dominance over the movement at

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<sup>5</sup> See below at Section V for a discussion of the complexities that would be presented by litigation under NITL’s forced switching proposal.

issue.<sup>6</sup> Congress carefully crafted the Interstate Commerce Act to limit rate relief to shippers who truly lack effective competitive alternatives. But the “conclusive presumptions” for market dominance that NITL proposes would provide automatic forced access for any shipper who decided to ship 75% of its traffic by a railroad for a 12-month period—thus giving shippers with competitive alternatives the ability to obtain forced switching simply by choosing to route traffic by rail for a short period. Such a presumption starkly departs from the settled understandings that the market dominance inquiry requires consideration of potential competitive alternatives—not just currently-used alternatives<sup>7</sup>—and that the Board should not give weight to arguments that place the existence of market dominance entirely within one party’s control.<sup>8</sup>

Still worse, NITL’s other conclusive presumption for market dominance would apply a maximum R/VC ratio as an automatic trigger for forced switching eligibility. Congress made clear that R/VC ratios cannot be used to establish a presumption either that the carrier possesses market dominance or that its rate is unreasonable. *See* 49 U.S.C. § 10707(d)(2).<sup>9</sup>

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<sup>6</sup> *See* NITL Petition at 44-46 (complaining about length of proceedings to litigate market dominance in recent carload cases and that “Board seems to believe that a determination of the issue of market dominance is more complex for [carload] traffic than for heavy-loaded unit trains of coal”). Relatively low-volume carload traffic, of course, is often more susceptible to competition from trucks than high-volume unit-train traffic, and the statute requires the Board to carefully consider the effectiveness of truck competition for carload traffic.

<sup>7</sup> *See, e.g., FMC Wyoming Corp. v. Union Pacific R.R. Co.*, 4 S.T.B. 699, 713 (2000) (concluding that the “potential for conversion to motor carriage is sufficient to discipline UP’s rail rates”); *Southwest R.R. Car Parts Co. v. Missouri Pac. R.R. Co.*, STB Docket No. 40073 (Feb. 20, 1998) (“The fact that it may take some time for a shipper to exercise its competitive alternatives does not preclude a finding of no market dominance.”).

<sup>8</sup> *See, e.g., E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42101, at 4 (June 30, 2008) (evidence “that a carrier responded to a threat of competition” by lowering rates was insufficient to prove market dominance, because otherwise carriers would have the ability “to insulate themselves from rate challenges” by the act of a small rate reduction).

<sup>9</sup> *See also Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 294 (1997) (“Apart from the 180% jurisdictional threshold, which has been set by law, we do not use rate-cost

NITL's argument that its "conclusive presumptions" are justified because § 11102 does not have an explicit market dominance requirement misses the point. *See* NITL Petition at 44. Creating a "new regulatory regime" for processing shipper complaints about allegedly high rates that is designed to avoid the jurisdictional market dominance requirements of 49 U.S.C. § 10707 is a blatant subversion of Congress's purpose in imposing those restrictions. It makes no sense to think that Congress would carefully restrict the Board's rate reasonableness jurisdiction to shippers that truly have no effective competitive alternatives, only to leave the door wide open for such shippers to pursue forced switching orders as a remedy for rates they do not like.

Moreover, Congress has made clear that it views rate reasonableness litigation as the primary means for protecting shippers from unreasonably high rates. Congress has given the Board specific guidance about the substantive factors that it should consider in rate reasonableness cases,<sup>10</sup> factors that it should not consider,<sup>11</sup> the appropriate time frame for processing rate complaints,<sup>12</sup> the need to create expedited procedures for SAC cases,<sup>13</sup> and the need to establish simplified standards for cases in which the creation of a full stand-alone cost

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relationships as the basis for qualitative market dominance determinations."); *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118, 122 (1981) (questioning whether R/VC ratios "reliably indicate the presence or absence of market dominance" because "there are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad").

<sup>10</sup> *See* 49 U.S.C. § 10701(d)(2) (setting forth Long-Cannon factors to be considered in rate reasonableness cases).

<sup>11</sup> *See* 49 U.S.C. § 10707(d)(2) (Board may not use R/VC ratio to establish presumption that rate exceeds a reasonable maximum).

<sup>12</sup> *See* 49 U.S.C. § 10704(c) (requiring Board to decide stand-alone cost cases within 9 months after close of administrative record and cases based on simplified methodology within 6 months after close of administrative record).

<sup>13</sup> *See* 49 U.S.C. § 10704(d) (requiring Board to "establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates").

presentation would be too costly.<sup>14</sup> Legislative history similarly reveals that Congress viewed rate litigation as the primary remedy for unreasonably high rates.<sup>15</sup>

Read as a whole, the Interstate Commerce Act leaves no doubt that maximum rate reasonableness litigation is intended to be the regulatory remedy for shippers that think their rates are too high. Granting NITL's request for "a new regulatory regime" where forced switching orders would replace rate reasonableness cases as the remedy for allegedly unreasonable rates is irreconcilable with the statute and the regulatory structure it establishes.

**B. NITL's Claim That Forcing Interchanges to Remain Open is Pro-Competitive Is Both Wrong And Contrary to Agency Precedent.**

The fundamental predicate of NITL's proposal is a claim that forcing railroads to open interchanges for switching promotes competition. However, the agency long ago concluded that requiring railroads to maintain open interchanges is not necessarily pro-competitive, and indeed that such requirements are often anti-competitive. *See Rulemaking Regarding Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982) ("*Traffic Protective Conditions*"). The ICC found in *Traffic Protective Conditions* that forcing railroads to keep interchanges open should be limited to instances where such a step was necessary to address a competitive problem. This conclusion directly contradicts NITL's assertion that such forced arrangements necessarily promote competition.

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<sup>14</sup> See 49 U.S.C. § 10701(d)(3) (requiring Board to "establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case").

<sup>15</sup> For example, the Senate Report on ICCTA identified "maximum rate regulation for captive traffic" as one of the provisions "necessary to protect rail shippers" that ICCTA would be retaining, and detailed Congress's desire that the Board resolve "challenges to the reasonableness of rates charged on captive traffic . . . more expeditiously." S. REP. NO. 104-176, at 7 (1995). Significantly, Congress did not include forced switching on its list of "provisions that are necessary to protect rail shippers." *Id.*

For many years the ICC imposed standard conditions on mergers known as the “DT&I Conditions,” which were intended to mitigate the impact of consolidations by, *inter alia*, forbidding consolidated carriers from offering better rates for new single-line routings and from preferring routings over its newly-acquired lines over routings on foreign railroads. *Traffic Protective Conditions*, 366 I.C.C. at 113. Particularly relevant here is Condition 5, which required a consolidated carrier to allow shippers on its lines “to route traffic over any and all existing routes and gateways.” *Id.* at 135 (DT&I Condition 5); *see also id.* at 113 (“Condition 5 prevents a carrier from restricting the number of routings over which its originating traffic may travel. It was intended to protect shippers by ensuring their power to continue routing traffic over all routes and gateways existing prior to the consolidation.”).

Although the DT&I Conditions were intended to benefit the public interest, with experience the ICC concluded that the conditions were anti-competitive. While couched in seemingly pro-competitive terms like maintaining “all existing routes and gateways,” in many ways the DT&I Conditions were a classic instance of regulation that protected certain competitors without necessarily improving competition. Among other things, the DT&I Conditions precluded railroads from “winnowing out inefficient routes” and making efforts “to rationalize their systems” and impeded railroads from competing effectively with other modes. *Traffic Protective Conditions* at 122, 114. The ICC’s conclusion was strongly supported by the U.S. Department of Justice, which commented that the DT&I Conditions were “perniciously anti-competitive.”<sup>16</sup> DOJ noted in particular that DT&I Condition 5 “requiring that all routing options remain open” ultimately hurt shippers by preventing carriers “from attempting to attract

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<sup>16</sup> *See* Comments of U.S. Department of Justice at 12-13, ICC Ex Parte No. 282 (Sub-No. 5) (filed Oct. 8, 1980).

new traffic through improved service.”<sup>17</sup> FRA similarly concluded that the DTI Conditions were themselves “anticompetitive.”<sup>18</sup>

One of the motivating factors behind the ICC’s decision to abandon the DT&I Conditions was its conclusion that blanket, automatic traffic protective conditions were an ineffectual and counterproductive way to address actual competitive problems. *See Traffic Protective Conditions* at 116 (“general conditions which are uniformly imposed are of questionable value”). Instead, the agency concluded that conditions to protect against competitive abuses should be “specific [and] narrowly focused.” *Id.* at 133.

The ICC’s experience-based conclusion in *Traffic Protective Conditions* remains valid today. Automatic requirements for open interchanges in the absence of any evidence of anticompetitive behavior are not an effective way to promote competition. Indeed, such requirements often harm competition. The agency’s longstanding holding that the forced switching provisions of the Interstate Commerce Act are intended to be used only to remedy competitive abuses is consistent with this basic recognition that one-size-fits-all measures to artificially impose “competition” are often counterproductive, and that the agency should only intervene in the marketplace to force an involuntary relationship when some market failure has occurred. It is worth noting that NITL participated in the *Traffic Protective Conditions* rulemaking and argued that if the Commission chose to remove the DTI Conditions it should “establish[] a national requirement for reciprocal switching” that supposedly would improve “[c]ompetition between carriers.” Comments of National Industrial Traffic League at 8-9, ICC Ex Parte No. 282 (Sub-No. 5) (filed Oct. 8, 1980). The ICC wisely chose to reject NITL’s

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<sup>17</sup> *Id.* at 11.

<sup>18</sup> Comments of Federal Rail Administration at 3, ICC Ex Parte No. 282 (Sub-No. 5) (filed Oct. 9, 1980).

forced switching plan in *Traffic Protective Conditions*, and the Board should similarly reject NITL's recycled idea for a "new regulatory regime" today.

**C. Congress Ratified the *Midtec* Interpretation of § 11102 in ICCTA, and the Board Does Not Have Authority to Adopt a New Interpretation.**

The final, and decisive, reason that the NITL Proposal is contrary to the statute is that Congress explicitly endorsed and ratified the ICC's *Midtec* interpretation of § 11102 when it enacted ICCTA. Before it passed ICCTA Congress was fully apprised of the ICC's existing standards for granting forced switching requests, and Congress was intensively lobbied by groups advocating the same policy change that NITL advocates today. But Congress chose to reject those requests and instead acted to preserve "existing standards" for forced switching requests by re-enacting the existing statutory language. H.R. REP. NO. 104-311, at 84, *reprinted in* 1995 U.S.C.C.A.N. 793, 796. This is a textbook case of legislative ratification of an agency interpretation, and it forecloses NITL's attempt to alter the congressionally-approved interpretation of § 11102 without Congress's consent.

Advocates of forced switching appear to be confused about the legislative ratification argument articulated by CSXT and several other commenters in Ex Parte 705, falsely claiming that it amounts to an argument that "Congress, in passing ICCTA, 'ratified' all of the Board's existing precedent." NITL Petition at 23; *see also* Reply Comments of Interested Parties at 41-42, Ex Parte 705. That caricature cannot obscure the reality that the legislative ratification doctrine is an established interpretive tool that has been repeatedly applied by the Supreme Court and the D.C. Circuit. *See infra* at 12-14. Nor can it change the fact that Congress's deliberate decision to re-enact § 11102 without change—after being fully apprised of the ICC's *Midtec* interpretation and after being urged by certain shipper interests to change that interpretation—is a prototypical instance of legislative ratification.

Forced switching advocates also conflate railroads' argument in Ex Parte 705 that Congress legislatively ratified the *Midtec* interpretation in ICCTA<sup>19</sup> with the entirely separate argument that Congress's failure to act on multiple post-ICCTA legislative proposals to change the agency's interpretation of § 11102 is evidence of acquiescence in that interpretation (a principle best encapsulated by the Supreme Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983)).<sup>20</sup> But because legislative ratification is triggered by Congress's actions in choosing to re-enact a statute that has been given a particular interpretation, it is analytically distinct from arguments that Congress's intentions can be discerned from its failure to act on legislation. While forced switching advocates' arguments that the *Bob Jones* principle does not apply to Congress's repeated post-ICCTA failure to enact legislation that would change the *Midtec* standard are unavailing, the Board need not ascribe any special significance to Congress's failure to act on post-ICCTA legislation in order to conclude that Congress's unequivocal rejection in ICCTA of calls to overturn the ICC's interpretation of its reciprocal switching authority is a legislative ratification of that interpretation.

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<sup>19</sup> See, e.g., Opening Comments of CSXT at 6-9; Initial Comments of Canadian Pacific Ry. Co. at 43-47 (filed Apr. 12, 2011); Opening Comments of Norfolk Southern Ry. Co. at 14-22 (filed Apr. 12, 2011).

<sup>20</sup> See, e.g., NITL Petition at 23-24 (claiming that *Bob Jones* was cited to support ratification argument); Ex Parte 705, Reply Comments of Interested Parties at 41-47 (filed May 27, 2011). While NITL claims that the Interested Party Comments "thoroughly responded to" the legislative ratification argument, NITL Petition at 24, in fact those comments were almost entirely devoted to an attempted rebuttal of the *Bob Jones* legislative inaction argument. The Interested Parties' only treatment of the distinct argument that Congress's deliberate rejection of calls to override *Midtec* in ICCTA constituted ratification of the ICC's interpretation is a single conclusory footnote claiming that cases recognizing ratification through re-enactment present "factual circumstances that are completely different." *Id.* at 47 n.44. As demonstrated below, however, the extensive Supreme Court and D.C. Circuit precedent on ratification by re-enactment is on all fours with the situation here. See *infra* at 12-14, 19.

The legislative ratification doctrine is the well-established principle that “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). The doctrine dates back over a century,<sup>21</sup> and it has been repeatedly applied by the Supreme Court<sup>22</sup> and the federal courts of appeal.<sup>23</sup> When it applies, the legislative ratification doctrine constitutes an exception to the ordinary rule that an agency may modify a statutory interpretation by giving a reasoned basis for its change of course.<sup>24</sup> In other words, once Congress has given its

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<sup>21</sup> See, e.g., *United States v. Cerecedo Hermanos y Compania*, 209 U.S. 337, 339 (1908); *United States v. G. Falk & Bro.*, 204 U.S. 143, 152 (1907).

<sup>22</sup> See, e.g., *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) (“When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the ‘congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.’” (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)); *United States v. Board of Comm’rs of Sheffield, AL*, 435 U.S. 110, 134 (1978) (“When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation”); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-66 (1951) (where “Congress considered in great detail” the NLRB’s prior application of the statute, “it is a fair assumption that by reenacting without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts”); *National Lead Co. v. United States*, 252 U.S. 140, 146-47 (1920) (re-enactment “amounts to an implied legislative recognition and approval of the executive construction of the statute . . . for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government”); see also *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 782-83 & n.15 (1985); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *Commissioner of Internal Revenue v. Estate of Noel*, 380 U.S. 678, 682 (1965).

<sup>23</sup> See, e.g., *Altman v. SEC*, 666 F.3d 1322, 1326 (D.C. Cir. 2011); *Society of Plastics Industry, Inc. v. ICC*, 955 F.2d 722, 728-29 (D.C. Cir. 1992); *AAR v. ICC*, 564 F.2d 486, 493-94 (D.C. Cir. 1977).

<sup>24</sup> See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (NLRB “is not now free” to change interpretation of Act after interpretation was ratified by, *inter alia*, re-enactment of statute without change); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396-97 (1956) (Commissioner of Internal Revenue could not revise interpretation of statute because re-enactment of provision without change indicated congressional acquiescence to that

imprimatur to an agency interpretation, the agency cannot alter that congressionally-adopted interpretation any more than it could disregard the statutory text.

The D.C. Circuit has explained that the legislative ratification doctrine requires three elements: (1) evidence that Congress re-enacted the statutory language without change<sup>25</sup>; (2) evidence that Congress was “made aware of the administrative interpretation”<sup>26</sup>; and (3) some “affirmative indication” that the re-enactment was intended to ratify the agency interpretation.<sup>27</sup> All three elements are satisfied here.

### **1. Element #1: Congressional Re-Enactment.**

There can be no serious question that the Congress that passed ICCTA re-enacted the reciprocal switching and terminal trackage rights provisions of the Staggers Act. *Compare* Staggers Act § 223, 94 Stat. at 1924 (Staggers Act version of then-§ 11103) *with* ICCTA § 102(a), 109 Stat. at 831 (reenacting identical language in current § 11102). This re-enactment is particularly significant because it was made as part of a significant review, revision, and

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interpretation); *Ward v. Commissioner of Internal Revenue Service*, 784 F.2d 1424, 1430 (9th Cir. 1986) (when Congress approves agency interpretations through re-enactment “those interpretations have the force of law and can only be changed by Congress”); *AAR v. ICC*, 564 F.2d at 494 (where Congress reenacted statutory language in spite of pleas to repeal agency’s interpretation of that language, Congress was deemed to have “affirmatively intended to adopt the Commission’s well established interpretation . . . [and] [t]he Commission was thus precluded . . . from radically changing its interpretation of that provision”).

<sup>25</sup> *AAR v. ICC*, 564 F.2d at 493.

<sup>26</sup> *Id.*; *see also United States v. Correll*, 389 U.S. 299, 305 n.20 (1967) (citing rejection of plea to change agency rule as evidence of congressional awareness and ratification of rule through re-enactment); *cf. Brown v. Gardner*, 513 U.S. 115, 121 (1994) (finding that re-enactment was without significance because “there is no . . . evidence to suggest that Congress was even aware of the [agency’s] interpretive position”).

<sup>27</sup> *AAR v. ICC*, 564 F.2d at 493; *see also Correll*, 389 U.S. at 305 n.20; *Isaacs v. Bowen*, 865 F.2d 468, 474 (2d Cir. 1989) (congressional awareness of interpretation and “affirmative, legislative indication of its willingness to leave [agency interpretation] in place” demonstrated ratification).

overhaul of the Interstate Commerce Act. *See Lorillard*, 434 U.S. at 582 (Congress’s “selectivity” in modifying some aspects of a re-enacted statute and not others “strongly suggests” that it intended to ratify interpretation of unamended sections). As in *Lorillard*, Congress’s decision not to change the language of § 11102 in a bill that substantially modified other sections of the Interstate Commerce Act strongly supports a conclusion that it approved of the ICC’s construction of that language.

**2. Element # 2: Congressional Awareness of ICC Interpretation of Statute.**

Second, Congress was well aware of the ICC’s interpretation of the reciprocal switching provisions of the Staggers Act at the time that Congress re-enacted those provisions in ICCTA. While Congress is generally presumed to be aware of an interpretation of a statute by its administering agency,<sup>28</sup> no such inference is necessary here, for there is overwhelming direct evidence that Congress was fully aware of both the ICC’s interpretation of then-§ 11102 in *Midtec* and *Intramodal Rail Competition* and of the fact that some parties wanted Congress to alter that interpretation.

One key indication that Congress was aware of the *Midtec* interpretation is the October 25, 1994 *ICC Regulatory Responsibilities Study*, a comprehensive report that the ICC submitted to Congress detailing the agency’s interpretation of its responsibilities under the Staggers Act.<sup>29</sup> The *ICC Regulatory Responsibilities Study* included a discussion of the statutory framework for competitive access remedies and the ICC’s interpretation of the appropriate scope of those remedies. In particular, the ICC stated unequivocally that “The Commission will force

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<sup>28</sup> *See Forest Grove Sch. Dist. v. T.A.*, 537 U.S. 230, 239 (2009).

<sup>29</sup> *See Interstate Commerce Commission, Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (Oct. 25, 1994), available at 1994 WL 639996 (“*ICC Regulatory Responsibilities Study*”).

such arrangements only where necessary to redress anticompetitive actions.” *ICC Regulatory Responsibilities Study* at \*25 (emphasis added). The Commission referred Congress to the *Midtec* decision to support this statement. *See id.* at \*25 n.152. The *ICC Regulatory Responsibilities Study* gave Congress clear notice of both the *Midtec* decision and the agency’s determination that competitive access remedies should be available only “to address a carrier’s anticompetitive actions.” *Id.* at \*26.

Moreover, the Congressional hearings on ICCTA contained considerable discussion of whether or not Congress should maintain or modify the ICC’s interpretation of its competitive access authority. NITL was one of several witnesses who argued that Congress should make it easier for shippers to obtain agency-mandated reciprocal switching or terminal access. NITL asked Congress to “guarantee . . . competitive switching rates” in order to “create more rail-to-rail competition.”<sup>30</sup> It claimed that the ICC had misinterpreted the Staggers Act and urged Congress “to enact specific changes to the statute” that would “encourage rail-to-rail competition.”<sup>31</sup> In the same vein, the Chemical Manufacturers Association argued that “[a]ny new legislation must encourage greater rail-to-rail competition than currently exists. All shippers must have the right of access to two or more railroads at reasonable rates and service.”<sup>32</sup> U.S. Clay Producers similarly advocated “statutory requirements and procedures for competitive access through switching, trackage rights, or otherwise, so that shippers served by only one Class I railroad are assured of access to other Class I railroads with reasonable rates and routes.”

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<sup>30</sup> *See Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearing Before the Subcomm. on Railroads of the H. Comm. on Transportation*, 104<sup>th</sup> Cong. (Jan. 26 & Feb. 22, 1995) (hereafter “*ICC Authority Hearings*”) at 183-84.

<sup>31</sup> *See id.* at 259-60.

<sup>32</sup> *See id.* at 534.

*Id.* at 493-94; *see id.* at 496 (“A prompt and effective approach must be provided in the statute so that all shippers are permitted access to more than one Class I rail carrier upon reasonable request.”).<sup>33</sup>

Congress also heard from witnesses urging it to uphold the ICC’s current interpretation. For example, the Department of Transportation recommended “no change” to current rules under which the agency “can order access under certain conditions” and “on a very limited basis.” *Id.* at 17-18 (testimony of J. Canny, Deputy Assistant Secretary of Policy, U.S. Dep’t of Transp.). In a written statement submitted to the House committee, DOT reiterated that the agency’s “competitive access authority should be retained in its current form” and that such authority “must be exercised judiciously.” *See id.* at 221. Many shippers also urged Congress to reject “suggestions that a new scheme to force railroads to allow competitors to use their facilities be imposed” and to maintain the ICC’s current interpretation of its competitive access authority. *See id.* at 486 (statement of over 400 shipper members of Committee Against Revising Staggers).

In short, there can be no question that Congress was “made aware of the administrative interpretation” of the ICC’s competitive access authority at the time it enacted ICCTA. *AAR v. ICC*, 564 F.2d at 493.

**3. Element #3: The Legislative History of ICCTA Strongly Indicates An Intent to Ratify The Midtec Interpretation.**

Finally, the legislative history of ICCTA contains unmistakable evidence showing that Congress made an affirmative decision to ratify the *Midtec* interpretation of § 11102. After extensive hearings where certain shipper interests advocated competitive access changes of a piece with those that NITL advocates today, Congress explicitly refused to adopt those

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<sup>33</sup> *See also ICC Authority Hearings* at 192-93 (testimony of R. Granatelli on behalf of Society of Plastics); *id.* at 281-82, 291 (Society of Plastics statement urging legislation to promote competitive access for shippers served by one railroad).

proposals. Instead, Congress chose to follow the recommendation of DOT and preserve “existing standards” for competitive access, and by doing so it decisively indicated an intent to ratify the *Midtec* interpretation.

The Congress that passed ICCTA acknowledged and rejected shipper arguments that legislative changes should be made to the ICC’s interpretation of § 11102. As the Senate Report on ICCTA explained:

The Committee recognizes that certain affected shipper groups – most notably smaller shippers and smaller railroads – believe that further legislative changes are necessary or desirable to more fully protect their interests. However, the Committee is concerned that such additional measures would necessarily cast an overly broad regulatory net and even then might be ineffective to solve the underlying concerns (e.g. car supply, market access, etc.).

S. REP. 104-176, at 9-10 (1995); *see also id.* at 5 (“Many broader transportation proposals viewed by the Committee to be re-regulatory were not included in this bill.”). Congress’s explicit refusal to adopt proposals designed to address shipper concerns about “market access” leaves no doubt that the re-regulatory proposals it was rejecting related to the competitive access provisions of the statute.

The Conference Report on ICCTA reiterated Congress’s intention to ratify “existing standards” for reciprocal switching and terminal access. H.R. REP. NO. 104-311, at 84, *reprinted in* 1995 U.S.C.C.A.N. 793, 796 (ICC functions including “terminal trackage rights and reciprocal switching jurisdiction” would be “transferred . . . under existing standards with minor modifications for large Class I railroads’ transactions”). Congress made clear that its intention was to retain the “existing agency power” to order competitive access—a power that the ICC had clearly held was limited to situations where agency action was necessary to remedy

anticompetitive conduct.<sup>34</sup> In short, the facts here overwhelmingly demonstrate legislative ratification of the ICC’s interpretation of reciprocal switching as a limited remedy to address anticompetitive conduct—not a sweeping authorization to impose forced access on demand.

*AAR v. ICC*, 564 F.2d 486 (D.C. Cir. 1977), is an instructive comparison. In that case the ICC had revised its previous interpretation of a “custom-of-the trade” provision of the Interstate Commerce Act exempting water transportation of bulk commodities from ICC regulation. *See id.* at 487. The agency argued that its initial interpretation of the statute was incorrect and that it had the authority to adopt a new interpretation. *See id.* at 489. While the D.C. Circuit concluded that both the ICC’s original and revised interpretations of the “custom-of-the trade” provision were reasonable readings of the statute in the abstract, *id.*, the court reversed the agency’s decision because it found that Congress’s decision to re-enact the provision in spite of “repeated pleas that the provision be repealed” indicated that Congress wished to ratify the prior interpretation. *Id.* at 493-94. The instant proposal presents a similar situation: a Congress that was well aware of the ICC’s *Midtec* interpretation and that was urged to alter that interpretation by statute instead chose to reject those proposals and re-enact the statute without change. As in *AAR v. ICC*, the agency is not now free to revise a prior interpretation that Congress has ratified.

Put simply, the Board does not have the authority to revisit an interpretation that Congress has ratified, even if that interpretation might initially have been a permissible one. Forced switching advocates’ theory that the appellate decisions upholding *Intramodal Rail Competition* and *Midtec* did not foreclose other interpretations of the statute is thus entirely

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<sup>34</sup> *See also id.* at 104, 1995 U.S.C.C.A.N. at 816 (ICCTA “retains the existing agency power to order access to terminal facilities”); H.R. CONF. REP. NO. 104-422, at 183-84, *reprinted in* 1995 U.S.C.C.A.N. 850, 868-69 (“Under the amended section 11102, the agency’s existing power to order access to terminal facilities, including main-line tracks a reasonable distance from the terminal, would be retained.”).

nonresponsive. *See, e.g.*, NITL Petition at 20-21. The issue is not whether the ICC could have interpreted the Staggers Act differently; it is whether the Board is allowed to disregard Congress’s decision in ICCTA to reject proposals to revise the agency’s competitive access standards and to ratify “existing standards” for competitive access.

In the same vein, NITL’s argument that the ICC misinterpreted the Staggers Act in *Midtec* and that the agency needs to adopt lower standards for forced switching orders in order to properly implement the Staggers Act is fundamentally misguided. *See* NITL Petition at 10-11. Even if NITL had asserted a plausible initial reading of the Staggers Act (and it has not), the version of the Interstate Commerce Act that binds the Board is not Staggers, but ICCTA. And there is no serious question that the Congress that enacted ICCTA approved wholeheartedly of the ICC’s interpretation of Staggers as a deregulatory statute under which competitive access should be limited to address instances of anticompetitive conduct and that Congress firmly rejected calls by NITL and others to make “legislative changes” to that interpretation that would change rules on “market access.” S. REP. 104-176, at 9-10 (1995).

The Congress that enacted ICCTA did so after considering and rejecting arguments that are indistinguishable from those that NITL advances in its Petition. Just like NITL does today, shippers told the Congress considering ICCTA that the ICC had misinterpreted Staggers by requiring proof of anticompetitive conduct to obtain a reciprocal switching order<sup>35</sup>; that railroads were sufficiently profitable to allow more forced switching<sup>36</sup>; that forced switching would be a

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<sup>35</sup> *See ICC Authority Hearings* at 259 (NITL statement arguing that ICC misapplied Staggers Act by not adopting policies to promote rail-to-rail competition); *id.* at 282 (Society of Plastics statement arguing that ICC misinterpreted Staggers Act in *Midtec*).

<sup>36</sup> *See id.* at 192 (Society of Plastics testimony that competitive access reform was appropriate because “the railroad industry is booming today”); *id.* at 258-59 (NITL statement arguing that “[w]hile the Staggers Act has produced much good, circumstances have changed since 1980” and “specific changes to the statute” should be made to “encourage rail-to-rail competition”).

preferable alternative to rate reasonableness cases<sup>37</sup>; that Canadian interswitching should be a model for a forced access scheme in the United States<sup>38</sup>; and that changing the law to allow more forced switching cases would be “pro-competitive” and “deregulatory.”<sup>39</sup> In short, almost every single argument NITL presents in support of its petition is a near-carbon-copy of an argument that Congress considered and rejected. If NITL is disappointed by the fact that in enacting ICCTA Congress rejected calls for expanding forced switching relief and explicitly endorsed the ICC’s interpretation of its statutory authority, then it should address its arguments to Congress, not to the Board.

## **II. THERE IS NO REASON FOR THE BOARD TO REPLACE ITS CURRENT POLICIES WITH THE NITL PROPOSAL.**

Even if the Board had the legal authority to reject the agency’s longstanding prior interpretations of § 11102 and to grant NITL’s desire to “establish a new regulatory regime,” NITL Petition at 1, it has no reasoned basis for doing so. The Ex Parte 705 proceeding included extensive comments about the lack of a basis for the Board to revisit its competition policies, and CSXT will not repeat those arguments here. But it should not go unmentioned that NITL has failed to articulate any persuasive basis for replacing the current regulatory system with its preferred forced switching regime.

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<sup>37</sup> See *id.* at 259-60 (NITL statement arguing that “rail-to-rail competition” through, *inter alia*, forced switching would be better alternative to lengthy and expensive rate reasonableness litigation); *id.* at 280-81 (Society of Plastics statement urging Congress to replace rate regulation with open access scheme).

<sup>38</sup> See *id.* at 192 (Society of Plastics testimony that Congress should amend statute to implement “the Canadian process” for competitive access); *id.* at 282 (Society of Plastics statement urging Congress to adopt Canadian open access system).

<sup>39</sup> See *id.* at 183-84 (NITL testimony that amending statute to create “a guarantee of competitive switching rates” would be “the next step in the deregulation process” and would “create more rail-to-rail competition”).

First, the problem that NITL complains about—rail rates that it thinks are too high—already has an adequate remedy under current law. Out of the many shippers who testified or submitted comments in Ex Parte 705, virtually none of them raised complaints about service. The complaints all focused on rail rates that are allegedly too high. And even if shippers had articulated complaints about service, there can be no serious argument that forced switching (and the added handlings it would entail) would improve service. Indeed, as demonstrated below in Section III, widespread forced switching would negatively impact service.

There is no reason for the Board to undertake a dangerous, untested experiment with a new regulatory regime to address complaints about allegedly unreasonable rail rates, because any shipper with such a complaint already has a remedy. The Board has well-developed, tested remedies for rate reasonableness determinations that are available to any shipper without effective competitive options who believes that its rate is unreasonably high.

While NITL asserts that it subjectively “prefer[s]” a forced switching regime to rate reasonableness cases, Ex Parte 705 Hearing Tr. at 61 (June 22, 2011), the Board’s current remedies are fully adequate to address the concerns of any shipper who thinks that its rates are too high. Indeed, the Board has instituted several recent reforms to simplify and streamline processes for rate cases,<sup>40</sup> to create simplified methodologies for smaller rate cases,<sup>41</sup> and to lower filing fees.<sup>42</sup> As CSXT’s Supplemental Comments in Ex Parte 705 demonstrated,

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<sup>40</sup> See *Major Issues in Rail Rate Cases*, Ex Parte No. 657 (Sub-No. 1) (Oct. 30, 2006); *Rate Regulation Reforms*, Ex Parte No. 715 (NPRM served July 25, 2012).

<sup>41</sup> See *Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1) (Sept. 5, 2007).

<sup>42</sup> See *Regulations Governing Fees for Services Performed in Connection With Licensing and Related Services—2007 Update*, Ex Parte No. 542 (Sub-No. 14) (Jan. 24, 2008) (lowering filing fee for SAC cases from \$178,200 to \$350 and filing fee for Simplified SAC cases from \$10,600 to \$350); see also *Regulations Governing Fees for Services*, Ex Parte No. 542 (Sub-No. 18) (July 7, 2011) (setting forth current fee structure for complaints).

shippers' complaints about the effectiveness of the Board's rate reasonableness processes are not well founded. *See* CSXT Supplemental Comments at 9-21, Ex Parte 705 (filed July 25, 2011).

The Board resolves major rate cases at a pace comparable to that of federal district court litigation, *id.* at 17-18, and it has made simplified and expedited procedures available to a substantial majority of shippers. *Id.* at 21. Moreover, there is no reason to think that forced switching cases would be a more efficient or practical method to settle rate disputes, in part because forced switching cases would present complex, case-specific factual issues. *See infra* at § V.

Second, despite NITL's complaints about the current interpretation of § 11102, it has made no showing that the current standard is too stringent. Indeed, there is a fundamental contradiction in NITL's position. On the one hand, it claims that the pernicious effects of a supposed clear lack of competition in the rail industry requires the Board to remake the regulatory landscape.<sup>43</sup> On the other hand, it says that it is too burdensome to ask shippers to meet the *Midtec* standard, *i.e.*, to demonstrate that forced switching is necessary to remedy or prevent "conduct that is contrary to the rail transportation policy or is otherwise anticompetitive." *Midtec*, 3 I.C.C.2d at 181-82.<sup>44</sup> So the "lack of competition" in the rail industry is supposedly severe and serious enough to justify a radical new regulatory regime, but according to NITL it would be too burdensome to ask a shipper to demonstrate anticompetitive

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<sup>43</sup> *See, e.g.*, Ex Parte 705 Hearing Tr. at 60-62 (June 22, 2011) (testimony of C. Warfel for NITL) (claiming that railroads' "substantial market power" has caused "steadily rising freight rates," "mediocre service," an "unwilling[ness] to engage in meaningful negotiations," and a pattern of railroads imposing "take-it-or-leave-it terms"); Ex Parte 705, Reply Comments of Interested Parties at 7-8 (claiming that rail industry has engaged in "collusion" and "conscious parallelism" that requires Board action); Ex Parte 705, Opening Comments of NITL at 4-6 (claiming that railroads "consciously avoid competition" and "refuse to negotiate" with shippers).

<sup>44</sup> *See, e.g.*, NITL Petition at 16.

conduct in an individual case. If shippers were right that the supposed lack of competition in the rail industry justifies reciprocal switching on a mass scale, it is not at all clear why they could not satisfy the *Midtec* standard in an individual case. *Cf. id.* at 174-75 (stating Commission’s pledge to grant reciprocal switching or terminal access relief “should the behavior of any . . . carrier exhibit anticompetitive abuse or other offense to the standards of the Interstate Commerce Act”).

NITL apparently believes that the fact that the ICC denied relief in four forced switching cases is self-evident proof that the standards are inappropriate. *See* NITL Petition at 14-16. But NITL does not make any showing that those cases were wrongly decided. And no conclusion can be drawn from the fact that no other cases have been filed. Indeed, it would not be surprising to find that shippers who believe a rate is unduly high might elect to take the more straightforward avenue of a rate reasonableness case (which, among other things, holds out the promise of reparations and a rate prescription).

In short, NITL has not made any showing of a need for the Board to alter its interpretation of its forced switching authority. And as described below, adopting NITL’s proposed rules would create significant operational and service problems that would adversely impact shippers, railroads, and the public as a whole.

### **III. NITL’S PROPOSAL WOULD HAVE SERIOUS ADVERSE IMPACTS ON RAIL SERVICE TO ALL SHIPPERS.**

The “railroad renaissance” that followed passage of the post-Staggers Act has been driven largely by major advances in the efficiency and reliability of rail service. Today, America’s railroads handle more freight over longer distances with fewer locomotives, cars and personnel than at any time in their history. Central to the industry’s ability to deliver faster, more reliable service to customers are modern operating practices designed to reduce the number of times that individual cars must be handled along their route of movement. Eliminating

unnecessary car handlings benefits both carriers and shippers by reducing delays at yards and interchange points, improving asset utilization, and reducing the overall cost of providing service.

NITL's mandatory switching proposal would undermine the predictability of traffic flows that is essential to current railroad operations and threaten the advances in rail service quality and reliability that the industry has been able to deliver in the post-Staggers era. While NITL's proposal would, at best, provide the possibility of lower rates to one subset of shippers—exclusively-served shippers whose facilities are located within 30 miles of an active interchange with a second carrier—the adverse service consequences of that proposal would be felt by all shippers (including customers ineligible for forced access because their facilities already are served by more than one railroad or are not within the 30-mile radius proposed by NITL). The harm likely to result from a forced switching regime far outweighs any benefits that might be garnered by those shippers who would be eligible to demand such switching. Accordingly, the overall public interest strongly supports rejection of NITL's proposal.

**A. Railroads Have Delivered Major Improvements In Service Quality and Reliability Over The Past Several Decades.**

In the years following passage of the Staggers Act, the U.S. rail industry underwent a structural reformation, as railroads rationalized unprofitable portions of their systems and consolidated to form stronger carriers capable of providing a broader range of services over wider geographic areas. At the same time, advances in technology have driven significant improvements in productivity and enabled railroads to develop new operating plans that transformed the manner in which carload shipments are transported. Closer coordination between carriers in handling interline shipments has resulted in more efficient train service and a substantial reduction in “dwell time” at interchange points.

The mergers and consolidations that reshaped the rail industry in the post-Staggers era created larger Class I carriers capable of offering expanded single-line service. The proliferation of new single-line rail service options vastly reduced the number of rail cars that must be interchanged between carriers during their journey along the rail network. The ICC has observed that:

Interchanging traffic adds to the total cost of handling traffic, including operational cost (car-switching) and clerical costs (recordkeeping). Interchanging freight also adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars.”

*Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 940 (1980) (“*BN/Frisco*”) (emphasis added).

This agency has repeatedly recognized the benefits—for carriers and shippers alike—of reducing the number of shipments that must be interlined between railroads. For example, in approving the transaction that created CSXT, the ICC stated:

The consolidation of interchange partners should provide faster, more efficient service to a wider geographic area, to the public benefit . . . . It is generally thought that single-line service has many advantages over joint-line service for both shippers and carriers. Interchange operations can be eliminated, reducing both operating and overhead costs and transit time; transaction costs are reduced; and incentives to provide less than efficient service (arising from per diem charges for railcars, rate divisions, or production externalities) are reduced. Thus, speed, reliability, and handling are enhanced. For these reasons, shippers tend to prefer single-line service over joint-line service.

*CSX Corp.—Control—Chessie System, Inc. & Seaboard Coast Line Industries Inc.*, 363 I.C.C. 521, 552-553 (1980) (emphasis added); *see also BN/Frisco*, at 940 (“One of the major benefits from this merger will be a reduction in the number of currently interlined shipments.”); *Union Pac. Corp et al.—Control—Missouri Pac. Corp. & Missouri Pac. R.R. Co.*, 366 I.C.C. 462, 489 (1982) (“*UP/MP*”) (“[s]hippers prefer single line or system service because it improves

reliability and transit times, and equipment availability.”). In *Burlington Northern Inc. & Burlington Northern R.R. Co.—Control and Merger—Santa Fe Pac. Corp. & the Atchison, Topeka & Santa Fe Ry. Co.*, 10 I.C.C. 2d 661, 741 (1995), the ICC noted the ways in which eliminating the need to interline traffic generates cost savings for shippers in their own businesses:

Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly. A single-line railroad route is becoming more important for carriers wanting to compete for service-sensitive freight. As a result of the new single-line service capability of the combined BN/Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange.

More recently, the Board estimated that rail consolidations have produced an overall increase of 60% in the average length of haul between switching events for both single-car and multi-car shipments. *Review of the General Purpose Costing System*, Ex Parte No. 431 (Sub-No. 4), at 8 (Feb. 4, 2013). That increase in average length of haul in turn has substantially reduced the number of cars that need to be interlined.

CSXT and other railroads have also developed a variety of efficient operating practices that eliminate unnecessary handling of those cars that continue to move in interline service. For example, increasing volumes of interline traffic move in “run-through” trains. Run-through operations enable entire trains to operate intact from a major yard on one railroad’s lines to a major yard on another carrier’s system, without the need to switch individual cars at the interchange location. Indeed, where possible, carriers route run-through trains in a manner that enables them to bypass busy terminal areas altogether. In many instances, locomotives “run through” with the consist, eliminating delays that would otherwise be encountered in switching

out locomotives. For example, CSXT frequently operates run-through unit coal train service in conjunction with western railroads over the Chicago gateway.

CSXT and other railroads “block” cars for movement both on their own rail systems and for interchange with connecting carriers. Cars classified at a hump yard are sorted into “blocks” with other cars that will move to the same intermediate yard, serving yard, destination, or interchange point further along the carrier’s lines. Blocking cars in this manner enables them to move longer distances without requiring further handling. A block of cars passing through an intermediate yard on its journey to the final destination can be “swapped” intact from an inbound train to an outbound train, without re-classifying or otherwise handling the individual cars moving in the block. CSXT and other railroads have developed detailed “blocking plans” at each classification yard to ensure that cars move across the network in the most efficient manner possible.

In addition to blocking cars for movement on its own lines, CSXT often “pre-blocks” cars that are destined for interchange to a connecting carrier. “Pre-blocking” interline shipments eliminates handling of individual cars at the interchange point and enables cars to move from a major yard on one railroad’s lines to a major yard on the connecting carrier’s system without any additional switching. This efficient practice improves the overall efficiency of the national rail network by reducing the number of car handlings required for interline movements. Connecting carriers reciprocate by “pre-blocking” cars moving to yards or destinations on CSXT’s lines. For example, CSXT pre-blocks cars destined to North Platte, NE (a yard served by Union Pacific (“UP”)) at Selkirk (Albany), NY, prior to interchanging them to UP at the Chicago Proviso yard. This enables UP to move the cars directly to North Platte without any further classification en

route. UP reciprocates by pre-blocking cars destined to Selkirk on CSXT prior to forwarding them to CSXT at the Chicago Barr yard

The ICC has acknowledged that pre-blocking traffic benefits shippers by reducing both transit time and operating costs. *See BN/Frisco*, 360 I.C.C. at 935 (“Preblocked trains will be able to move over long distances without interchange and with minimal switching. The elimination or reduction of switching or interchange . . . will also save time and resources in carrying freight.”); *UP/MP*, 366 I.C.C. at 489 (“Shippers also benefit from improved transit times and resultant reduced equipment costs made possible when single rail systems are able to minimize interchange delays by increasing the use of preblocking and run-through trains.”).

CSXT and other railroads have further improved the efficiency of interline rail operations by concentrating interchange activity at a smaller number of efficient, high-volume interchange locations. This practice improves transit time by making it possible for carriers to interchange larger volumes of traffic (including run-through trains) at locations chosen to take advantage of the most efficient line-haul routes, and reducing delays encountered by cars that would otherwise dwell for longer periods of time at remote yards and wayside interchange points awaiting pickup by the receiving carrier. Eliminating low-volume interchange points also reduces costs by enabling railroads to redeploy underutilized assets used to serve those locations.

The ICC has recognized that rationalizing interline operations can produce substantial public benefits. For example, in *Changes in Routing Provisions—Conrail—July, 1981*, 365 I.C.C. 753, 771 (1982), *vacated on other grounds*, 704 F.2d 373 (7th Cir. 1983), the ICC noted that a proposal by Conrail to reduce the number of points at which it would interchange traffic with other railroads “will tend to rationalize Conrail’s route structure, permit it to eliminate its duplicative facilities, and make it more efficient.” The ICC went on to find that the proposed

action would improve service through “the saving in line-haul miles (less circuitry), elimination of unnecessary interchanges, and reduced or non-affected transit times resulting from the changes in the routing provisions.” *Id.* As discussed above, similar considerations informed the ICC’s 1982 decision to discontinue its prior practice of imposing the so-called “DT&I Conditions” in connection with its approval of railroad consolidations. *Traffic Protective Conditions*, 366 I.C.C. 112 (1982); *see supra* at 8-11. In doing so, the ICC found that the DT&I Conditions—which, among other things, required railroads to maintain all existing routes and points of interchange with connecting carriers—undermined the efficiency of the rail network because “[t]he Conditions hamper carrier efforts to rationalize their systems by freezing existing junctions and interchanges.” *Traffic Protective Conditions*, 366 I.C.C. at 114.

In addition to these efforts to improve its interline operations, CSXT has worked tirelessly to enhance the quality and reliability of service along its own network. CSXT has developed and implemented a variety of operating practices to achieve that objective. For example, CSXT (like other railroads) has developed an overall operating plan for its system that seeks to direct traffic flows to the most efficient routes on its network. Concentrating traffic over a smaller number of efficient, high volume routes enables CSXT to run longer trains and to reduce the number of daily train starts (thereby generating savings for fuel and train crews). Planning its operations in this manner also makes it possible for CSXT to direct capital investments in new track and facilities to those routes and locations at which they will generate the greatest benefits.

Nearly two-thirds of the general freight “carload” traffic transported by CSXT moves in more than one road train during its journey. Like other Class I railroads, CSXT employs a “hub and spoke” operating plan to handle such traffic. Cars originating at CSXT-served points, or

received at an interchange point, are routed to a CSXT classification yard. Upon arrival at the yard, cars are switched out of the inbound train, classified and/or blocked to their next destination, and switched into an outbound road train for further line-haul transportation. The cars (or blocks of cars) then move in a road train from the classification yard to a local CSXT serving yard, where they are placed into a local train for delivery to the consignee's facility. This process is performed pursuant to a detailed car blocking plan that is designed to ensure that each car moves across the CSXT network in the most efficient manner possible.<sup>45</sup> CSXT's major classification yards are sized and equipped with yard locomotives and crews, based upon the anticipated volume of cars that will require handling at each facility.

CSXT's system operating plan also incorporates "scheduled" train service. Given the truck-competitive nature of most merchandise commodities, customer expectations for both service quality and reliability are high. By developing and adhering to a "scheduled" operating plan, CSXT can coordinate the arrival of road trains with the departure of local trains that serve customer facilities, thereby reducing the "dwell time" that cars experience at local serving yards. Normalizing the time at which trains arrive and depart enables CSXT to call train crews when they are needed and to anticipate the volume of cars that will arrive (and require switching) at classification yards at various times throughout the day. Yard assignments are coordinated with

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<sup>45</sup> The "hub and spoke" operating model utilized by CSXT in handling general freight traffic is similar to the methods employed by Federal Express in handling individual packages. Upon receiving a request for service, those carriers pick up the package by truck at the customer's facility (analogous to local train service at origin); deliver it to a regional sorting facility (analogous to a local serving yard); move the package by truck and/or air to a major sorting facility such as Federal Express's Memphis hub (analogous to a rail classification yard or hump yard); transfer the package to another airplane or truck to complete the intercity portion of the transportation (analogous to switching cars between road trains at an intermediate yard); deliver the package to a regional facility closer to the destination (analogous to road train delivery to a local serving yard); and deliver the package to its intended recipient by truck (analogous to local train service to the receiver's facility).

the schedules upon which trains moving to and from each yard operate. “Scheduled” train service also assists shippers in planning their own operations by making arrival and departure times for their shipments more predictable. Coordinating the schedules upon which CSXT road and local trains operate, and designing yard operations in a manner that supports such scheduled train services, are essential elements of reliable “scheduled” train service.

In order to promote the most expeditious movement of cars along its network, CSXT creates a “trip plan” for each individual general freight shipment. A “trip plan” includes all of the services required to handle a shipment, including road train service to move the car on one or more trains from origin to destination (or point of interchange with another railroad); assignment of cars to “blocks” that facilitate the transfer of the cars between trains at intermediate yards; and a local train service plan to deliver an empty car for loading at origin, pick up the loaded car for line-haul movement, and deliver the loaded car to its final destination. By developing trip plans and utilizing technological tools such as trackside scanners, CSXT can track the movement of each car across its network, and adjust the plan if necessary in response to unforeseen events (*e.g.*, delay to one train that results in cars missing “connections” to other road or local trains). These technological advances (in conjunction with efficient operating practices) enable CSXT and other railroads to offer customers access via internet-based tools to real-time information regarding the status of their shipments, from the time they arrive on CSXT’s system until they are delivered to the receiver or interchanged to a connecting railroad. Such visibility is particularly important for customers who employ “just in time” inventory practices.

In short, the adoption of more efficient operating practices and better coordination between carriers in providing interline service have generated vast improvements in rail service over the past several decades. Today’s freight rail service is more efficient and reliable than it

has been at any time in history, making the U.S. rail network the envy of the world.<sup>46</sup> These advances have benefited all shippers, whether or not they have access to multiple competitive rail options.

The key to the success of these modern rail operating practices is predictability. With knowledge of customers' shipment patterns and service requirements, carriers can develop train schedules that offer the best possible service to the greatest number of shippers. Normalized traffic flows allow railroads to size and staff their yard operations in a manner that maximizes efficiency and reduces the potential for congestion during peak periods. The ability to direct traffic to the most efficient routes and interchange points makes it possible for carriers to implement service-enhancing practices such as run-through train service and “pre-blocking” of interline shipments. Stable, repetitive shipment patterns also enable railroads to allocate resources (locomotives, cars, crews) and capital dollars in a manner that maximizes their utilization.

**B. NITL's Mandatory Switching Proposal Would Undermine Modern Railroad Operating Practices That Have Driven Major Improvements In Rail Service Quality and Reliability.**

NITL asks the Board to require railroads to provide, on demand, forced access via switching anywhere “there is or can be ‘a working interchange’” with a second rail carrier within 30 miles of the shipper's facility. July 25 Decision at 4 (emphasis added). From an operating standpoint, the consequences of such a requirement would include a tremendous increase in the

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<sup>46</sup> See, e.g., Federal Railroad Administration, *Preliminary National Rail Plan* (October 2009) at 4, 21, available at <http://www.ontrackamerica.org/files/RailPlanPrelim10-15.pdf> (“By many measures, the U.S. freight rail system is the safest, most efficient and cost effective in the world . . . A review of the previous 29 years since the railroads were partially deregulated by the Staggers Act of 1980 reveals improvements in the railroads' physical plant (infrastructure) as well as their performance metrics. Safety and fuel efficiency have remarkably improved. Rail rates are lower today than in 1980. when compared in constant dollars.”).

number of handlings associated with cars that would be eligible for forced switching, a shift of such cars to less efficient (and often more circuitous) routes and interchange locations, and an increase in transit time for such traffic. These adverse service effects would diminish any benefits that shippers might achieve by invoking their newly-minted right to forced switching on demand.

However, the potential adverse impact of NITL's proposal on traffic that would become subject to mandatory switching tells only part of the story. By far the greatest harm that NITL's proposal would do would be to undermine the ability of CSXT and other railroads to maintain the efficient operating practices that have enhanced the quality and reliability of rail service for all customers in recent years. As explained above, operating practices such as "scheduled" train service, run-through trains, "pre-blocking" of cars moving in interline service and the development of sophisticated blocking plans for classification yards all are predicated on the existence of stable, predictable traffic movements over routes and interchange points that promote the most efficient handling of the traffic. If implemented, NITL's proposal would significantly alter the routes and interchange points over which cars eligible for mandatory switching move. Moreover, because shippers would be free to shift traffic back and forth between routes at any time by simply designating a different routing for their shipments, car movement patterns could be in a constant state of flux.

The resulting lack of stability in daily traffic volumes over particular routes would threaten the ability of CSXT and other railroads to maintain efficient practices such as run-through train service and "pre-blocking" arrangements. Constantly changing traffic flows would make it difficult (if not impossible) to allocate resources to classification yards in a manner that optimized each facility's ability to handle cars efficiently and avoid congestion. Permitting

shippers to designate any interchange point of their choosing within 30 miles would inevitably result in a transfer of cars away from higher-volume interchanges to smaller yards and little-used wayside interchange tracks that may not have the capacity to accommodate significant increases in daily interchange activity.<sup>47</sup> Diverting cars from a serving railroad’s line-haul route to an interchange point near the “last mile” of service would result in a loss of “visibility” that would make it impossible for the carrier to know of – much less plan for – the arrival of cars at local serving yards. The proliferation of such “pop up” shipments would undermine the ability of railroads to provide local train service to customer facilities on a predictable schedule. The overall increase in the number of required car handlings, and the rerouting of cars to more circuitous (and less efficient) line-haul routes, would consume valuable track and yard capacity that would otherwise be available to accommodate future growth in the demand for rail service. In short, the impact of NITL’s proposal would be a degradation in rail service quality and reliability for all shippers.

### **1. Adverse Impacts on Train Service.**

NITL’s forced switching proposal would adversely affect the train services provided by CSXT and other railroads in a number of ways. The increase in cars moving to and from new interchange points selected by shippers would require CSXT (and other railroads) to make significant changes to their train operations. For example, if a shipper designated a location at which CSXT road trains occasionally (but not regularly) pick up or set off cars delivered to or received from another railroad, those road trains would be required to stop more frequently (or

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<sup>47</sup> A “wayside interchange” is a location (other than a yard) at which railroads interchange occasional or low-volume movements. CSXT has several such interchanges, including one at Findlay, OH. The track facilities at wayside locations reflect the limited interchange activity that takes place there. For example, a wayside location at which two railroads interchange 6-8 cars per day might consist of a single 1000-foot track, which would be adequate to accommodate that volume of traffic—but not much more.

for longer periods of time) to serve the new interchange point. Doing so would adversely affect transit time for all cars moving in such road trains. If the interchange point designated by the shipper was a wayside interchange track, the road train might be required to use the main line to perform such interchange switching, thereby tying up the line and delaying other trains as well.

If the volume of traffic diverted to a new interchange point were sufficiently large, CSXT might decide instead to institute a new local train assignment to serve the interchange. A second local train might also be required where an increase in interchange activity at a particular location exceeded the ability of an existing local assignment to handle that traffic. That alternative would require CSXT to expend additional resources (a locomotive and crew) to serve the interchange. Because the shipper could at any time choose to return the traffic to its original route of movement, the traffic warranting a new local train assignment could disappear as quickly as it arose. Moreover, even if a new local train assignment relieved CSXT road trains from serving the interchange point, those road trains would nevertheless be required to stop at a local serving yard to drop off and pick up the cars moving to or from the interchange point. In either case, the result would be less efficient train service and higher costs to serve the traffic.

Indeed, NITL's proposal could require railroads to reinstate trains that they have been able to rationalize by concentrating traffic on efficient, higher-volume routes. This would not only increase the overall cost of providing train service, it could adversely affect service quality for all customers by adding new (and otherwise unnecessary) trains to busy line segments. Such a result would nullify the efforts of CSXT and other railroads to simplify their operations. Moreover, line capacity consumed by new road or local train services would reduce the capacity available to accommodate organic traffic growth.

The adverse impact of “pop up” switch traffic on train operations would be particularly severe. As discussed above, modern technology enables CSXT to track the movement of a car along its network from the moment it first appears online (at a customer origin or interchange point) until it is delivered to the receiver or forwarded to a connecting railroad. For example, a car received in interchange at Chicago and destined to Atlanta is “visible” to CSXT from the time it is interchanged to CSXT at Chicago until it is placed by CSXT at the receiver’s facility. Such visibility allows CSXT to track the movement of the car throughout its journey across the system, to coordinate the schedules of the road and local trains that will handle the car, and to predict the time at which the car will arrive at a serving yard near the destination and be available for final delivery. Such “visibility” also enables CSXT to offer its customer real-time information about the status of the shipment. However, if the shipper were to designate a new route involving line-haul transportation by NS from Chicago to an interchange with CSXT near Atlanta, the car would not be “visible” to CSXT until it arrived at the designated interchange point (or, perhaps, shortly before if NS provided advance notice of its arrival). As a result, CSXT would not be able to schedule the car for movement to destination on a particular local train. Instead, CSXT (and the receiver) would have to wait until the car was actually delivered to plan its further movement—much as railroads did decades ago.

The constant shifting of hundreds of thousands of carloads among an untold number of routes and interchange points could threaten the practice of scheduled railroading that has enabled CSXT and other railroads to provide more consistent and reliable service. Switching outbound cars to a connecting carrier at an interchange point within 30 miles of the origin would place the line-haul transportation of those cars beyond CSXT’s control. At best, CSXT could provide local train service to the origin facility on a schedule that met the needs of the customer.

However, once cars were placed on a track for interchange to a second carrier, CSXT would have no way of knowing about—much less controlling—the schedule upon which they moved. On inbound shipments, the inability to predict when cars might arrive at an interchange point would make it impossible to offer scheduled local train service to the consignee’s facility.

Permitting shippers to designate any interchange point of their choosing within a 30-mile radius of the origin facility would undermine the efforts of railroads to streamline interline service by eliminating inefficient or low volume interchanges and consolidating traffic over more efficient, high-volume routes. Dispersion of traffic among a multiplicity of lower-volume interchanges could threaten the continued operation of run-through trains that expedite the movement of interline traffic. Constant fluctuations in the volume of cars moving via particular interchange points would undermine the cooperative “pre-blocking” arrangements that reduce car handlings and dwell time at intermediate yards. Any disruption of those efficient operating practices would be harmful to all shippers (including those who have competitive rail options and others who would not be eligible for mandated switching under NITL’s proposal).

Given the physical configuration of the rail network, and the “hub and spoke” nature of carload rail operations, NITL’s proposal would inevitably result in more circuitous movements for many cars that were eligible for mandated switching. For example, a large manufacturer ships carload traffic from origins in Mexico to its facility in Jacksonville, FL, which is served exclusively by CSXT. CSXT currently receives the cars at New Orleans, and moves them to its hump yard at Waycross, GA, where they are blocked for delivery by a road train to CSXT’s Busch Yard, a serving yard from which local trains serving the manufacturer’s facility operate. The manufacturer’s facility is located within 30 miles of CSXT’s Moncrief Yard near Jacksonville, which is an active interchange point with NS. Under NITL’s proposal, the

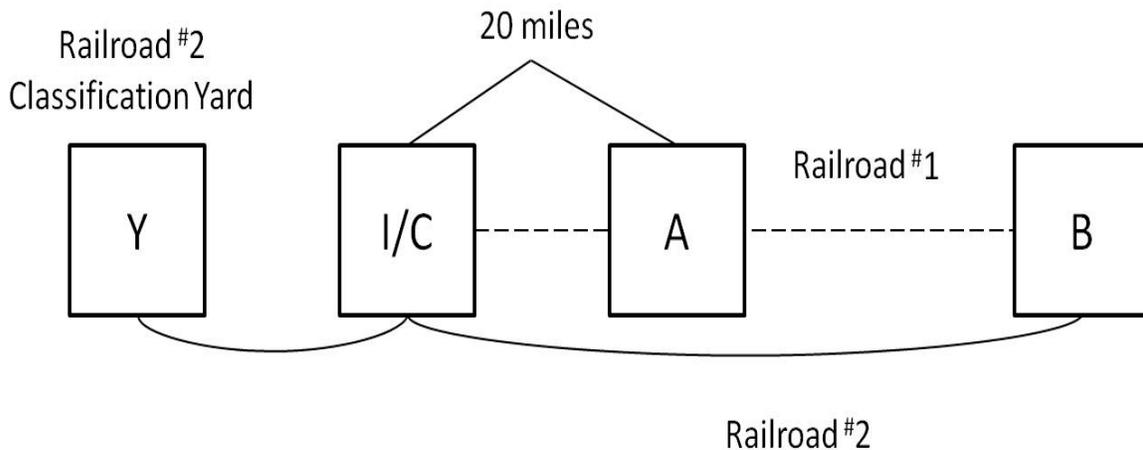
manufacturer could obtain line-haul transportation from New Orleans from NS and require CSXT to receive the traffic at Moncrief Yard for delivery to its Jacksonville facility.

Moncrief Yard is not a classification facility, however. Rather, like Busch Yard, it is a serving yard that provides local train service to nearby customers. CSXT does not operate any train service directly between Moncrief Yard and Busch Yard or the manufacturer's plant. Moncrief Yard is dedicated to its own customers and would not have the capacity to flat-switch and block the cars into a new train destined to a new location that it does not serve today. The only train service to Busch Yard originates at Waycross. Therefore, in order to complete the movement of the cars to the manufacturer, CSXT would have to transport them from Moncrief Yard 147 miles north to Waycross, GA, where they would be blocked into a train destined to Busch Yard (as they are today). In other words, even though the manufacturer's Jacksonville facility is located within 30 miles of Moncrief Yard, designating a route involving an interchange with NS via Moncrief Yard would add 294 miles to the overall movement of this traffic. In addition to incurring those additional miles, the shipments would be delayed by up to three days as they dwelled at both Moncrief and Waycross.

Such inefficient movements would not be isolated incidents. There are many instances in which the closest potential interchange between a carrier serving an origin and an alternate line-haul carrier would be located in the opposite direction (in relation to the origin) from the point to which the subject traffic is ultimately destined. Figure 1 depicts an example in which Railroad #1 exclusively serves Customer's facility at point "A." Assume that Customer's traffic is destined to Point "B," which is located east of the origin. Customer requests that Railroad #1 provide competitive switching service to an interchange point with Railroad #2, so that Railroad #2 (which also serves Point B) can provide the line-haul transportation. The closest interchange

between Railroad #1 and Railroad #2 (“I/C”) is located 20 miles west of Point A. In this example, Railroad #1 would be required to move each car originated at Customer’s facility 20 miles in the wrong direction (west), in order to interchange them with Railroad #2. Thereafter, Railroad #2 would, in essence, “re-trace” those 20 miles (over its own lines) in moving the car east to its destination at Point B.

**FIGURE 1**



As Figure I shows, the circuitry associated with this switching movement would be even greater if Railroad #2 were required to move the cars further west to a classification yard (Point “Y”) for placement in an eastbound road train destined to Point B.

Whether or not, in a particular instance, a request for mandated switching resulted in a more circuitous movement, such a request would generate additional car handlings and dwell time in every case. Consider, for example, a car currently handled in single-line service by Railroad #1, which serves both the origin and the destination exclusively. Today, the loaded car is switched at least four times during its journey: once upon pickup at the origin customer’s facility; a second time at a serving yard to place it in a road train for line-haul movement; a third time at a serving yard near the destination to place it in a local train for delivery; and a fourth

time to spot it at the receiver's facility. If the car must travel over Railroad #1's system in more than one road train, additional switching and classification would be required.

Under NITL's proposal, the minimum number of car handlings required to serve the shipment would increase from four to at least seven: (1) the car would be switched at origin by Railroad #1; (2) it would be switched at Railroad #1's serving yard to place it in a train for movement to the interchange point with Railroad #2; (3) it would be switched by Railroad #1 at the interchange point to place it for pickup by Railroad #2; (4) it would be switched by Railroad #2 at the interchange point to place it in a train for line-haul movement (assuming that the train picking up the car is a road train providing line-haul transportation); (5) it would be switched by Railroad #2 at the interchange point at which it was delivered back to Railroad #1; (6) it would be switched by Railroad #1 at that interchange point to place it in a local train for delivery to the receiver, and (7) it would be switched by Railroad #1 to place it on the receiver's track at destination. This "four to seven" car handling scenario conservatively assumes that Railroad #2 can move the car the entire distance from the first interchange point to the second interchange point in a single train. If Railroad #2 picked up the car with a local train and switched it into a road train at a serving yard near the first interchange, and/or the car was required to move in more than one road train during its journey along Railroad #2's lines, several additional switch movements would be required. Likewise, if the car needed to be moved by Railroad #1 from the second interchange point to a serving yard prior to delivery to the receiver, or to a classification yard on Railroad #1's lines, Railroad #1 would perform additional switch movements as well.

As the foregoing example illustrates, even in the "simplest" operating circumstances, NITL's mandatory switching proposal would cause car handlings to multiply. This, in turn, would have a significant negative impact on train service and transit time. Data maintained by

the AAR indicate that the average terminal dwell time for rail cars on all Class I railroads consistently exceeds 20 hours.<sup>48</sup> In 2012, CSXT averaged terminal dwell of approximately 24 hours across its system (about average for the industry as a whole).<sup>49</sup> Based on that real-world data, each additional car handling resulting from NITL's proposal could delay the arrival of such cars at their ultimate destination by 24 hours or more. Indeed, the manufacturer's traffic destined to Jacksonville, FL discussed above would experience a delay of three days if it were shifted from its current route of movement to an interchange with NS at Moncrief Yard. The increased dwell and transit time could be even greater if a request for forced switching shifted cars to remote wayside interchange tracks that are not served by both participating railroads on a daily basis.

The extra car handlings, train movements and dwell time resulting from NITL's proposal would degrade service not only for eligible shippers who chose to exercise their right to mandatory switching, but for all rail customers. The train delays discussed above would affect all cars moving in those trains. The additional switching required at some yards (particularly those operating near capacity and smaller yards with limited resources) would slow the movement of all cars through those facilities. Indeed, the inability of railroads to predict yard workload requirements accurately (due to constant fluctuations in traffic volume and loss of "visibility" of inbound shipments) could result in unanticipated "surges" and congestion at smaller yards. Such congestion might cascade to the main line, where trains would need to be held until the yard could receive them.

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<sup>48</sup> See Railroad Performance Measures, "Terminal Dwell," available at <http://www.railroadpm.org/Graphs/Terminal%20Dwell%20Graph.aspx>.

<sup>49</sup> See *id.*

Regardless of the consequences in any particular situation, increased car handlings and dwell time necessarily result in longer transit time and poorer asset utilization. The additional locomotives, cars, and train crews that CSXT and other railroads would need to deploy in order to handle the same amount of traffic under NITL's proposal would increase the cost of rail service, not only for those shippers who avail themselves of mandated switching, but for all rail-served customers.

## **2. Adverse Impacts on Yard Operations**

Yard operations are a critical element in providing efficient railroad service. Virtually every car of general freight traffic must move through one or more yards during its journey along the rail network. The ICC's observation in *BN/Frisco* that "the time a railcar spends in a yard or terminal is most of its time in transit" remains true today. 360 I.C.C. at 940. CSXT and other railroads tailor their yard facilities and yard operations to optimize the handling of cars and to support train service schedules that meet customer expectations.

Railroads operate several types of yard facilities, each of which is designed and staffed to perform specific operations. The largest yards are major "classification" yards (also known as "hump" yards). Classification yards are designed to handle a large volume of car classification and switching activity. The typical classification yard consists of (1) a "receiving" area at which inbound trains arrive with cars that must be classified for further movement in a different train; (2) the "classification bowl" area, which consists of a hump track connected to multiple classification tracks onto which cars are sorted for further movement; and (3) a "forwarding" area in which outbound trains are built and prepared for departure. Major classification yards may also contain locomotive servicing facilities, rip tracks on which to hold and perform minor repairs to bad-ordered cars, and crew facilities.

CSXT and other railroads also operate yards at which cars are “flat switched” by a locomotive and crew that moves them from one track to another. Flat switching is far less efficient than switching cars over a hump. Therefore, a flat switching yard does not have the capacity to accommodate the same level of switching activity as a hump yard. In addition to major classification yards and flat switching yards, railroads operate smaller local serving yards at points along their network. Carload shipments destined to local industries are delivered to a nearby serving yard for delivery by a local train. Outbound carload shipments are picked up at customer origins and brought to the serving yard, where they are placed into a train for line-haul transportation and/or movement to a classification yard. Serving yards also may also be the reporting terminals for local train crews.

Railroads make decisions regarding the size of yards, and the number of locomotives and yard crews assigned to each, based upon the anticipated volume of cars to be handled at a particular yard facility. The greatest number of tracks, locomotives and yard personnel are assigned to the major classification yards, which are designed to handle high-volume car classification and switching operations. The size and staffing of other yards is determined on the basis of the number of daily road and local trains that originate, terminate or stop at the yard, and the number of cars that are picked up, set off, or switched at each location. Where daily volume is small, a local serving yard may not be assigned any “resident” locomotive power or yard crews.

NITL’s mandatory switching proposal would undermine the efficiency of railroad yard operations in several ways. As demonstrated above, NITL’s proposal would generate a massive increase in the number of handlings required to carload general freight traffic. The added switching workload would, in all likelihood, increase dwell times at major classification yards.

This would, in turn, reduce the overall efficiency of car classification operations, disrupt train service schedules and degrade service for all shippers.

The impact of a mandatory switching regime could be even more severe at smaller yards and wayside interchange points. Those facilities are currently designed to handle small volumes of interchange traffic and/or to support local train service to nearby customers, and they do not have the capacity to accommodate a substantial increase in daily interchange activity. A major increase in daily car volume would strain the capacity of such facilities, and the resulting congestion could spill over to main line tracks in the vicinity as well. In particular, small yards and wayside facilities are ill-equipped to accommodate the interchange of unit trains or other trainload quantities of freight. Requiring carriers to transfer such traffic at any “working interchange” on the rail network is simply impracticable.

The additional track and other facilities that would be needed to avoid such problems could not be created instantaneously—indeed, physical constraints resulting from alternate uses of adjoining property might render any expansion infeasible. Moreover, even if it were possible to add yard and track capacity quickly in response to an increase in the number of cars routed via new interchange points, the possibility that shippers might shift cars back to their original routing (or to a different interchange location) would create a strong disincentive to making such investments. Accordingly, NITL’s proposal would, in all likelihood, generate significant and ongoing disruption at many smaller yards and wayside interchange locations. By altering the historical shipment patterns and traffic volumes upon which the yards operated by CSXT and other railroads are based, adoption of NITL’s proposal would result in some yards having too little capacity to handle the demand for switching service and others having “excess” capacity due to the diversion of traffic to alternate locations.

The unpredictability of daily traffic flows and loss of “visibility” of incoming interchange traffic occasioned by adoption of NITL’s proposal would impair the ability of CSXT and other railroads to develop and adhere to efficient yard operating plans. The “blocking plans” utilized by carriers to facilitate the movement of cars along the rail network are based upon the historical and anticipated traffic moving through each yard facility. Constant fluctuation in the number of cars destined to particular destinations and interchange points (as a result of shippers changing the routing of their traffic) would make it difficult to predict the size of the blocks to be built for outbound trains on a daily basis—or, for that matter, whether a block to a particular destination would be needed at all. A “switching on demand” regime would likewise make it difficult for railroads to align other elements of their yard operating plans, including yard crew assignments, locomotive fleets and hours of operation, to meet ever-fluctuating workload requirements. The instability of daily interchange volumes and the likely diversion of cars away from high-volume interchanges would reduce the incentive of connecting carriers to engage in cooperative arrangements such as “pre-blocking” of interline traffic. A shift in car routings away from high-volume interchange points would defeat the rail industry’s ongoing efforts to improve service by simplifying train operations, taking advantage of scale economies by running longer trains over the most efficient routes, and bypassing busy terminal areas where possible.

The impairment of yard operations generated by adoption of NITL’s proposal would adversely affect the quality and reliability of service for all rail-served customers. Virtually every carload of general freight traffic passes through one or more yard facilities during its journey along the CSXT network. Thus, adoption of NITL’s request that the Board radically alter the current regulatory regime for the benefit of one subset of shippers (*i.e.*, those who are served by a single railroad and located within 30 miles of an interchange point) would have

serious negative consequences for many other shippers who rely upon CSXT and other railroads to provide a safe, efficient and reliable transportation option for their freight.

#### **IV. ADOPTION OF THE NITL PROPOSAL WOULD STRAND PAST AND CHILL FUTURE CAPITAL INVESTMENTS.**

Another significant impact of adopting the NITL Proposal would be to create uncertainty that produces a disincentive for capital investments that are essential for the viability of the rail network and the national economy as a whole. As the Board knows, nearly all of railroads' capital investment is funded by the railroads themselves. Unlike other transportation industries, the rail industry's infrastructure is primarily self-funded, not government-funded.

If the NITL proposal is adopted without a sufficiently compensatory access pricing scheme, then railroads may be forced to reduce capital investments substantially. Since NITL has failed to propose any access pricing plan, it is impossible at this stage to determine how significantly a forced switching regime would reduce funds needed for capital investment. The impact could be substantial, particularly under an access pricing scheme that is less than fully compensatory.

Moreover, the NITL Proposal would have a chilling effect on capital investment regardless of what access pricing model is used. The primary effect of the NITL Proposal would be to introduce significant uncertainties about current and future volumes and capacity needs. Traffic from a sole-served origin that a railroad carries today could be gone tomorrow, if the shipper has the right to forced switching on demand. Conversely, a railroad could be presented unexpectedly with new volumes (that it has a common carrier obligation to transport) by a shipper who obtained a forced switching order against another railroad. The NITL Proposal would significantly increase the amount of traffic that both could disappear overnight and could

“pop up” in new locations, and as such it make it difficult for railroads to know where they should invest in their network.

As a result, adoption of the NITL Proposal could result in stranded capital investments—*i.e.*, instances where a railroad’s improved capital infrastructure is ultimately worthless because it loses traffic to a competitor. And the potential of stranding capital investments will make it harder for railroads—who are responsible to their shareholders for making good investments—to justify future investments for traffic that may be at risk of a future forced switching order.

Moreover, a fundamental problem with implementing widespread forced switching is that it would separate the incentive to maintain a track from the responsibility for maintaining that track. In other words, an incumbent railroad subject to a forced switching order may have the responsibility to maintain its track, but if its only revenue from that track is a government-mandated switch charge for carrying another railroad’s traffic, it will have little incentive to maintain that track at a high level. The Board should not assume that an owner will continue to invest in a track or yard when the only compensation it is receiving is a switch charge. And the Board should consider carefully the consequences of imposing NITL’s desired “new regulatory regime” on railroad incentives to make the kind of capital improvements that benefit the transportation network as a whole.

**V. RECIPROCAL SWITCHING CASES WILL BE COMPLICATED AND PRESENT DIFFICULT FACT-SPECIFIC ISSUES.**

NITL has suggested that its proposal would be “deregulatory” because expanding forced switching requests would supposedly reduce the need for maximum rate regulation. *See Ex Parte 705 Hearing Tr. at 61 (June 22, 2011)*. But there is no justification for the Board to enact the NITL proposal as a means to “reduce regulation.” The new class of forced switching regulation that NITL proposes would raise a host of complex issues, many of which are fact-

intensive questions that could only be resolved on a case-by-case basis. There is no reason to think that this process would be any simpler than rate litigation—particularly where the amounts at issue would qualify for treatment under the *Simplified Standards*.<sup>50</sup> And unlike rate litigation, which has been refined and streamlined by the Board so that the rules are well-understood by all stakeholders, forced switching cases will present novel issues whose resolution is uncertain.

Some of the complex litigation issues that would need to be resolved in forced switching cases include: (1) which shippers will qualify for forced switching orders; (2) what are the conditions of the agreement, including pricing, equipment, shipment priority, and liability; (3) the appropriate duration of any forced switching order; (4) what labor protections are appropriate and who would pay for them; and (5) what environmental review would be necessary for a forced switching order. None of these complex issues will be easily resolved, and many will require in-depth, fact-specific resolution in individual cases.

#### **A. Which Shippers Would Qualify For Forced Switching Orders?**

The first major litigation question is which shippers would qualify for forced switching orders. While NITL intentionally has drawn its proposal so as to sweep in a vast number of shippers, the eligibility of many shippers for forced switching would require individualized attention and examination. Three prominent eligibility issues that would require litigation are whether the 30-mile distance is rail miles or air miles; the definition of a terminal; and the definition of “regular switching.”

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<sup>50</sup> The Board found in *Simplified Standards* that 73% of all traffic potentially eligible for a rate reasonableness challenge has a maximum case value that would make it eligible for one of the simplified methodologies. See *Simplified Standards*, Ex Parte No. 646 (Sub-No. 1), at 35 (Sept. 5, 2007) (finding that 45% of regulated traffic with an R/VC over 180% had a maximum case value less than \$1 million and that another 28% of regulated traffic with R/VC over 180% had a maximum case value less than \$5 million).

## 1. Air Miles or Rail Miles?

One critical unresolved question is whether the 30-mile distance threshold proposed by NITL represents 30 air miles—*i.e.*, mileage “as the crow flies”—or 30 railroad miles. The NITL proposal is ambiguous, although its assertion that switching eligibility be determined by considering the “radius” from a terminal or interchange point suggests that NITL intends to refer to air miles. As the Board knows, the rail track-mile distance between two locations is often longer than the geographic distance “as the crow flies,” *i.e.*, the air-mile distance. As a result, many locations that are within 30 air miles of an interchange are significantly more than 30 miles on a track-mile basis. For example, in southeastern Virginia the coal terminals of CSXT and NS at Newport News and Norfolk are within 30 air miles of each other. But those thirty miles are divided by the James and Elizabeth Rivers, and the actual rail mile distance is hundreds of miles. Moving rail cars from one side to the other would be extremely inefficient, requiring circuitous routings that would run counter to both railroads’ prevailing flows of loads and empties.

## 2. What Is a Terminal?

While the definition of “miles” is something that the Board could conceivably settle with a single decision, other aspects of eligibility often would require a detailed factual examination. For example, NITL asserts that the Board should create a conclusive presumption in favor of forced switching within the boundaries of a “terminal.” But the geographic boundaries of a “terminal” often are not self-evident, and the determination of those boundaries will often require individualized consideration and litigation.<sup>51</sup> Indeed, NITL admits that this question will often

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<sup>51</sup> See *Midtec*, 3 I.C.C. 2d at 179 (“The question[] of what is a terminal area . . . [is a] factual one[] requiring consideration of all the circumstances surrounding a particular case.”); *Rio Grande Inds., Inc.—Purchase and Related Trackage Rights—Soo Line R.R. Co. Line Between Kansas City, MO & Chicago, IL*, Decision No. 6, ICC Fin. Docket No. 31505, available at 1989 WL 246814, at \*9 (Nov. 13, 1989) (“The Interstate Commerce Act does not define ‘terminal

require case-by-case determination. *See* NITL Petition at 57 (“The determination of when the carrier has in fact ‘established’ a ‘terminal’ is left undefined.”).

### **3. What Is “Regular Switching”?**

NITL’s “conclusive presumption” to allow forced switching within 30 miles of an interchange where cars are “regularly switched” will also require significant case-by-case litigation. How often must switching occur to be “regular”? Again, NITL leaves the question for case-by-case determination. *See* NITL Petition at 59 (“How ‘regular’ such switching must be would be left to the Board’s determination.”)

The question of whether switching is “regular” enough to suggest that additional switching is workable would be a critical and fact-specific determination. NITL is wrong that any existing regular switching requires a “conclusive” presumption that any other reciprocal switching is workable. Yard capacity and crew capacity place real limits on how much switching may take place. In some places capacity may allow additional switching. In others more switching may not be possible without causing significant congestion or without additional investment in infrastructure. The Board will be required to carefully examine these questions. Indeed, the statute forbids the Board from mandating a switching relationship unless it finds that the switching would be “practicable and in the public interest,” and the Board cannot make that determination without considering whether the interchange could in fact handle the additional requested switches without adverse consequences. 49 U.S.C. § 11102(c)(1).

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facility,” and agency’s determination of what constitutes terminal track depends on consideration of multiple circumstances).

**B. Assuming that Forced Switching Is Ordered, What Would Be the Conditions of the Agreement?**

While determining whether a shipper is eligible for a forced switching order often will require substantial litigation, that is just the beginning of the complexities of a forced switching case. The hallmark of a forced switching order is that it is involuntary, and railroads forced to enter into such involuntary “agreements” will often find themselves unable to agree on all the relevant terms. In those situations the Board will be called upon to “establish the conditions and compensation applicable to such agreement.” 49 U.S.C. § 11102. Indeed, the lack of any precedent as to what terms are reasonable in a forced switching arrangement likely would cause many parties to turn to the Board to resolve disagreements.

The access price for forced switching is perhaps the most obvious question that will be significantly disputed in any case. But price is just one of the many terms that the Board may need to resolve. Some of the other terms that could be disputed in forced switching arrangements are outlined below.

- Some questions involve the logistics of the interchange itself. For example:
  - **Where will the interchange occur?** Different interchange locations will often be more compatible with one railroad’s operations than the other’s. Determining which interchange location point should be used is a highly fact-specific judgment for the Board to make.
- Other questions involve the provision of cars and compensation for cars. For example:
  - **Which railroad has the duty to provide cars?**
  - **If a customer loads a car provided by one railroad and routes it via the other railroad, who compensates the first railroad—and by how much?**
- Railroads might also disagree about what priority the railroad subject to the forced switching order is obliged to give to switching its competitor’s traffic. For example:

- **Is railroad subject to a forced switching order required to give equal priority to switching cars for its competitor? What if the line owner is short of power or crews?**
- **Who resolves disputes about whether a railroad is giving appropriate priority to forced switching traffic?**
- Other disputes could arise about how railroads can respond to capacity constraints. For instance:
  - **If an interchange track exists off a main line, but the number of cars that are subject to a forced switching order on a given day exceeds the track's capacity, is there an obligation to block the main to handle the excess cars?**
  - **When Railroad A attempts to deliver to Railroad B and Railroad B's interchange track is occupied, what does Railroad A do with the cars? Return them to the customer? Embargo the interchange going forward? What compensation does Railroad A get if it returns cars to the customer? Who pays that compensation, the customer or Railroad B?**
- In addition, congestion and additional switch time could impact passenger service on the many routes where Amtrak or commuter rail operates on freight railroad tracks. As a result, contractual responsibility for addressing passenger delays often will be contentious. The Board may have to resolve questions like these:
  - **Who is responsible when reciprocal switching causes Amtrak or commuter delays? The incumbent? The new entrant? The shipper who demanded the reciprocal switching arrangement?**
- Other issues may arise around liability provisions:
  - **Is a railroad liable for accidents that occur while it is switching cars for a competitor as the result of a government order?**

**C. The Board Must Consider The Duration of Any Fixed Switching Order That It Imposes.**

Another set of potentially complex and contentious issues centers around the duration of any forced switching order the Board might impose. In many situations the potential network and service impacts of a forced switching order would change over time along with changes in traffic flows and available capacity, and in those situations the Board would be required by the statute to consider whether its prior order continues to be “practicable and in the public interest.”

49 U.S.C. § 11102(c)(1). While NITL entirely ignores the issue of how long a forced switching order would remain in place and what circumstances would be sufficient to change it, the Board would often have to grapple with these issues if the NITL Proposal were to be adopted. For example, would forced switching orders be permanent, or would they have a fixed duration, like a rate prescription? What would be the process for revising or removing a forced switching order, and what standards would the Board apply to consider such requests? Once again, adopting NITL's proposal would lead to complexities that belie its claim that such orders would be a simple alternative to rate litigation.

**D. The Board Would Also Have To Consider The Impact of Forced Switching on Labor.**

The unstable traffic flows resulting from implementation of NITL's forced switching proposal would have an adverse impact on railroad employees. As described above, fluctuations in the level of traffic and interchange activity would, in all likelihood, require railroads to make frequent modifications to train starts and yard assignments. For employees, the loss of traffic by a carrier could result in being furloughed or loss of earnings opportunities with their carrier. Moreover, because shippers would have the unfettered right to redirect their traffic from one carrier to another, furloughed employees would be subject to recall at any time and could likewise be furloughed again and again in response to constantly changing staffing requirements. This likely consequence of forced switching—which NITL fails to address in its petition—would take a personal toll on railroad operating personnel.

Moreover, the statute requires the Board to at least consider whether any mandated switching arrangement needs to contain “provisions for the protection of the interests of employees affected thereby.” 49 U.S.C. § 11102(c)(2). For example, Board orders for reciprocal switching will often have the effect of switching work from one carrier's employees to

another carrier's employees. This situation is likely precisely what Congress had in mind when it enacted § 11102(c)(2) requiring consideration of labor protection. But if there is labor protection for employees of a host railroad who are displaced because another railroad has taken business through a mandatory switching arrangement, the Board has many significant questions to resolve. First, what form would that protection take? Would the Board adopt one of its standard sets of conditions used in other situations, or would it craft something new for forced switching cases? For that matter, would a standard set of labor protective conditions even be appropriate, or would protective provisions have to be crafted for each situation? Moreover, who would pay for those protective conditions? In most circumstances the cost of labor protection is the responsibility of the employing railroad or its successor, an arrangement that makes sense because the employer has chosen to take an action that presumably benefits it. (Hence the term "labor protective conditions" – the agency *conditions* the right of a carrier to engage in a transaction upon extending certain protection to adversely affected employees.) But in a forced switching order it would be unfair for the host railroad to both lose the business and have to pay labor protection for the affected employees. Would the new entrant railroad be responsible? Alternatively, would the shipper requesting the order (who was the cause of the displacement) be responsible?

**E. Environmental Review of Forced Switching Orders Often May Be Necessary.**

A final complication from NITL's proposal is that in many situations the Board will be required to conduct environmental review of forced switching requests. In many individual instances forced switching proposals will likely trigger environmental review under the thresholds set forth in the Board's 49 C.F.R. Part 1105 regulations. And the collective impacts of a proposal that would create more switching, more yard activity, and more network congestion

will certainly have significant impacts on traffic, pollution, and noise that the Board is statutorily required to consider before revising its rules.

The National Environmental Policy Act (42 U.S.C. § 4332) requires federal agencies to consider the environmental impacts of major federal actions. The Board has adopted guidelines for determining whether to prepare Environmental Impact Statements and Environmental Assessments for requested Board actions, which are codified at 49 C.F.R. Part 1105. Those guidelines establish certain thresholds at which an Environmental Assessment “will normally be prepared” for actions that will result in significant diversions from rail transportation to truck transportation,<sup>52</sup> significant increases in rail traffic,<sup>53</sup> or significant increases in rail yard activity.<sup>54</sup> These thresholds are significantly lower in nonattainment areas under the Clean Air Act.<sup>55</sup> Many of the areas served by CSXT that are implicated by the NITL proposal are nonattainment areas, including Atlanta, Baltimore, Birmingham, Charlotte, Chicago, and Memphis.<sup>56</sup>

For forced switching cases, the most relevant thresholds are those governing yard activity, which require environmental review of any action resulting in a 100% increase in yard activity in an attainment area or a mere 20% increase in yard activity in a non-attainment area. *See* 49 C.F.R. §§ 1105.7(e)(5)(i)(B), (e)(5)(ii)(B). Many potential forced switching orders may

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<sup>52</sup> 49 C.F.R. § 1105.7(e)(4)(iv); 49 C.F.R. § 1105.7(e)(5)(i)(C).

<sup>53</sup> 49 C.F.R. § 1105.7(e)(5)(i)(A).

<sup>54</sup> 49 C.F.R. § 1105.7(e)(5)(i)(B).

<sup>55</sup> *See* 49 C.F.R. § 1105.7(e)(5)(ii). A “nonattainment area” is an area in which air pollution levels persistently exceed national ambient air quality standards, or that contributes to ambient air quality in a nearby area that fails to meet those standards. *See* 42 U.S.C. § 7407.

<sup>56</sup> *See* Environmental Protection Agency, Currently Designated Nonattainment Areas for All Criteria Pollutants, available at <http://www.epa.gov/oaqps001/greenbk/anc13.html>.

approach or exceed these thresholds, for forced switching by definition will involve additional yard activity.

Moreover, the decrease in service quality that would be caused by the NITL proposal could cause many rail customers to switch their traffic from rail transportation to truck transportation and thus increase highway traffic. This constitutes further grounds for consideration of the environmental impact of a forced switching regime. Indeed, if the substantial service disruptions caused by adoption of the NITL proposal caused just one out of a thousand rail carloads to be switched to truck transportation, that would amount to a shift of nearly 30,000 carloads to motor carriage—vastly exceeding the Board’s 1,000 carload threshold. *See* AAR, *Railroad Facts* (2011 ed.) (29,209,122 carloads originated in United States in 2010). While NITL’s proposal does not say a word about the potential environmental impacts of its proposal, the Board cannot ignore these substantial impacts.

\* \* \*

Far from being “deregulatory,” the NITL proposal amounts to a full employment act for transportation lawyers and consultants. If just a small number of the shippers eligible for forced switching relief under the NITL proposal chose to request such relief, the Board would be faced with adjudicating an amount of regulatory litigation not seen since the avalanche of post-Staggers Section 229 rate complaints. Such litigation would create a serious strain on the agency’s limited resources, requiring dedication of significant staff time and potentially the employment of additional staff and administrative law judges. There is no justification for creating these complexities, or for assuming that a forced switching regime will be easier to administer than the Board’s well-established, judicially-confirmed regulatory framework.

**VI. CONCLUSION**

For the reasons detailed above, the NITL proposal should be rejected and the STB should maintain its current competitive access rules.

Respectfully submitted,



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Dated: March 1, 2013

**Exhibit 2**  
**to**  
**Opening Comments of**  
**CSX Transportation, Inc.**

**Ex Parte No. 711 (Sub-No. 1)**  
***Reciprocal Switching***

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 711**

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**PETITION FOR RULEMAKING TO ADOPT REVISED  
COMPETITIVE SWITCHING RULES**

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**REPLY COMMENTS OF CSX TRANSPORTATION, INC.**

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**May 30, 2013**

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CSX Transportation, Inc. (“CSXT”) respectfully submits these Reply Comments in response to the Board’s July 25, 2012 order requesting comments on the National Industrial Transportation League’s (“NITL’s”) Petition for a rulemaking to consider changes to the Board’s rules for considering reciprocal switching requests (“NITL Petition”).

### **SUMMARY OF COMMENTS**

The Opening Comments filed by other parties confirm what CSXT demonstrated in its Opening Comments: the NITL Proposal is a misguided effort to remake the regulatory system to benefit a favored subset of shippers at the expense of the vast majority of rail users. Adoption of the NITL Proposal would both create significant operational problems and set off an avalanche of new regulatory litigation. Even the comments submitted by supporters of forced switching make clear that the Proposal is slanted heavily in favor of a few shippers of relatively-higher rated traffic who have the resources to pursue a complex new type of regulatory litigation. This small group of intended beneficiaries—predominantly chemicals shippers—has proposed a plan transparently designed to serve their desire to obtain lower rail rates without having to prove that those rates are unreasonable. Those shippers would do so at the cost of significantly damaging the fluidity of the rail network and service for other shippers. The Board should reject this misguided and shortsighted proposal.

The NITL Proposal is designed to have the Board pick winners and losers. The “winners” are the limited number of shippers who could take advantage of forced switching to pressure railroads to lower their rates (without having to prove that those rates are unreasonable). The losers include shippers who could not or do not want to use forced switching but who would nevertheless share in the costs of such switching, including lower network efficiency, degraded service, and longer delays and dwell times. The losers include rail employees who would be subject to more furloughs, disruptions, and uncertainty as a result of the unpredictable traffic

flows that the NITL Proposal would create. The losers include all parties who depend on timely and efficient decisions from the Board, for the NITL Proposal would spur complex and substantial regulatory litigation that could grind the agency's processes to a halt. And the losers would include the public as a whole, which would have to deal with the cascading effects of a less efficient rail system that would be less competitive with trucks, including more highway congestion, more pollution, and higher prices for consumers. Even if the NITL Proposal were truly in the best interests of some subset of "winners"—and it is not at all clear that it is—the NITL Proposal is plainly not in the *public* interest.

Section I of these comments summarizes the clear and unmistakable evidence that the NITL Proposal is designed to benefit a few chemicals shippers at the expense of rail users as a whole. While quantitative assessments of how many forced access users might "benefit" from reduced rail rates are deeply speculative, assessments agree that the NITL Proposal and its "conclusive presumptions" are designed to ensure that any such rate reductions disproportionately benefit a limited group of chemicals shippers. Indeed, shippers' comments confirm the point. While chemicals shippers are full-throated supporters of the NITL Proposal, other shippers are lukewarm at best to the NITL Proposal as written. Moreover, chemical shippers already have ample access to remedies for allegedly unreasonable rates, and those existing remedies allow the Board to provide any warranted rate relief for hazardous and toxic-by-inhalation ("TIH") shipments without encroaching on security and routing decisions that are within the expertise of the railroads and of other agencies.

Section II demonstrates that advocates of the NITL Proposal have failed to demonstrate that the proposal would be in the public interest, as opposed to what they believe is their own narrow private interest. The Board is charged with advancing the public interest in its

implementation of the Interstate Commerce Act. The evidence in this proceeding overwhelmingly shows that it is in the public interest to maintain the existing, successful regulatory regime, and that it is not in the broader public interest to experiment with a forced switching regime that indisputably would increase car handlings and switches, decrease network fluidity, and adversely affect rail service.

Section III addresses the adverse effects that the NITL Proposal would have on rail operations, a topic that CSXT and other railroad commenters addressed at length on Opening. In contrast, NITL and other proponents of forced switching have not addressed the significant operational inefficiencies and degraded service that would result from allowing a select group of shippers to use forced switching to disrupt regular traffic flows. Section III summarizes the overwhelming evidence that forced switching would undermine the modern operating practices that enable railroads to deliver efficient and reliable rail service. CSXT Reply Exhibit 1 is a video exhibit that illustrates these facts by depicting three real-world scenarios on the CSXT network where a forced switching order could adversely affect operations and service for many CSXT customers. Section III also rebuts NITL's claim that the adverse effects of widespread forced switching could effectively be addressed on a case-by-case basis, and it shows that the entirely different history of Canadian railroading does not in any way suggest that the NITL Proposal would be operationally feasible in the United States.

Section IV demonstrates that the NITL Proposal would increase regulation, not reduce it. Indeed, NITL and its supporters have disavowed any desire to replace existing rate regulation with forced switching regulation, and instead made clear that NITL intends forced switching to be an additional remedy that shippers can use as a "Plan B" if they do not want to bring a rate case (or believe that they cannot prevail in such a case). Moreover, the Opening Comments

confirm what CSXT showed in Opening: forced switching cases would be complex, contentious, and would present many difficult issues that the NITL Proposal fails to acknowledge.

Section V demonstrates that the analysis submitted by NITL in support of its proposal is unreliable and unpersuasive. This is primarily so because the analysis NITL presents fails to assess the actual NITL Proposal, and instead makes a series of unwarranted presumptions designed to artificially underestimate the number of shippers who would be eligible for forced switching under the NITL Proposal as written. Section V also demonstrates that the comments submitted by NITL and its allies on access pricing should be rejected. The prices adopted by a Canadian regulatory agency for interswitching are not a reasonable or an accurate proxy for a compensatory access price, and even if they were, NITL's application of this cost-based fee approach is flawed and internally inconsistent.

Section VI concludes by reiterating the basic legal principle that CSXT explained on Opening: even if a wholesale revision to the Board's reciprocal switching policies were justified (and it is not), the Board does not have the authority to revise deregulatory policies that were specifically approved and ratified by Congress in ICCTA. The exact same arguments NITL and its allies make in this proceeding were made to the Congress that enacted ICCTA. Congress rejected those arguments then, and the Board is not a forum for parties to appeal congressional decisions with which they do not agree. And even if the Board had legal authority to adopt the NITL Proposal (which it does not), it would be imprudent and unwise for the Board to make wholesale revisions to the regulatory system when Congress has not directed it to do so—and indeed when the vast majority of legislators who participated in the Ex Parte 705 proceeding urged the Board to not disturb current regulatory policy.

**I. THE NITL PROPOSAL IS DESIGNED TO BENEFIT THE FEW AT THE EXPENSE OF THE MANY.**

While NITL and its supporters attempt to characterize its proposal as a benefit for so-called “captive shippers” that is being challenged by “railroads,” in fact its proposal would benefit a select subset of shippers at the expense of other shippers, consumers, railroads, and all who depend on an efficient and effective rail network. Above all else, the NITL Proposal is designed to provide forced access for a small number of chemicals shippers, many of whom transport TIH or other hazardous materials and object to the rates charged to transport these dangerous commodities. Indeed, the Opening Comments show that shippers of other commodities are unenthusiastic at best about NITL’s Proposal. Some want the Board to expand the NITL Proposal into a full open access regime with switching available to all or nearly all shippers;<sup>1</sup> some are primarily concerned that the proposal not impact existing rate remedies.<sup>2</sup> But virtually no parties other than NITL and chemicals interests are satisfied with the NITL formulation. This fact alone strongly suggests that the NITL Proposal is designed to serve the narrow interests of a subset of shippers—not the broader public interest. And the analyses that have been submitted with Opening Comments confirm that any potential rate reductions from the proposal—speculative as they are—disproportionately would benefit a limited group of chemicals shippers, while the costs of the proposal would be borne by other users of the rail network.

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<sup>1</sup> See, e.g., Opening Comments of Nat’l Grain and Feed Ass’n at 7, 23-24.

<sup>2</sup> See, e.g., Opening Comments of Entergy Arkansas, Inc., Kansas City Power & Light Co., Seminole Electric Cooperative, Inc. & Wisconsin Electric Power Co. at 11-14.

**A. The NITL Proposal Primarily Benefits Chemicals Shippers At The Expense Of Other Groups.**

While the ambiguities in the NITL Proposal make it impossible to assess its impact precisely,<sup>3</sup> the various analyses submitted on Opening agree that shippers of chemicals traffic would constitute a disproportionate share of those eligible for forced switching under the NITL Proposal. Parties have submitted significantly different estimates of how many shippers would be eligible for forced switching and the impact that the proposal would have on rail rates for eligible and ineligible shippers. The most reliable analysis—and indeed the only one that attempts to model the impact of the actual rules that NITL has proposed—is the one submitted by the Association of American Railroads. As detailed below in Section VI, many of the shipper-submitted analyses ignore significant elements of the NITL Proposal, primarily by assuming that the only eligible shipments would be those with R/VC ratios over 240%.

All parties agree on one thing, however: any benefits of the NITL Proposal would be concentrated among shippers of chemicals traffic. While chemicals shipments constitute a relatively small portion of overall rail traffic—approximately eight percent of overall carloads and 14% of overall rail revenues<sup>4</sup>—chemicals shippers constitute a remarkably disproportionate share of shippers eligible for forced switching under the NITL Proposal.

For example, the U.S. Department of Transportation’s (“USDOT’s”) analysis showed that chemicals traffic would make up approximately half of shippers eligible for forced switching. USDOT focused its analysis on the major commodities of coal, chemicals, and farm products, and identified 360,142 carloads of potentially eligible traffic that was both (1) within

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<sup>3</sup> See Opening Comments of CSXT at 3; Opening Comments of AAR at 14 (explaining that “data limitations and ambiguities in the NITL proposal make it impossible to generate a precise impact estimate” and that “AAR is not able to estimate rate reductions or identify with any certainty the traffic that would receive rate reductions”).

<sup>4</sup> ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS at 24, 29 (2011 ed.).

30 rail route miles of an interchange; and (2) at an R/VC of over 240%.<sup>5</sup> Opening Comments of USDOT at 2-3, 11. Over half of those carloads—nearly 183,000—were chemicals shipments. *Id.* at 10. Moreover, USDOT found that those chemical shipments accounted for over 71% of the revenue at stake for the eligible shipments. *See id.* at 11.

The NITL’s analysis—deeply flawed as it is—likewise shows a disproportionate benefit for chemicals shippers. A full 42% of NITL’s claimed “reduced revenue” from its proposal would inure to chemicals shippers. *See* Opening Comments of NITL, V.S. Roman, App. D Table E. Indeed, chemicals shippers admit that they would be the primary beneficiaries of the NITL Proposal. The American Chemistry Council asserts that “[c]hemical shipments have the largest potential savings of any commodity group” under the NITL Proposal and estimates that chemicals shipments would constitute one-third of all carloads that might be eligible for automatic switching under NITL’s 240% R/VC presumption. Opening Comments of ACC at 5. And AAR’s analysis indicates that over a quarter of all lanes eligible for forced switching under the NITL Proposal would be chemical shipments. *See* Opening Comments of AAR, V.S. Baranowski, at 10 (showing 21,366 eligible lanes, of which 5,667 are chemicals lanes).

Under any analysis, therefore, chemicals shippers would have more access to forced switching and potential rate reductions than any other group of shippers. But as detailed further below, the costs of the NITL Proposal would be distributed among the entire community of rail users. And while the benefits of any hypothetical rate reductions are speculative, the costs of increasing switching, decreasing network fluidity, and creating a complex new regulatory regime are certain to occur. The Board should not reshape the regulatory landscape by imposing

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<sup>5</sup> USDOT’s analysis thus does not model the full proposal—which permits shippers to demonstrate eligibility for forced switching either by shipping 75% of their product by rail for a 12-month period or by submitting other evidence that they lack effective competitive options.

regulations with widespread costs and speculative, concentrated benefits in order to satisfy the demands of one narrow interest group, no matter how vocal it might be.

**B. The NITL Proposal Is Primarily Supported By Chemicals Shippers.**

The Opening Comments themselves provide the best evidence of the NITL Proposal's disproportionate impact. For while NITL claims to represent all shippers, in fact its proposal is primarily supported by the limited set of chemicals shippers who believe they would benefit from it. NITL effectively conceded this point in its Petition, which provided a list of "a number of individual companies" whose Ex Parte 705 comments supported expanding forced switching. That list exclusively consisted of chemicals shippers.<sup>6</sup> While it is true that other shipper groups have expressed support for expanded switching, chemicals shippers constitute a lopsided share of the advocates for the NITL approach.<sup>7</sup> Indeed, many of the most vocal advocates of the NITL Proposal are not just chemicals shippers, but shippers of hazardous or toxic by inhalation chemicals. The Chlorine Institute strongly supports the NITL Proposal. So does the American Chemistry Council and individual shippers of hazardous materials.<sup>8</sup> The fact that so many TIH

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<sup>6</sup> NITL Petition at 27-28 & nn. 90-96 (citing Ex Parte 705 comments of E.I. du Pont de Nemours & Co., Olin Corp., Westlake Chemical Corp., Total Petrochemicals USA, Inc., PPG Industries, and Dow Chemicals as examples of support from "individual companies").

<sup>7</sup> Nine of the 22 replies submitted to the Board in support of the NITL's initial petition were filed by chemicals shippers. *See* Reply of AksoNobel, Ex Parte 711 (filed July 22, 2011); Reply of Interstate Asphalt Corp., Ex Parte 711 (filed July 22, 2011); Reply of Olin Corp., Ex Parte 711 (filed July 22, 2011); Reply of Dow Chemical Co., Ex Parte 711 (filed July 26, 2011); Reply of American Chemistry Council, Ex Parte 711 (filed July 27, 2011); Reply of Bayer Material Science, Ex Parte 711 (filed July 27, 2011); Reply of Chlorine Institute, Ex Parte 711 (filed July 27, 2011); Reply of Fertilizer Institute, Ex Parte 711 (filed July 27, 2011); Reply of PPG Industries, Inc., Ex Parte 711 (filed July 27, 2011).

<sup>8</sup> For example, Diversified CPC International, Inc. manufactures and supplies multiple chemicals that PHMSA classifies as flammable gases and flammable liquids. Diversified manufactures propane, isobutene, butane, propylene, and difluoroethane, all of which are assigned hazardous material classification 2.1 (flammable gas), and it also manufactures Class 3 flammable liquids like pentane, isopentane, and dichloroethylene. *See* 49 C.F.R. § 172.101; Diversified CPC International, "Products Overview," available at [www.diversifiedcpc.com/html/products.htm](http://www.diversifiedcpc.com/html/products.htm).

shippers have chosen to participate in this proceeding to support the NITL Proposal—even though TIH materials account for only 0.25% of all U.S. rail carloads<sup>9</sup>—is a strong indication that the NITL Proposal primarily favors chemical shippers, particularly those who ship TIH commodities.

Non-chemicals shippers are either indifferent to the NITL Proposal or primarily concerned with revising it into a full “open access” regime. For example, coal shippers primarily want assurance that rate remedies (and particularly shippers’ ability to prove market dominance) would not be adversely affected by a forced switching regime. A group of four coal-burning electric power utilities—three of which are former rate case complainants—submitted comments urging the Board not to make any change that would limit shippers’ ability to challenge the reasonableness of their rates. *See* Opening Comments of Entergy Arkansas, Inc., Kansas City Power & Light Co., Seminole Electric Cooperative, Inc. & Wisconsin Electric Power Co. (“Joint Coal Shippers”). The Joint Coal Shippers took no position as to the advisability of adopting the NITL Proposal. Instead, they urged the Board not to make changes that could make it harder for shippers to demonstrate the lack of effective competition that complainants must prove to establish that the STB has jurisdiction over complaints about the reasonableness of their rates. *See id.* at 11-14. The coal shippers argued that a regulatory change that would limit a solely-served shipper’s right to seek rate relief would constitute “a significantly adverse impact” on shippers. *Id.* at 11.

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<sup>9</sup> *See* Association of American Railroads, Hazmat Transportation by Rail: An Unfair Liability, available at <http://www.aar.org/~/media/aar/Background-Papers/Haznat-by-Rail.ashx> [sic]. *Cf.* CSXT Ex Parte 705 Supplemental Comments at 24 (noting that “out of the twenty-one witnesses from shippers or shipper organizations who testified at the [Ex Parte 705] hearing in support of changing the current regulatory regime 43% represent TIH shippers (9 of 21)”).

Agricultural shippers are unenthusiastic about the NITL Proposal for other reasons. While many agricultural shippers support the concept of forced switching in general, they recognize that the NITL Proposal is not designed to benefit them. A coalition of agricultural shippers submitted an analysis finding that, because “less than 6%” of agricultural shipments would qualify for forced switching under the NITL Proposal, “the estimated economic benefits accruing to shippers of [agricultural commodities] as a group from the Proposal as written would not be significant.” Opening Comments of Nat’l Grain and Feed Ass’n *et al.* at 5-6. Indeed, those shippers argued that the NITL Proposal would be “a net negative” to them because few could take advantage of forced switching and many would be subject to increased rates to “offset” rate decreases to shippers who qualified for forced switching. *See id.* at 22 & V.S. Fauth at 20. As a result, these shippers asked the Board to adopt a “significantly modified” rule that would make any shipment with a rate above a 180% R/VC ratio eligible for forced switching and that would allow shippers to argue for forced switching access to interchanges more than 30 miles away. *Id.* at 7, 23-24. In other words, the agricultural shippers argued that the NITL Proposal would be of little benefit to them, and they urge the Board instead to adopt rules that approach a full “open access” regime.

Other commenters similarly recognized that the NITL Proposal would confer limited benefits on agricultural shippers and urged the Board to take more extreme “open access” measures. The U.S. Department of Agriculture argued that the NITL Proposal “would benefit too few grain and oilseed shippers” and urged the Board to adopt a blanket presumption of forced switching eligibility for any shipment with a rate above 180% R/VC located within 30 track miles of a switching point. Opening Comments of USDA at 6-7. And the joint comments of the Alliance for Rail Competition (“ARC”) and grain shippers admit that “many shippers . . .

have little or no hope of taking advantage of competitive switching,” in part because many “shippers of agricultural commodities” are located where it would not be possible to obtain switching from a second carrier. Opening Comments of ARC at 13.<sup>10</sup>

Lastly, it should not be forgotten that a significant number of shippers strongly oppose changes to existing regulations like the NITL Proposal that could degrade rail service. The record in Ex Parte 705 contains multiple examples of shippers that urged the Board to reject calls for reregulatory actions like forced switching and to continue its successful regulatory policies. David Yeager of the Hub Group urged the Board at the Ex Parte 705 hearing to not damage service for the majority of rail customers at the behest of a vocal minority:

I know that a few railroad customers in specific rail markets who ship specific kinds of freight believe that expanding rail regulation will benefit their own self-interests. However, such a shift will do harm to many more companies and individuals in the long run. Taking actions that could reduce railroad efficiency will harm the interests of intermodal customers, as well as the public at large, who benefit from the railroads.

Shippers and the public at large need railroads that are able to invest in the infrastructure expansion, terminals, and rolling stock. I'm very concerned that if the Board makes changes to regulatory policies that it will adversely affect the ability of the railroads to continue investing in their networks.

I'm also concerned that these proposals could negatively affect rail service to customers like us by reducing asset utilization and otherwise impairing the rail network.

Ex Parte 705 Hearing Transcript at 78-79 (June 23, 2011).<sup>11</sup>

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<sup>10</sup> ARC also uses its Opening Comments as an opportunity to attack a variety of STB policies and decisions as supposedly being biased in favor of railroads and against shippers. *See* Opening Comments of ARC at 5 & nn. 5 & 6. Other shippers used their Opening Comments to make similarly unrelated demands, such as the Chlorine Institute's suggestion that the Board reopen former merger decisions “to impose additional competitive conditions.” Opening Comments of Chlorine Institute at 3. The Board should reject all these proposals to rewrite long-settled decisions and policies as both substantively meritless and procedurally improper in a proceeding seeking comments about the specific merits of the NITL Proposal.

As demonstrated below, the entire shipper community—including thousands of shippers who do not want or are not eligible for NITL-style forced switching—would bear the costs of the NITL Proposal through the increased congestion and poorer service that the NITL Proposal would inevitably cause. Some shippers may be willing to trade the risk of substantially degraded rail service for potentially lower rates, but those shippers are gambling not only with the quality of their own rail service, but with the quality of service for thousands of other shippers that would not derive any benefit from forced switching.

**C. Chemicals Shippers Do Not Need Another Regulatory Remedy To Reduce Rates.**

Some important conclusions can be drawn from the fact that the NITL Proposal is primarily supported by and designed to benefit the chemicals industry. First, the narrow base of support for the NITL Proposal—and the lukewarm reactions it has elicited from other major shipper groups—is a strong indicator that the Proposal is one that would benefit narrow parochial interests and not the interests of the public as a whole. As demonstrated below in Section II, the Board is charged with acting in the overall public interest, and it should be extremely skeptical of any proposal advanced by such a narrow slice of the community of rail users.

Second, the record contains almost no evidence that chemicals shippers need the Board to reduce standards for obtaining forced switching. The sole stated purpose of the NITL Proposal is to enable eligible shippers to obtain lower rail rates. But there is no evidence that chemicals shippers are unable to avail themselves of the Board's processes. On the contrary, in recent

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<sup>11</sup> See also NS Supplemental Comments at 28-32, Ex Parte 705 (submitted July 25, 2011), for a summary of the many shipper and economic development agency statements urging the Board to maintain its current regulatory regime.

years chemicals shippers have pursued multiple Three Benchmark cases,<sup>12</sup> Stand Alone Cost cases,<sup>13</sup> and Simplified Stand Alone Cost cases.<sup>14</sup> Chemicals shippers have won relief from the Board in some of their cases<sup>15</sup> and have resolved others through negotiations.<sup>16</sup> The Board has devoted substantial attention to improving and streamlining its rate reasonableness processes, and there is no evidence that the standard rate reasonableness process is an inadequate means of relief. *Cf.* Opening Comments of CSX Transportation, Inc. at 22-23 (describing recent reforms and simplifications of the rate process).

In short, chemicals shippers have proven to be ready, willing, and able to file rate cases, and there is no need for the Board to remake the regulatory landscape to give these shippers a backdoor rate reduction mechanism to “complement” existing rate reasonableness challenges. Indeed, the rate reasonableness process is a markedly superior method for the Board to resolve important fundamental public policy questions about the appropriate level of rates for hazardous chemicals and toxic-by-inhalation hazards. Railroads have argued that rates for this traffic appropriately incorporate factors like the inherent risk of transporting these commodities, the costs of security procedures, increased insurance premiums, and positive train control, and the

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<sup>12</sup> See, e.g., *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100 & 42101; *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket Nos. 42114, 42115 & 42116; *Canexus Chemicals Canada, L.P. v. BNSF Ry. Co.*, STB Docket No. 42132.

<sup>13</sup> See *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125; *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, STB Docket No. 42130; *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121.

<sup>14</sup> See *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket Nos. 42115 & 42116 (served Jan. 28, 2010).

<sup>15</sup> See *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket No. 42114 (served Jan. 28, 2010).

<sup>16</sup> See, e.g., *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. 42123; *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42112; *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100 & 42101.

fact that other modes charge premiums for transporting these commodities. Chemicals shippers have objected to these suggestions, and they claim that railroads are charging too much to transport their traffic. The Board is considering multiple cases that will address these important issues, and there is no need for it to create an alternative remedy that would allow chemicals shippers to use forced switching as an end run around the rate reasonableness process.

**D. The Board Should Not Make Regulatory Changes For The Benefit Of The Chemicals Industry That Would Interfere With Other Agencies' Regulatory Policies Intended To Promote The Safe And Secure Handling Of TIH Shipments.**

The Board must carefully consider the safety and security implications of enacting a forced switching proposal that may be invoked often by chemicals shippers. Because the most enthusiastic advocates of forced switching are chemicals shippers, the Board can expect that chemicals shippers will be the most likely to institute forced switching litigation. As a result, it is likely that a disproportionate number of the carloads that would be subjected to additional handling would be carloads of chemicals. This creates significant safety and security issues that could lead to Board decisions that conflict with the letter and/or the spirit of other agency regulations intended to maximize the safety and security of rail transportation of hazardous materials, particularly toxic-by-inhalation chemicals. The Board should consider carefully the wisdom of allowing chemicals shippers to control routing and create operational complications through forced switching in the interest of "lower rates" when those shippers have ample access to rate reasonableness remedies for any rates they believe to be unreasonably high.

Allowing NITL-style forced switching for hazmat, including TIH commodities necessarily increases the handling and switching of that traffic. By definition, a car that is subject to forced switching will undergo additional handling and additional dwell time. Also by definition, forced switching would lead to transportation of these commodities via routes of the

shipper's choosing. Inevitably, additional handling and switching will increase the risk of an accidental release. But forced switching would not just increase risk, it inevitably would lead to controversy over how the STB's new rule would interact with multiple regulations administered by other agencies that are intended to maximize the safety and security of rail transportation of dangerous commodities.

Three federal agencies share primary responsibility for ensuring the safety and security of rail transportation of hazardous materials. The Hazardous Materials Transportation Act (49 U.S.C. §§ 5101 *et seq.*) authorizes the Secretary of the Department of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5103(b). This authority is delegated to the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). In addition, the Transportation Security Administration ("TSA") has legal authority to impose safety and security requirements on rail under the Aviation and Transportation Security Act (ATSA, Pub. L. No. 107-71, 115 Stat. 597 (2001)), and has broad authority for "security in all modes of transportation , including. . . security responsibilities over other modes of transportation that are exercised by the Department of Transportation." 49 U.S.C. § 114(d). Finally, the Federal Railroad Administration ("FRA") has additional authority over railroad safety and security, and FRA enforces PHMSA's Hazardous Materials Regulations ("HMR") (49 C.F.R. pts 171-180).

Together these agencies have fashioned multiple overlapping regulations intended to increase the safety and security of hazardous rail shipments. The NITL Proposal threatens to impact at least four of these important regulatory controls.

- DOT Routing Rule: Rail carriers are required to annually evaluate each route over which certain hazardous materials, including TIH materials, can be transported and to select the “safest and most secure” route practicable for each of those shipments. 49 C.F.R. § 172.820(j). App. D to 49 C.F.R. Part 172 specifies 27 factors that rail carriers are required to analyze when selecting the “safest and most secure practicable route.” NITL’s Proposal to allow shippers to use “forced switching” to alter the routes of TIH traffic to obtain a cheaper rate could undermine the PHMSA and FRA regulatory policy that those regulatory factors be the primary considerations when routing traffic.
- Rail Security Plans: Because the NITL Proposal would disrupt traffic flows and decrease predictability for any forced switching traffic, it would make it harder for railroads to develop and carry out the security plans required by FRA and PHMSA regulations. In developing security plans required under Subpart I of Part 172 of the HMR, rail carriers are to work with shippers and consignees to minimize the time a rail car containing one of the specified hazardous materials is placed on track awaiting pick-up, delivery, or transfer. *See* 73 Fed. Reg. 72,182, 72,183 (Nov. 26, 2008). Forced switching of TIH and hazmat traffic makes it much harder to reduce the amount of time that TIH cars are held in yards, terminals and other tracks while awaiting transportation, because forced switching would very likely result in more dwell time for dangerous commodities at unpredictable locations. *See, e.g.*, Opening Comments of CSXT at 42; Opening Comments of Norfolk Southern Ry. Co. at 54-55, 64, 77-78; Opening Comments of UP at 23.
- Secure Handoff: Railroads interchanging TIH materials must engage in a “positive and secure handoff,” that is, each railroad must have personnel at the interchange point who will be present at the handoff. *See* 73 Fed. Reg. 72,130, 72,131 (Nov. 26, 2008). It is not at all clear how the STB and TSA would reconcile a forced switching rule with an attended interchange rule. Most likely, they would agree that if an interchange that a shipper wants to force traffic through does not meet the standards that the TSA says must be met in order to interchange TIH traffic, that interchange would not be considered “feasible.” However, it is far from clear that shipper interests would concede this point. Certainly, it would have to be resolved either in a rulemaking or through subsequent litigation.
- Positive Train Control: As the Board knows, pursuant to the Rail Safety Improvement Act of 2008 (“RSIA”),<sup>17</sup> Congress has imposed a requirement that passenger railroads and Class I freight railroads install positive train control (“PTC”) on mainlines used to transport passengers or TIH materials by December 31, 2015. Because NITL-style forced switching would give TIH shippers the ability to change the routes for their traffic at will, it could raise

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<sup>17</sup> Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 104, 122 Stat. 4848, 4856-57 (codified at 49 U.S.C. § 20157).

significant issues regarding the implementation of PTC rules. For example, if the owner's long-haul route is equipped with PTC, but the alternative carrier's route is not, how much latitude would the STB grant to the shipper to force TIH traffic over the route that is not equipped with PTC, either because that line currently carries no TIH or because it currently qualifies for a *de minimis* exception under FRA rules? The inherent unpredictability of TIH volumes and routing caused by forced switching orders will make compliance with STB and FRA rules even more difficult.

- Expedited Delivery: Because any shipper electing forced switching under the NITL Proposal effectively would be trading more efficient service for potentially lower rates, the proposal also contradicts the spirit of PHMSA regulations intended to “ensure the prompt delivery of hazardous materials shipments and to minimize the time materials spend in transportation, thus minimizing the exposure of hazmat shipments to accidents, derailments, unintended releases, or tampering.” PHMSA, Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments; Proposed Rule, 71 Fed. Reg. 76,834, 76,836 (Dec. 21, 2006).<sup>18</sup> Further, some chemical products are unstable and begin to break down in a relatively short time. DOT regulations require that these products be transported from origin to destination within specified time limits. *See e.g.*, 49 CFR §§173.314(g)(1) & 173.319(a)(3). It would not seem to be a defense against a violation of those regulatory requirements that the delay was caused by forced switching mandates. CSX does not suggest that a forced switching rule would lead to an actual conflict with these regulations, but only that the PHMSA policy goals conflict with the almost certain results of implementation of the NITL Proposal. *See generally* Opening Comments of Norfolk Southern Ry. Co. at 54; Opening Comments of AAR at 19; Opening Comments of KCS at 61; Opening Comments of UP at 3, 27, 69.

In short, forced switching of TIH cars is fundamentally inconsistent with the policies underlying current regulations that are aimed at making transportation of TIH materials safer and more secure. The responsible agencies—FRA, TSA, and PHMSA—have weighed the safety and security concerns regarding TIH shipments and have developed a network of regulations to address these concerns. The Board should not adopt NITL's call for a new regulatory scheme

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<sup>18</sup> The HMR also requires that shipments of hazardous materials be forwarded “promptly and within 48 hours (Saturdays, Sundays, and holidays excluded)” after acceptance of the shipment by the rail carrier. 49 C.F.R. § 174.14(a). If only biweekly or weekly service is performed, the carrier must forward a shipment of hazardous materials in the first available train. *See id.* Carriers may not hold, subject to forwarding orders, tank cars loaded with certain hazardous materials. *See id.* § 174.14(b).

that would allow TIH and hazmat shippers looking for a better rate to cause disruptions, reroutes, and delays that are at odds with the national regulatory goals of these other agencies. CSXT submits that the most responsible way for the Board to resolve a TIH shipper's complaint about the level of its rates is for that shipper to challenge the reasonableness of those rates—not for the Board to undermine the efforts of those agencies to improve safety and security.

## **II. THE NITL PROPOSAL SHOULD BE REJECTED BECAUSE IT IS NOT IN THE PUBLIC INTEREST.**

The Board's lodestar in evaluating any proposal for change to its railroad access regulations must be whether such change would advance the public interest. The threshold limitation on the Board's statutory powers to order competitive access to a rail carrier's facilities is that such forced access must be "in the public interest." *See* 49 U.S.C. § 11102(a) (Board may order owning rail carrier to allow another rail carrier to use terminal facilities owned by the first carrier if the Board finds that such use is "practicable and *in the public interest*") (emphasis added); *id.* § 11102(c) (Board may require rail carriers to enter agreement to switch and transport cars of a competing carrier if Board finds such a requirement is "practicable and *in the public interest*") (emphasis added); *see also* 49 U.S.C. § 10705(a)(1) (providing for prescription of through rates, and joint rates and divisions if the Board finds them "desirable *in the public interest.*") (emphasis added).

The Board and its predecessor have consistently applied this statutory directive by recognizing that, in each case, competitive access should be ordered only if the overall public interest would be advanced by such a requirement. *See, e.g., Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 5 I.C.C.2d 331, 335 (1989) (in considering a request for forced switching, "the substantive test is, overridingly, a public interest one"); *Intramodal Rail Competition*, 1 I.C.C.2d 822, 823 (the agency's "first obligation is to implement and administer

[the Commerce Act's] provisions in a manner consistent with the broader public interest considerations set out in the Rail Transportation Policy . . ."); *Golden Cat Div. of Ralston Purina Co. v. St Louis Southwestern Ry. Co.*, 1996 STB LEXIS 132 (April 17, 1996); *see also* 49 U.S.C. § 10101(4) (Rail Transportation Policy provides that a goal of U.S. rail regulation is "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, *to meet the needs of the public* and the national defense") (emphasis added).

**A. Proponents Of The NITL Proposal Have Failed To Present Evidence Or Argument To Support A Finding That The Proposal Would Serve The Public Interest.**

Critically, the "public interest" the Board is charged with protecting and advancing through its regulatory actions is the broad overall interest of all of the public, not the parochial interests of a subset of the public such as a select group of shippers. Some participants in this proceeding have a narrow and distorted view of the Board's overarching responsibility to serve the public interest, *i.e.* that what may advance certain private, short-term interests of a narrow segment of the public also necessarily serves the public interest. But the Board's mandate to advance and protect the public interest is far broader and more comprehensive than the narrow conception fostered by some members of the NITL, including certain chemicals shippers. Rather than catering to the vocal minority of shippers clamoring for forced-access-on-demand to serve their narrow self-interests, the Board's primary duty is to identify and pursue policies designed to foster and maintain public benefits.

Commenters supporting the NITL Proposal fail to acknowledge that while they believe they would obtain private benefits from the proposal, many other shippers would be hurt by, for example, reduced carrier and rail network efficiency, operational problems causing congestion, delays, longer transit times, and degraded service, as well as greater costs. While it appears that

potential financial “benefits” of the NITL Proposal would be confined to a concentrated group of shippers, the corresponding operational and network detriments and costs would be widely dispersed to most shippers, including the majority that would obtain no benefit from forced switching. Thus, the narrow group of supporters of the NITL Proposal essentially seek the Board’s intervention to pick winners and losers among shippers, as well as between certain shippers and rail carriers and their employees. The new policies and increased regulatory intervention urged on the Board by the NITL and its supporters would advance their private interests by sacrificing both other private interests and the greater public interest in an efficient, high quality, stable freight rail network able to maintain and improve service for all rail shippers through continued capital investments and improvement.

Advocates of commencing a rulemaking aimed at radically changing the Board’s competitive access regulations and forcing access based on a one-size-fits-all set of mechanical presumptions have failed to demonstrate that their proposals would generate broadly distributed public benefits. Indeed, they have not even attempted to show that their proposals would result in any net *public* benefit whatsoever. Their far narrower claim is essentially that they believe the proposal would generate *private* benefits—primarily in the form of lower rail transportation rates—for *some* shippers. As demonstrated elsewhere, any attempt to quantify potential rate changes that might result from the NITL Proposal is an inherently speculative endeavor, and the methods used by proponents of the proposal are particularly unreliable and incomplete, and produce dubious results. *See infra* Section V; Reply Comments of AAR at Section II.B.

But even if it were possible to project with some degree of accuracy the changes in rail rates that some favored shippers might obtain under the NITL Proposal, that narrow exercise misses the point. It would not allow the Board to analyze the net effect of the proposal on the

broader public interest, including the effect on rail service quality; the overall effect on the capacity, fluidity, and efficiency of the national freight rail network; the effect on rail carrier costs and future capital investment; the potential effect on rail rates for customers who would not seek or be eligible for forced switching; and the overall effect on the national transportation system, the millions of businesses and consumers that depend on it, and the national economy and economic growth. Those net costs and effects—not the speculative potential rate reductions touted by a narrow group of self-interested proponents of the NITL Proposal—are what the Board must consider when it evaluates whether that proposal would serve the public interest.

In evaluating whether a proposed action or regulation would advance the public interest, this agency has carefully distinguished between public benefits and private benefits. Private benefits of a proposal should not be given weight in evaluating whether it is in the public interest. As the ICC explained in considering a proposed consolidation, “every proposed consolidation will produce private benefits, such as cost reductions and service improvements. . . . Our inquiry is whether the private benefits will also accrue to the public interest.” *CSX Corp – Control – Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521, 551 (1980). Without more, the claim that some shippers might obtain rail rate reductions under the NITL Proposal is at best a claim of private benefit that should be afforded little weight in the Board’s assessment of the broader public interest.<sup>19</sup>

Virtually all parties supporting the NITL Proposal focused primarily on potential rate reductions they speculate might result from a forced switching regime. None promised that they

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<sup>19</sup> See, e.g., Opening Comments of ACC at 5 (only cited “benefits” of proposal are potential rail rate reductions, primarily for chemicals shippers; asserting without support that corresponding revenue losses to rail carriers would “not unduly harm” them); Opening Comments of NITL at 45-54 (focusing on private benefits of reduced rates to shippers, asserting that a ten percent reduction in net rail revenues would not cause undue financial harm to rail carriers, and broadly asserting that rail traffic volume “possibl[y]” might increase due to reduced rates).

would pass their savings on to their customers or consumers. If a shipper obtained rate reductions as a result of forced switching but did not pass its cost savings along to others, this would be a purely private gain to that shipper and forced switching would neither generate a public benefit nor advance the public interest.<sup>20</sup> As the ICC warned, “some . . . private benefits may harm the public interest.” *See, e.g., Guilford Transp. Indus., Inc. – Control – Boston and Maine Corp.*, 366 I.C.C. 294, 335 (1982). Here, the forced switching proposal would result in a regulation-impelled wealth transfer from carriers to selected shippers. Such a forced transfer creates no net benefit, and certainly no net public benefit.

Moreover, as discussed in more detail below, the purported private benefit of lower rates for some chemicals shippers should be accorded even less weight in the analysis because those shippers already have direct, robust avenues to challenge rates they believe are unreasonable. *See I.C. infra*. Because shippers already have multiple statutorily mandated regulatory methods to challenge rail rates, the potential “benefits” of the NITL Proposal to a select group of shippers would be limited to: (1) an ability to use forced access to circumvent the rate case process mandated by Congress and developed and refined by the Board through years of experience; and (2) to seek to use forced access claims and litigation to obtain rates below the levels supported by a maximum rate reasonableness analysis under governing law and regulations. Neither of these two potential private benefits would advance the public interest. As demonstrated below, forced access cases (whether under the NITL Proposal or a variant that is more consistent with

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<sup>20</sup> Some private benefits, such as carrier cost savings or efficiencies resulting from a merger, are also public benefits. *See CSX – Control – Chessie Sys. and Seaboard*, 363 I.C.C. at 551-52; *see also* 49 C.F.R. § 1180.6(b) (merger applicants should include as public benefits the cost savings that would accrue to them as a result of the proposed consolidation). However, private benefits to selected shippers in the form of a net revenue transfer from rail carriers plainly are not public benefits. *See, e.g.*, Opening Comments of AAR at 16-18; Reply Comments of AAR, V.S. Fagan at 2.

governing law and policies) would be complex, time-and-resource-consuming, and difficult to litigate. Accordingly, creating such a complex new regulatory regime to “supplement” the Board’s rigorous existing rate reasonableness methods and remedies (*see* Opening Comments of NITL at 16) would consume substantial additional private and public resources without generating additional public benefit. And there is no public benefit or interest in allowing selected shippers to rely on regulatory intervention to obtain rates below maximum reasonable levels.

Aligned against these purported “benefits” is an array of negative effects and public detriments that could result from the forced switching proposal. For example, forced switching threatens to undermine and undo the rail service efficiencies and productivity gains that have resulted from rail system rationalizations, minimization of interchanges and switching, and network consolidation painstakingly implemented by rail carriers over the last three decades. As CSXT and other commenters have explained, some of the greatest efficiency improvements and cost reductions achieved by carriers since the Staggers Act have been the result of reductions in switching, shorter terminal and rail yard dwell times, and longer single-carrier hauls. *See, e.g.*, Opening Comments of CSXT at 25-33; Opening Comments of AAR, V.S. Rennie, at 10-18; Opening Comments of UP at 53-57. Requiring new and additional switching of foreign carrier traffic at the demand of a shipper could reverse those gains by introducing more interchanges and switching, increased terminal dwell times, and shorter single-carrier hauls. Together, such additional car and equipment handlings, delays, and operating burdens and complications could dramatically reduce efficiency and increase costs, thereby undermining the hard-won efficiency,

productivity, and service quality gains that have been achieved by rail carriers and generated substantial and broad public benefits over the last 30 years.<sup>21</sup>

Another public detriment of the NITL Proposal is that it would reduce the incentive for rail carriers to make capital investments necessary to improve and maintain their networks. Forcing carriers to allow competitors to use rail facilities built with the owning carrier's private investments at anything less than fully compensatory access prices would reduce their expected return on those capital investments and discourage future investments. If a carrier and its investors cannot reliably project an adequate return on capital invested in the rail network, they will choose to invest elsewhere. Results of reduced or inadequate capital investment in the rail system would likely include inadequate capacity to meet projected growth in demand for rail transportation services, rail system congestion and delays, deterioration of rail service and efficiency, and potentially more traffic transferred to over-the-road trucks which would result in more pollution and greater strain on public infrastructure. Each of these consequences would have a significant negative effect on the public interest and weigh heavily against the limited—and largely private—potential “benefits” of the NITL Proposal.

In addition to potential reductions in capital investments by rail carriers, the forced switching regime embodied in the NITL Proposal would almost certainly increase the operational costs of rail carriers who would be forced to use their property, equipment, and resources to switch and transport traffic for their competitors. Rail carriers that have tailored

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<sup>21</sup>The NITL Proposal not only would require changes to railroad operations, it also could lead to potential changes of railroad ownership on affected line segments. If forced switching orders were to result in the rerouting of enough traffic to degrade the profitability of a line segment, rail carriers would have to consider responsive measures, which might include sale of those segments to short line railroads. This is yet another example of how NITL's desire to grant certain shippers the ability to reshuffle traffic patterns could cause wide-ranging, unintended consequences.

their operations—from optimizing facilities and allocating equipment, to local and terminal service plans and schedules, to crews, to maintenance, to the numerous other components of their operations—to serve their traffic in an efficient and cost-effective manner could be forced to make *ad hoc*, disruptive changes to those operations in order to interchange and accommodate different and varying flows of traffic injected by other carriers. The introduction of new and unforeseen traffic into busy terminal areas through forced switching would increase the owning carrier’s operating costs substantially at the same time it eroded that carrier’s efficiency and service quality. This agency has repeatedly recognized that cost *reductions* realized by a carrier as result of an approved consolidation or action constitute public benefits. *See, e.g., CSX Corp. – Control – Chessie Sys. and Seaboard*, 363 I.C.C. at 551 (cost reductions are considered to be a public benefit); 49 C.F.R. § 1180.6(b) (cost savings included as benefits of proposed consolidation). By the same logic, cost *increases* resulting from a carrier action or transaction required by agency regulation or order must be considered public detriments that negatively affect the public interest.<sup>22</sup>

**B. Use Of An R/VC Ratio To Establish One-Size-Fits-All Classes Of Movements Entitled To Forced Switching Would Be Arbitrary, Inaccurate, And Contrary To The Statute.**

A central premise of the NITL Proposal is the erroneous notion that the Board may determine the public interest in forced switching cases *categorically* through the mechanical

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<sup>22</sup> Proponents of the NITL Proposal may contend that there are other public benefits that would result from the imposition of forced switching. As discussed above, their opening comments focused primarily on their projected *private* benefits, *not* public benefits. If forced switching proponents were to identify potential public benefits of their proposals, any such benefits would have to be measured against the public detriments (including increased costs) of the proposal to determine whether there might be any *net* benefits accruing to the public as a result of the proposal.

application of a pre-established one-size-fits-all ratio or percentage.<sup>23</sup> NITL proposes the application of “conclusive presumptions” to make forced switching determinations, displacing the Board’s longstanding approach of determining the public interest based on individualized consideration of the specific facts and circumstances of each case.<sup>24</sup> The use of a single R/VC ratio or a one-year traffic volume share as the determinant of the public interest for all of the different potentially eligible facilities and traffic would disregard the myriad varying material facts, circumstances, and conditions of each peculiar individual facility, location, shipper, and type of traffic that might be at issue in forced access requests. As the agency has recognized in an analogous context, application of simplistic arithmetic ratios (such as a single static R/VC ratio) is a crude and inaccurate way to determine whether there is effective transportation competition for specific traffic. *See, e.g., Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118-122 (1981) (rejecting use of R/VC ratios to determine market dominance, in favor of “more accurate . . . determinations on a case-by-case basis.”).<sup>25</sup>

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<sup>23</sup> *See, e.g.,* STB Ex Parte No. 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Notice at 4 (served July 25, 2012) (describing the two “conclusive presumptions” that are “central to NITL’s propos[als],” R/VC > 240, or serving rail carrier handled 75% or more of the traffic at issue); *id.* at 5 (conclusive presumptions regarding whether workable interchange exists within reasonable distance of shipper’s facilities).

<sup>24</sup> Under the NITL Proposal, the conclusive presumptions would operate as a one-way ratchet: Traffic meeting the ratios is conclusively deemed eligible for forced switching, but shippers whose traffic does not qualify under those ratios are not deemed ineligible for competitive switching. *See* NITL Petition at 41-52, 65-67; Opening Comments of NITL at 7. Instead, a shipper that does not meet the conclusive presumption requirements may still seek forced access by arguing that there is a “lack of effective competition” for transportation of its traffic. *See* NITL Petition at 7, 46, 67. Thus, the NITL Proposal would impose crude wooden presumptions in instances in which they favor shippers, and ignore the logical inverse presumption by allowing a fact-and-circumstance-specific assessment where the presumptions do not favor shippers.

<sup>25</sup> Even the ICC’s initial use of R/VC ratios—which the agency rejected after a short time as inaccurate given the numerous varied factors affecting competition and market dominance—established only *rebuttable* presumptions, not the conclusive, irrebuttable presumptions NITL has now proposed. *See Market Dominance Determinations*, 365 I.C.C. 118.

It is an even more arbitrary and capricious way to make determinations regarding the multi-faceted and variable requirements of the public interest.

Not only would uniform application of a single arithmetic ratio to determine forced access requests be inaccurate and arbitrary, it would also be contrary to the statute authorizing the Board to order such access. Section 11102 clearly contemplates an individualized determination of each request for competitive access, not mechanical application of the same pre-determined arbitrary ratio to each unique access request. *See* 49 U.S.C. § 11102(a) (providing for forced access and use of a carrier’s terminal facilities “if the Board finds *that use* to be practicable and in the public interest without substantially impairing the ability of the [owning] rail carrier” to use the facilities for its own business) (emphasis added); *id.* § 11102(c) (authorizing forced switching “agreements” in those instances “*where it finds* such agreements to be practicable and in the public interest . . . .”) (emphasis added).

Importantly, the statute does *not* state that the Board may make *categorical* determinations for entire classes or types of traffic. Nowhere does the statute grant the agency the power to make broad, one-size-fits all determinations—whether through “conclusive presumptions” or otherwise—that entire classes of traffic are entitled to forced switching or forced access. Where Congress intended to authorize the STB to make broad regulatory determinations for entire categories or classes of persons or traffic, it expressly enumerated that power in the language of the statute. *See, e.g.,* 49 U.S.C. § 10502 (a), (b) (authorizing the Board to exempt from regulation “*class[es]* of persons,” in addition to individual persons, transactions, or services) (emphasis added). Because Congress did not authorize the Board to make broad general access determinations for classes of traffic (*e.g.,* all shippers at a single-served facility within 30 miles of an interchange that generates an R/VC > 240%), the Board may order

competitive access only after a petitioning shipper proves that under the specific facts and circumstances at issue, such an order is in the public interest or necessary for competitive rail service. *See id.* § 11102.

Application of a simplistic ratio as the keystone for forced switching determinations may be quick, simple, and inexpensive, but it is far from an accurate, reasonable, or sound way to evaluate or advance the public interest under the peculiar circumstances, facts, and conditions obtaining in each individual request for forced switching. Moreover, the categorical approach embodied in the conclusive presumptions of the NITL Proposal are not authorized by the statute.

In sum, supporters of the NITL Proposal have identified few public benefits of such a forced switching regime. They speculate that *some* shippers might realize short-term *private* gains (largely in the form of rail rate reductions that would be a zero-sum transfer from rail carriers to a subset of shippers), but *private benefits are not public benefits*. And the Board is charged with promoting the latter, not the former. On the negative side of the ledger, CSXT, AAR, and other commenters have identified numerous and substantial negative effects of the proposal on the public interest, including significant harm to the operations and efficiency of the national rail network and degraded rail service to the many rail shippers who would not benefit from the proposal. Even crediting the largely unsupported claims of limited potential public benefits made by proponents, the net effect of the NITL Proposal on the public interest would be negative.

Because the negative effects of the NITL's Proposal would far outweigh any potential benefits identified in this information-gathering proceeding, the proposal fails to satisfy a fundamental threshold requirement for major new regulation by the Board—that it serve and advance the public interest. As the ICC has long held, in order to show that forced access is

“practicable and in the public interest” a proponent must demonstrate “more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them.” *Jamestown Chamber of Commerce v. Jamestown W. & N. R. Co.* 195 I.C.C. 289, 291 (1933); *see Midtec Paper Co. v. United States*, 857 F.2d 1487, 1492 (D.C. Cir. 1988) (quoting *Jamestown Chamber of Commerce* in affirming present forced access rules and standards). Because proponents have not, and cannot, demonstrate that the NITL Proposal would be in the public interest, the Board should reject the proposal and terminate this proceeding without further action.

### **III. PROPONENTS OF FORCED SWITCHING HAVE NOT ADDRESSED THE NEGATIVE CONSEQUENCES OF NITL’S PROPOSAL ON RAIL SERVICE.**

Among the issues that the Board asked the parties to address in their submissions was “whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads.” Notice at 8 (served July 25, 2012). In its Opening Comments, CSXT demonstrated that NITL’s Proposal would undermine the major improvements in service efficiency and reliability that CSXT and other railroads have delivered for their customers in the post-Staggers era. *See* Opening Comments of CSXT at 24-43. By generating unnecessary car handlings, diverting shipments away from efficient high-volume routes, and disrupting the predictability of traffic flows upon which modern rail service planning is predicated, forced switching would impair the ability of railroads to operate “scheduled” train services, to minimize car dwell time at yards and interchange points, and to maintain cooperative operating arrangements (including run-through trains and “pre-blocking” of interline traffic) with connecting carriers. As CSXT has shown, those adverse service consequences would affect all

rail customers, including shippers who would derive no benefit from NITL's ill-conceived proposal.<sup>26</sup>

Conspicuously absent from the Opening Comments filed by NITL and other proponents of forced switching is any meaningful discussion of the potential impact of forced switching on the quality or cost of rail service. Based upon what it characterizes as “the Canadian experience,” NITL blithely asserts that its proposal “will not adversely affect rail network efficiency at all.” Opening Comments of NITL at 58. Remarkably, NITL suggests (without presenting any supporting evidence) that diverting traffic to a plethora of new routes and interchanges “may increase network efficiency.” *Id.* (emphasis in original).

Highroad Consulting dismissed the potential impact of NITL's Proposal on rail network fluidity by pointing out that “[t]he railroad industry has responded to change positively in the past. They are innovative and accomplished at identifying opportunities to improve the efficiency of operations and to grow their business.” Opening Comments of Highroad Consulting at 11. Highroad misses the point: the concern raised by CSXT and other rail carriers is that forced switching would destroy the very service innovations and efficiency-enhancing operating practices that railroads have developed and implemented over the past two decades. Moreover, Highroad's observation begs the question of why the Board should risk harm to service quality—at the expense of all rail customers—for the sake of a limited group of shippers who seek lower rates.

The American Chemistry Council (“ACC”) based its claim that NITL's Proposal “will not unduly harm freight railroads” solely on its forecast that forced switching would reduce

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<sup>26</sup> The concerns expressed by CSXT regarding the adverse effects of forced switching on rail service quality were echoed in the Opening Comments of other railroad parties. *See, e.g.*, Opening Comments of AAR, V.S. W. Rennie; Opening Comments of KCS at 14-17; Opening Comments of Norfolk Southern Ry. Co. at 71-79; Opening Comments of UP at 22-53.

carrier revenue by 2.4%. Opening Comments of ACC at 5-6. Nowhere in its comments does ACC mention—much less analyze—the potential effects of forced switching on the efficiency or reliability of the rail network. Likewise, the Interested Agricultural Parties contend that forced switching “would not significantly impact the Class I railroads” because “the amount of ‘at risk’ revenues . . . would be insignificant.” Opening Comments of Interested Agricultural Parties at 20-21. However, the Opening Comments of the Interested Agricultural Parties make no mention whatsoever of the potential adverse impacts on railroads or their customers that would result from a degradation in service. The Opening Comments of Olin Corporation focus entirely on the supposed “lack of competition” for chemical traffic, and make no mention whatsoever of the impact on rail safety of dispersing that traffic (including shipments of chlorine and other hazardous chemicals) among numerous routes and interchanges. The Alliance for Rail Competition (“ARC”) acknowledges that it is “possible” that forced switching could lead to “unsafe operations or inadequate investment,” but argues that “these dangers should not head up the Board’s list of concerns in this proceeding.” Opening Comments of ARC at 9. Indeed, ARC chides the Board for asking interested parties “to do extensive and expensive cost-benefit analyses” of the effects of NITL’s Proposal, and asserts that “rail-to-rail competition needs to increase, even if shipper benefits are uncertain.” *Id.* at 5-6 (emphasis added).

In short, the Opening Comments of NITL and other proponents of forced switching do not address the operating concerns identified by the railroads, nor do they demonstrate that the purported competitive benefits of NITL’s Proposal outweigh the likely harm to rail network efficiency, service quality and reliability, and future investment incentives that would flow from implementation of a “forced switching on demand” regime. Instead, they urge the Board simply to assume that, because Canada’s century-old interswitching regulation has not caused major

service problems in that country, the impact of NITL's far broader proposal on the United States rail network would likewise be benign. As the following discussion (and the Opening Comments of CSXT and other railroad parties) demonstrate, such a leap of faith is dangerous and unsupported by the record evidence.

**A. Forced Switching Would Undermine The Modern Operating Practices That Have Enabled Railroads To Deliver More Efficient And Reliable Rail Service.**

Despite NITL's claims to the contrary,<sup>27</sup> there is ample evidence that its forced switching proposal would undermine modern railroad practices that have enabled carriers to deliver major improvements in rail service and efficiency. *See* Opening Comments of CSXT at 33-47. NITL envisions a rule that would allow a qualifying shipper to demand access to a second carrier anywhere "there is or can be 'a working interchange'" within 30 miles of the shipper's facility." July 25 Decision at 4 (emphasis added). As the Opening Comments submitted by CSXT and other railroads show, such a rule would significantly increase car handlings and dwell time at yards and interchange locations, divert traffic from the high-volume, lower cost routes that carriers have developed to maximize service efficiency, and increase overall transit time. *See* Opening Comments of CSXT at 33-47.

Permitting shippers to demand service via any interchange point of their choosing would convert large volumes of traffic that currently move in single-line service to less efficient interline movements. The immediate impact of such a rule would be to generate a major increase in the number of car handlings required to transport such cars across the rail network. As the Opening Comments of CSXT and other railroads showed, such additional handlings would degrade service by increasing both dwell time in yards and overall transit time. For

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<sup>27</sup> *See, e.g.*, Opening Comments of NITL at 33, 62.

example, CSXT illustrated that shifting even the simplest car movement from a single-line routing to an interline movement involving a second carrier would increase the number of handlings required to serve the movement from four to seven. *See* Opening Comments of CSXT at 40-41. CSXT’s average system-wide terminal dwell time is approximately 24 hours. *Id.* at 42. Thus, the record indicates that each additional interchange required in response to a demand for forced switching would delay the subject car(s) by approximately 24 hours. The Opening Comments of NS and UP likewise support a finding that forced switching would add significant delays to car transit times.<sup>28</sup> As NS pointed out, carload shipments spend much of their overall transit time not actually moving in a train, but being handled at origin, destination and intermediate locations. *See* Opening Comments of Norfolk Southern Ry. Co. at 74 (noting that, on average, carload traffic spends 41% of its transit time in handling locations). Indeed, this agency has long recognized that “[i]nterchanging freight . . . adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars.” *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 940 (1980).<sup>29</sup> NITL’s forced switching proposal would degrade service and network efficiency by requiring more frequent car handlings and increasing the amount of time that cars spend in rail yards. Indeed, as CSXT showed, NITL’s Proposal could lead to

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<sup>28</sup> *See* Opening Comments of Norfolk Southern Ry. Co. at 77-79 (describing current dwell times and illustrating that increased car handlings in interchanges would increase dwell time at those locations); Opening Comments of UP at 22-23 (“[F]rom the time the empty cars arrive in a terminal until the loaded cars depart, even in relatively uncomplicated interchange situations, where two railroads are operating in the same terminal and delivery cars directly into each other’s yards, reciprocal switching would add 48 to 96 extra hours during which the affected cars would remain in yards, increasing car inventory and consuming capacity.”).

<sup>29</sup> Even Highroad witness Thurston acknowledged that “switching rail cars between railways at interchange points or within rail yards for train-building or shipper placement objectives is a more time consuming and resource demanding activity than simply hauling trains along a mainline operation.” Opening Comments of Highroad Consulting, V.S. Thurston at 27.

significant increases in car movements through yards and wayside interchange points that are not equipped to accommodate such an increase in daily activity. *See* Opening Comments of CSXT at 45. Such a result would negate the efforts of railroads to eliminate costly and inefficient interchanges by consolidating traffic over a smaller number of high-volume routes. *See* Opening Comments of CSXT at 37-39; Opening Comments of Norfolk Southern Ry. Co., V.S. Ehlers at 11-13.

NITL's Proposal would not only complicate carriers' yard operations; it would also undermine train operations and overall network planning.<sup>30</sup> As CSXT's Opening Comments explained, railroads have implemented a variety of efficient, modern operating practices to enhance the quality and reliability of their service offerings. CSXT and other carriers have adopted "scheduled" train service plans that offer more consistent, reliable service to customers. A "scheduled" train service plan also enables carriers to coordinate the arrival and departure of road and local train with the yard operations required to support on-time train performance. Scheduled service benefits shippers by providing greater predictability regarding the arrival and departure times for their shipments. Coordinating the movement of road trains and local trains with yard operations promotes fluid movement of traffic across a carrier's network.

Another important operating practice utilized by CSXT is the development of a "trip plan" for each carload shipment that traverses its rail lines. Nearly two-thirds of the general freight carload traffic transported by CSXT moves in two or more road trains during its journey. *See* Opening Comments of CSXT at 32. A "trip plan" enables CSXT to assign individual cars to those trains that can handle the movement most efficiently. CSXT also employs a "hub and spoke" train and yard service plan that seeks to route cars through high-capacity hump yards in

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<sup>30</sup> *See* Opening Comments of CSXT at 24-47; Opening Comments of KCS at 14-16; Opening Comments of Norfolk Southern Ry. Co. at 71-79; Opening Comments of UP at 22-57.

order to expedite the transfer of cars from one train to another. CSXT and other carriers employ detailed “blocking plans” at each major yard, pursuant to which cars moving to a common destination (or point further along the network) are classified into “blocks” that travel together. Transporting cars in blocks reduces the number of times that individual cars must be switched at intermediate points, by allowing entire blocks of cars to be “swapped” from an in-bound train to an out-bound train without further classification. *See* Opening Comments of CSXT at 28-33.

CSXT employs similar efficient operating practices in handling interline traffic. For example, CSXT and connecting carriers expedite the movement of interline freight by operating “run-through” trains between points on their respective systems. Run-through trains are built at a major yard on one railroad’s lines and operate intact to another yard (beyond the interchange point) on the receiving carrier’s system. This practice eliminates the need for either railroad to handle or reclassify individual cars at the point of interchange.<sup>31</sup> Indeed, run-through trains often bypass major terminals such as Chicago and New Orleans, thereby avoiding costly delays incurred in handling traffic via congested lines and gateways.

Where run-through train service is not feasible (for example, where merchandise traffic does not move in sufficient quantities to fill out an entire train), CSXT and its connecting railroads may “pre-block” cars for one another prior to interchange. Like cars moving in run-through trains, such blocks are built at a major yard on one railroad’s lines for through movement to a point on the receiving carrier’s system, and are “swapped” intact at the interchange location. This practice reduces car handlings by allowing “blocks” of cars to be

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<sup>31</sup> These and numerous other practices implemented by carriers have improved car and equipment utilization and thereby further improved efficiency and reduced rail costs. To cite one recent example, the North American Boxcar Pool was able to reduce days per load from 31.2 to 29.9 in the span of just four years, from 2009 through 2012. This increased efficiency was equivalent to creating more than 300 new rail cars of transportation capacity.

transferred from an in-bound train to an out-bound train without further classification. *See* Opening Comments of CSXT at 28-29.

As CSXT's Opening Comments demonstrate, the key to the success of these efficiency-enhancing operating practices is the predictability of the traffic flows for which a railroad must plan. *See* Opening Comments of CSXT at 33. NITL's Proposal offers no element of predictability or stability upon which CSXT and other carriers could plan their operations. There is no minimum time commitment or other limitation upon a shipper's right to shift the routing of its traffic. Rather, shippers would be free to demand forced switching at any time, at any location, and for any reason, without making any commitment to move their freight via the new route for any period of time. Indeed, under NITL's Proposal, a shipper could demand forced switching and reroute its traffic for a short period of time simply to induce the original carrier to offer a reduced rate, then immediately shift its traffic back to the original route were it to successfully achieve lower rates.<sup>32</sup>

CSXT and other U.S. railroads have invested massive resources to develop a modern, efficient national rail network. As *The Economist* recently observed, America's rail system today is "the most cost-effective" in the world.<sup>33</sup> NITL's forced switching proposal would derail the efforts of CSXT and other carriers to meet the growing demand for safe, efficient and reliable rail transportation services. A regulatory regime that permitted shippers to demand that U.S. railroads establish new (and less efficient) routings and interchange arrangements on a whim,

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<sup>32</sup> If a shipper committed its traffic to an alternate route by entering into a contract with the second carrier, that shipper would, under current law, have the ability to obtain a rate from the original carrier under the Board's "bottleneck" process. What NITL is seeking in this proceeding is relief that is essentially the same as that available under the bottleneck remedy, without being required to commit its traffic to the alternate route.

<sup>33</sup> "Back on track: The quiet success of America's freight railways," *THE ECONOMIST* (April 13, 2013), available at <http://www.economist.com/news/business/21576136-quiet-success-americas-freight-railways-back-track>.

and shift traffic back and forth between alternative routes at any time, would wreak havoc on the train service plans, yard operations and cooperative arrangements upon which CSXT and other carriers rely to provide that service to their customers. The fact that a forced access “remedy” would be available only to a subset of shippers, while the adverse impacts of its proposal would be felt by all rail customers, further underscores the wisdom of rejecting NITL’s Proposal.

**B. CSXT Video Exhibit 1 Illustrates The Adverse Operational Impacts Of The NITL Proposal.**

In light of proponents’ abject failure to address the significant potential operational effects of the NITL Proposal, CSXT submits with its Reply Comments a video exhibit to illustrate some of the operational problems that the NITL Proposal would cause. *See* attached Exhibit 1. The video focuses on three real-world scenarios on the CSXT system where NITL-style forced switching would lead to significant operational complications. These three scenarios are not unique or unusual. On the contrary, they are only examples of the kinds of problems that could occur in many similar situations across the rail network if the NITL Proposal were to be adopted.<sup>34</sup>

The first video example of a scenario in the Norfolk-Newport News area shows the extreme inefficiency and absurd results that would result from adopting NITL’s Proposal to conclusively presume that switching would be reasonable “within a radius of 30 miles of an interchange.” While NITL has never clarified whether it means air miles or rail track miles, the

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<sup>34</sup> CSXT emphasizes that these comments and in particular these specific examples are offered solely by CSXT. They are not intended to represent the position of Norfolk Southern or any other rail carrier. Moreover, CSXT’s use of these three examples to illustrate the effects of the NITL Proposal is not intended to suggest that forced switching would be warranted, feasible, or lawful at any of these examples—even if the NITL Proposal were to be adopted. CSXT reserves all its rights to challenge the lawfulness and feasibility of forced switching at any of these locations in any future proceeding.

dictionary definition and ordinary use of the term “radius” mean straight-line air miles.<sup>35</sup> Using the common meaning of “radius,” the NITL Proposal would lead to a “conclusive presumption” that switching was feasible over rail line distances that far exceed 30 rail miles. For example, the coastal geography of southeastern Virginia means that many areas that are within 30 miles of each other “as the crow flies” are separated by a much greater distance of rail track miles. The Norfolk-Newport News portion of Exhibit 1 shows that a shipper who invoked forced switching for a shipment to the CSXT Pier IX coal terminal would add hundreds of miles and significant circuitry to the route for its traffic. *See* Exhibit 1 at 2:40—4:35. And the costs of that inefficiency would not be borne only by the customer requesting forced switching. On the contrary, the disruptions and delay attributable to the inefficient movement would impact thousands of other customers who depend on efficient and fluid rail operations.

Second, the video exhibit illustrates the significant operational impacts that can occur when a forced switching request disrupts the “hub and spoke” nature of carload operations. *See* Exhibit 1 at 5:32-15:11. The Jacksonville scenario depicted in the video was described in CSXT’s Opening Comments at pages 39 to 40, where CSXT explained the significant operational difficulties that result from forcing switching at flat serving yards. In the Jacksonville scenario, the active interchange within 30 miles of the customer’s facility is not actually used by trains serving that facility. That is, under the CSXT operating plan, there is no train that runs between Moncrief yard (the interchange point) and Busch yard, which is the customer serving yard. Moreover, given switching and service demands of existing traffic served by the yard at the interchange point (Moncrief yard), that yard likely would not have the capacity to flat-switch and block a significant additional volume of forced-switch cars.

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<sup>35</sup> *See* Webster’s Third New Int’l Dict. 1874 (defining “radius” as “a line segment extending from the center of a circle or sphere to the curve or surface”).

Depending on the size of the cut of cars that would be released to CSXT at Moncrief yard, it might be possible for CSXT to accept such additional cars at that yard. However, it is another thing entirely to assume that Moncrief yard would have the capacity to flat switch the cars onto a departure train bound for the customer(s) facility. It would not. As this example illustrates, it is critical to understand that *not every interchange can function as a classification yard*.<sup>36</sup>

Because of these operational constraints, cars arriving at that interchange due to a forced switching order would have to be routed north to CSXT's Waycross, GA, hump yard for blocking into another train that would serve the customer. The reason that CSXT's and other railroad's operating plans work to process as much traffic as possible through regional hump yards is that classification and switching at those regional hubs is far more efficient than classification at flat switching yards—as the video illustrates.<sup>37</sup> *See id.* at 7:30 – 12:15. The irregular and inefficient operations that forced switching would create significantly interferes with the fluidity of the “hub-and-spoke” model that is the backbone of CSXT's carload service plan, and that interference and inefficiency has downstream effects that impair service to other CSXT customers.

The third illustration in Exhibit 1 demonstrates the significant congestion and disruption that can occur when forced switching moves are added to complex metropolitan areas like Baltimore. *See Exhibit 1 at 15:12–20:35.* Baltimore is one of many locations on CSXT's

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<sup>36</sup> As CSXT has discussed elsewhere in its comments, one of the significant operational problems posed by forced switching on demand is the variability and unpredictability of traffic flows and volumes it would introduce to operating plans that are based on known and relatively predictable traffic patterns. Under CSXT's current operating plan for its existing traffic and customers, the Moncrief yard operates very close to its capacity, and thus has very limited ability to handle additional traffic.

<sup>37</sup> CSXT's video exhibit is illustrative and conceptual. The video is not intended to be a technically precise depiction of actual operations, but rather a generally accurate animated illustration of some of the principles, concerns, and operational effects described in these comments.

network where busy freight and commuter operations require precise balance and careful planning. Adding forced switching movements to the mix can disrupt that balance and create significant congestion and service impacts for other customers. Exhibit 1's Baltimore example shows how a single forced switch ethanol movement could create serious backups for other freight movements and commuters, as well as require the movement of hazardous materials through the downtown area, a routing that CSXT avoids today.

In short, the video Exhibit demonstrates that the NITL Proposal would cause significant complications throughout the rail network. These effects would not be limited to the examples in Exhibit 1. For as Exhibit 1 depicts, if the NITL Proposal is adopted operational harms like these can be expected across the rail network. *See* Exhibit 1 at 19:38—20:35.

**C. NITL's Recommendation That Railroads Be Permitted To Demonstrate That An Individual Request For Forced Switching Is Infeasible Or Unsafe Does Not Save Its Ill-Conceived Proposal.**

One of the “four basic principles” underlying NITL's forced switching proposal is that competitive switching would not be available if the rail carrier can show the switching would be infeasible or unsafe, or would unduly hamper the ability of that carrier to serve its existing customers.

Opening Comments of NITL at 8. According to NITL, this proviso “assures that competitive switching would not result in operational or safety problems.” *Id.* at 64. NITL is wrong.

While this suggested limitation on the availability of forced switching might defeat a proposal that is, on its face, “infeasible”—for example, a demand by a shipper that carriers switch unit trains at a little-used wayside interchange location that is equipped with a single 2,000 foot track—it utterly fails to address the fundamental problem identified by CSXT and other carrier parties. Viewed in isolation, one shipper's demand that a railroad deliver its cars to another railroad at an existing interchange location for line-haul movement by the second carrier would not, in many instances, be “unsafe” or “infeasible.” However, the cumulative impact of

having hundreds of shippers demand that carriers shift thousands of rail cars to new routings via less efficient alternate interchanges—and, perhaps, subsequently requesting that the traffic be returned to its original route of movement—would undermine the network planning and “scheduled” train and yard operations that have enabled the industry to provide improved service to all customers. NITL’s proposed “basic principle” does not take such cumulative impacts into consideration.

Moreover, NITL’s Opening Comments leave unanswered a host of issues that might arise in connection with an individual demand for forced switching service. For example, assume that two railroads interchange a total of 20 cars daily at a wayside location equipped with two interchange tracks totaling 1500 feet in length. If a shipper made a new request that the carrier serving its facility switch four outbound loaded cars and four inbound empty cars per day with the second carrier at that “active” interchange point, the 1500 feet of track would be insufficient to handle that modest volume of additional interchange traffic.<sup>38</sup> In such a case, would the requested switching be “infeasible” under NITL’s Proposal? How would the Board evaluate a shipper’s request that would require additional track construction?

Likewise, suppose a shipper demanded switching service via an interchange location at which the main line is used to perform interchange switching? (The scenario discussed in the paragraph immediately above would, in all likelihood, involve such a location). Where road or local trains occupy the main line while performing interchange switching (or place cars on the main line while serving an industry or interchange track), any increase in daily switching volume would necessarily reduce the available capacity of the main line for through train movements.

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<sup>38</sup> A 1500-foot interchange track can hold a maximum of 25 60-foot rail cars. In the example in the text, the eight new cars to be interchanged would bring the daily interchange volume to 28 cars.

Moreover, congestion caused by increased switching at one location can result in delays to other trains operating along the network. Would NITL's proposed rule permit a carrier to refuse a request for forced switching on the basis of such "network" impacts?

As these examples illustrate, NITL's facile suggestion that a railroad could defeat a demand for switching service by showing that such switching is "infeasible" or "unsafe" is, at best, illusory.

**D. The "Canadian Experience" Provides No Support For NITL's Forced Switching Proposal.**

In its Opening Comments, NITL asserts that the "Canadian Experience" proves that "there will be no adverse operational or network effects" for U.S. railroads and their customers if NITL's forced switching proposal is adopted. Opening Comments of NITL at 59. Other proponents of forced switching likewise rely on Canada's "inter-switching" regulation to support the premise that NITL's Proposal could be implemented without inflicting harm on the U.S. rail network. *See, e.g.*, Opening Comments of Highroad Consulting at 17-20, V.S. Thurston; Opening Comments of ARC at 11; Opening Comments of Diversified CPC International, Inc. at 8-10; Opening Comments of Roanoke Cement Company at 9-10. NITL's reliance upon Canada's experience with mandatory inter-switching as a basis for imposing forced switching in the United States is misplaced, for several reasons.<sup>39</sup>

First, the size and scope of Canada's rail network—and, in particular, the number of locations at which inter-switching can take place—is minuscule in comparison to the number of interchanges that would be subject to NITL's Proposal. As NITL's own witness Maville testified, there are only 70 interchange locations, spread across seven large provinces, at which

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<sup>39</sup> For similar and related reasons, the Canadian interswitching fee system is neither a reasonable proxy for forced switching access prices in the United States, nor a meaningful foundation for estimating potential effects of the NITL Proposal. *See V.C, infra.*

Canadian-style inter-switching applies. Only two Canadian provinces (Ontario with 33 and Quebec with 10) have more than seven designated interchange points. Opening Comments of NITL, V.S. Maville at 23, Table 6. Thus, from an operational standpoint, the geographic reach of Canada's inter-switching regulation is quite limited.

Conversely, the number of interchange points at which shippers might demand forced switching under NITL's Proposal is far more extensive. For example, NS' Opening Comments showed there were 150 active interchange locations between CSXT and NS alone in 2011.

Opening Comments of Norfolk Southern Ry. Co., V.S. Ehlers at 10-11.<sup>40</sup> In other words, there are more than twice as many CSXT-NS interchanges alone as there are in all of Canada.

Moreover, the volume of rail traffic handled by U.S. railroads is far greater than the number of cars transported in Canada by CN and CP. *See, e.g.*, ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS at 69-81 (2011 ed.). NITL's Proposal, which would mandate forced switching for any traffic moving to or from a shipper facility within 30 miles of an active interchange location, sweeps more broadly than Canada's inter-switching regulation, which applies only to traffic originating or terminating within 30 kilometers (18.6 miles) from a designated interchange point. As these figures demonstrate, NITL's assertion that the Canadian inter-switching system "is far more extensive than what the League has proposed" (Opening Comments of NITL at 62) is ludicrous. Notwithstanding NITL's unsupported assertions to the contrary, implementation of forced switching in the United States would be vastly more complex from an operating standpoint than the inter-switching that takes place in Canada.

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<sup>40</sup> As NS witness Ehlers explained, NS and CSXT have consolidated traffic flows over 36 of those interchange points, which efficiently handle approximately 90% of all CSXT-NS interline traffic. *See id.* The NITL Proposal, however, would threaten to undo those efficient traffic flows and accompanying service improvements.

Second, as NITL witness Maville acknowledges, Canada's inter-switching regime has been in place for more than a century. Canadian rail regulators first adopted an inter-switching requirement in 1904, and mandated it for all railroads beginning in 1908. Opening Comments of NITL, V.S. Maville at 6-7. Indeed, the first inter-switching order was issued in response to a dispute regarding the construction of what was only the second set of interchange tracks connecting the Grand Trunk Railway and Canadian Pacific. *Id.* See also Opening Comments of Highroad Consulting, V.S. Thurston at 7.

As these facts demonstrate, today's Canadian rail network—including the locations at which traffic is interchanged between CN and CP—was designed and constructed with the regulated inter-switching rule in mind. Canada's railroads built their lines and facilities, and have developed their train service and yard operating plans, with full knowledge of the traffic patterns generated by the inter-switching requirement. In particular, Canada's rail network was constructed with the necessary capacity (including adequate track at each CN/CP interchange point) to handle the anticipated volume of inter-switched traffic. Likewise, decisions involving investment in new track, facilities, and equipment have been made on the basis of a regulatory regime that includes mandatory inter-switching. It should come as no surprise that, having more than 100 years of experience with inter-switching, and the opportunity to tailor their physical plant and operating practices to accommodate the inter-switching requirement, that Canada's railroads have experienced few major operational problems in implementing Canada's inter-switching rules.

The situation presented by NITL's Proposal is entirely different. The U.S. rail system is the product of the laws and regulations that have governed America's railroads over the past century. In particular, exercising the regulatory freedoms embodied in the Staggers Act over the

last 35 years, U.S. railroads have rationalized their physical plant and adopted more efficient operating practices, in order to reduce costs and to improve the quality and reliability of rail service. As CSXT’s Opening Comments explain, those efficiency-enhancing measures include consolidating traffic flows over a smaller number of high-volume routes and interchanges, and implementing train and yard service plans designed to minimize the number of times that cars must be handled enroute. Those strategies have been explicitly sanctioned by both Congress and this agency.<sup>41</sup> Indeed, more than 30 years ago, the ICC approved the U.S. railroads’ strategy of closing inefficient interchanges. *See Rulemaking Regarding Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982) (“*Traffic Protective Conditions*”). In deciding to remove the so-called “DT&I Conditions”—which included a requirement that merging carriers allow shippers “to route traffic over any and all existing routes and gateways”—the ICC endorsed the practice of increasing inefficiency by allowing U.S. railroads “to rationalize their systems.” *Traffic Protective Conditions* at 114. Thus, while Canadian railroads have operated for more than a century under a regulatory system that incorporates mandatory switching at all CN-CP interchange points, the policies governing U.S. railroads have promoted the elimination of inefficient interchanges to reduce costs and enhance service. Given that reality, NITL’s assertion that Canadian-style mandatory switching could be imposed in the United States without any significant operational impacts is unpersuasive.

Third, NITL’s suggestion that Canada’s policy decision to adopt mandatory inter-switching provides a justification for the Board to impose a forced switching requirement in the United States ignores the fact that Canada’s inter-switching rule is part of a regulatory regime

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<sup>41</sup> *See, e.g.*, 49 U.S.C. § 10101(3) (expressing policy “to promote a safe and efficient rail transportation system”); *id.* § 10101(4) (“to ensure the development and continuation of a sound rail transportation system”).

that is markedly different than that which exists in the United States. The rail regulatory system established by Congress in ICCTA prescribes rate litigation as the appropriate remedy for unreasonably high rates. Opening Comments of CSXT at 5-8. The Board’s regulations offer shippers multiple rate procedures, including full SAC cases, “Simplified” SAC and a streamlined “Three-Benchmark” methodology, by which they can pursue rate relief (depending on the magnitude of the rate dispute). Those procedures are well-established, and provide an effective regulatory remedy for shippers who believe that their rates are too high. The primary proponents of forced switching—including coal and chemical shippers—invoke the Board’s rate processes on a regular basis.

Canada’s approach to resolving rail rate disputes is fundamentally different. While the Canadian Transportation Agency (“CTA”) does have a process for pursuing a rate complaint against a Canadian carrier, the procedures and decisional standards employed by the CTA are significantly different than those that apply in the United States. *See* Opening Comments of Highroad Consulting, V.S. Thurston at 5. Unlike the STB, the CTA does not offer a variety of regulatory procedures (like the SAC, SSAC and 3-B methodologies) that allow a shipper to align the cost and complexity of the rate proceeding to the amount at issue. These differences in approach to rate regulation exist, in part, because Canadian shippers have access to mandatory inter-switching. Indeed, Highroad witness Thurston acknowledges that “[r]egulated interswitching has been the corner stone of the competitive access provisions contained in the *Canada Transportation Act*.” Opening Comments of Highroad Consulting, V.S. Thurston at 23.

NITL (and other proponents of forced switching) ignore these fundamental differences in the regulatory approaches adopted by Congress (in the United States) and Parliament (in Canada). The Canadian rate regulatory system is built on a different foundation than the

American system—Canada’s backbone is mandatory inter-switching, while U.S. regulators have opted for a case-by-case approach to resolving rate disputes. By seeking to impose a forced switching requirement in addition to the Board’s existing, robust rate regulation procedures, NITL attempts to engraft a single element of the Canadian Parliament’s regulatory model on the fundamentally different approach to resolving process rate disputes that Congress adopted in the United States. NITL offers no persuasive reason why the Board should do so.

#### **IV. THE NITL PROPOSAL WOULD INCREASE REGULATION AND DO NOTHING TO DECREASE IT.**

The Opening Comments also made clear that the NITL Proposal would result in a massive increase in Board regulation. CSXT’s Opening Comments explained that forced switching cases under the NITL Proposal would be contentious and fact-specific inquiries that would increase regulatory burdens on the Board and on litigants. *See* Opening Comments of CSXT at 48-57. Other opening comments confirm that CSXT was correct, and that forced switching cases under the NITL Proposal would involve multiple disputes that the Board would need to resolve in individual cases. Moreover, the opening comments made clear that advocates of forced switching have no intention of scaling back the Board’s existing rate reasonableness jurisdiction—rather, they unabashedly ask the Board to create an alternative regulatory shortcut for shippers who want to pay lower rates but do not want to bring a rate case (or do not think they can prevail in such a case). NITL’s request for a substantial expansion of Board regulation is at odds with Congress’s clear directions in the Staggers Act, ICCTA, and Ex Parte 705 comments<sup>42</sup> to reduce and streamline regulation, and the Board should reject it.

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<sup>42</sup> *See infra* at 77-78 (citing congressional letters submitted in Ex Parte 705 urging Board not to revise its current regulatory approach).

**A. The NITL Proposal Would Not Reduce Board Regulation.**

The Board’s Decision requesting further comments on the NITL Proposal identified the potential of reduced regulation—and particularly reduced rate litigation—as a possible benefit of more forced switching. *See* July 25 Decision at 6. The Board’s comments may have been inspired by shippers’ claims that reciprocal switching would be “deregulatory.”<sup>43</sup> But in their opening comments shippers have admitted that they want the Board to aggressively increase its regulation of the rail industry. *See, e.g.*, Opening Comments of ARC at 14 (“It is time for the Board to focus on regulatory remedies against abuses of market power.”); Opening Comments of NITL at 16 (forced switching proposal “is intended to operate as a supplement to, and not a replacement for, the existing remedies available to shippers”). In this vein, advocates of the NITL Proposal unanimously have urged the Board to ensure that the availability of forced switching would not have any impact on a shipper’s ability to challenge the reasonableness of its rates. *See, e.g.*, Opening Comments of NITL at 15-16; Opening Comments of NGFA at 17 (arguing that availability of competitive switching should have “no effect” on market dominance determination); Opening Comments of Olin at 7; Opening Comments of USDA at 7. In other words, NITL and its allies want the Board both to give them an additional regulatory remedy and to provide a guarantee that the availability of that remedy would not impact their ability to pursue rate relief through existing means.

The Board cannot give that guarantee, for the Interstate Commerce Act does not allow the Board to pre-ordain that lowering the standards for shippers to obtain forced access orders would not affect shippers’ ability to pursue rate relief. The statute requires the Board to determine whether effective transportation competition exists for a movement before it may

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<sup>43</sup> *See* Ex Parte 705 Hearing Transcript at 61 (June 22, 2011).

consider the reasonableness of any rate, and provides that the Board has no jurisdiction over movements for which there is effective competition. *See* 49 U.S.C. § 10707(a). Given that unwaivable jurisdictional prerequisite, the Board may not take dramatic regulatory action under the rationale of enhancing “competition” and then issue a blanket ruling that these newly available competitive remedies are not an effective competitive option for rate reasonableness purposes.

On the contrary, if the Board were to adopt NITL’s proposal to reduce a shipper’s burden of proof to obtain forced switching orders, the Board would have to take those lowered burdens into account in the market dominance determination. The Board has long recognized that shippers can be expected to take reasonable self-help efforts to avail themselves of competitive options. In *FMC Wyoming* the Board found that a railroad was not market dominant where a shipper could have spent millions of dollars to build infrastructure to support truck shipments.<sup>44</sup> Similarly, in *Seminole Electric v. CSXT* the Board gave serious consideration to whether a coal shipper’s potential to spend millions of dollars to construct barge facilities and purchase a barge option was sufficiently feasible to preclude a finding of market dominance.<sup>45</sup> And in other cases the Board has considered whether a shipper could “build out” to a second carrier to create intramodal competition.<sup>46</sup>

The same analysis would apply to a forced switching option under the NITL Proposal. For if a shipper’s ability to build out access to another railroad is relevant to whether a defendant

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<sup>44</sup> *See FMC Wyoming Corp. v. Union Pacific R.R. Co.*, 4 S.T.B. 699, 712-14 (2000) (noting that amortized cost of new infrastructure “would be roughly comparable” to \$1 million annual demurrage charge).

<sup>45</sup> *See Seminole Electric Cooperative v. CSX Transp., Inc.*, STB Docket No. 42110 (May 19, 2010) (ordering oral argument on whether shipper’s ability to construct barge facilities was sufficiently feasible to constitute effective competition).

<sup>46</sup> *See Texas Municipal Power Agency v. BNSF Ry. Co.*, 6 S.T.B. 573, 583-84 (2003).

railroad possesses market dominance, then a shipper's ability to obtain that same access to a second carrier through an STB order is similarly powerful evidence that would weigh against a finding of market dominance. The Board cannot promise that it would not consider that evidence in rate cases simply because NITL and its allies want to have a choice of whether to bring rate reasonableness cases or forced switching requests.

**B. The NITL Proposal Would Lead To A Substantial Increase In Complex Regulatory Litigation.**

CSXT's opening comments warned that adoption of the NITL Proposal would lead to complicated and time-consuming litigation over a variety of aspects of forced switching. The opening comments in this proceeding confirm the truth of CSXT's comments: the NITL forced switching regime would create a raft of complex and contentious regulatory litigation.

NITL's Proposal that the Board adopt "conclusive presumptions" that would automatically trigger a forced switching order does not alter this conclusion. In the first place, NITL's "conclusive presumptions" nearly all relate to eligibility for forced switching orders, and fail to address the many contentious issues that would arise concerning issues like pricing, agreement terms, and service impacts. Moreover, as discussed above, NITL's "conclusive presumptions" are all one-way propositions. While establishing a "conclusive presumption" would relieve shippers from their burden of proof, a shipper who fails to establish one of the conclusive presumptions is not precluded from raising other arguments. Shippers located more than 30 miles from an interchange are still free to argue that they are a "reasonable distance" from an interchange. Shippers who pay rates lower than 240% R/VC and who ship more than 25% of their product by truck can still argue that they are entitled to a forced switching orders. The one-way operation of NITL's conclusive presumptions guarantees that no fixed R/VC level or interchange distance could be used to fix the bounds of shippers eligible for forced switching.

If the Board adopts the NITL Proposal, everything relating to forced switching would be subject to litigation. Indeed, many of the opening comments seeking expansion of NITL’s “conclusive presumptions” suggest that even if the Board rejects those requests, shippers who do not qualify for a “conclusive presumption” would seek to obtain forced switching orders in individual adjudications.

CSXT’s Opening Comments identified five sets of distinct issues that would need to be resolved in forced switching cases: (1) which shippers would qualify for forced switching orders; (2) what are the conditions of forced switching agreements, including pricing, equipment, shipment priority, and liability allocation; (3) the appropriate duration of any forced switching order; (4) what labor protections are appropriate and who would pay for them; and (5) what environmental review would be necessary for a forced switching order. These complex and fact-intensive issues would require the Board to make many difficult judgments, and many of the issues would arise again and again in adjudications of forced switching requests. The regulatory regime that would be created by the NITL Proposal would not be easy to administer, would not be simple or quick, and certainly would not be “deregulatory.”

**1. There Would Be Significant Litigation Over The Application Of Eligibility Criteria To Determine Which Shippers Would Qualify For Forced Switching Orders.**

CSXT’s Opening Comments explained that there would be significant disputes about which shippers would qualify for forced switching orders, including, for example, about whether the 30-mile distance should be measured by rail miles or air miles and about the definitions of “terminal” and “regular switching.” *See* Opening Comments of CSXT at 49-51. With respect to measuring the mileage limit, NITL itself has been inconsistent. The NITL Proposal prescribed radial air miles as the distance limit for determining forced switch eligibility. But, its expert used rail track miles for his analysis. *Compare* NITL Petition at 68 *with* Opening Comments of NITL,

Roman V.S. at 16.<sup>47</sup> In many instances, the choice between air miles and rail miles would lead to dramatically different numbers of shippers are eligible for forced switching.<sup>48</sup>

But even if the rail miles versus air miles issue were resolved conclusively for all cases, several commenters argue that the Board should consider forced switching orders over distances of over 30 miles. *See, e.g.*, Opening Comments of NGFA at 24 (urging Board to not be limited by 30-mile proposal and instead make a “liberal, case-by-case determination of when a shipper facility is a ‘reasonable distance’ from a working interchange point”). As written, NITL’s Proposal already allows shippers to argue that movements outside the “conclusive presumption” zone of 30 miles are nonetheless a reasonable distance for forced switching. Once again, NITL’s one-way “conclusive presumption” leaves the door open for a shipper to litigate further, here over whether a longer distance is “reasonable.”<sup>49</sup>

An additional likely source for disputes and litigation would concern the 75% of traffic eligibility criterion. As proposed, the criterion is ambiguous and susceptible to manipulation. For example, the proposed regulation states that either a “shipper” or “group of shippers” could rely upon the 75% criterion. *See* Petition at 67 (proposed 49 C.F.R. § 1145(c)). But the proposed regulations do not explain whether for a “group of shippers,” the 75% would be applied

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<sup>47</sup> In context, Mr. Roman’s suggestion that he modeled track miles rather than air miles to be “more equitable to railroads” is disingenuous. *See* Opening Comments of NITL, V.S. Roman at 16. An analysis that intentionally understates the reach and effect of the actual NITL Proposal as written and the shippers eligible to obtain forced switching, submitted as a basis for evaluating the effects of the proposal, is not “more equitable” to railroads than an analysis of the actual terms and effects of the NITL Proposal as submitted.

<sup>48</sup> For examples of points where “a radius of 30 miles of an interchange” encompasses points far more than 30 track miles, see Opening Comments of CSXT at 50, Opening Comments of Norfolk Southern Ry. Co. at 51-52, and CSXT Reply Video Exhibit 1 at 2:40—4:35.

<sup>49</sup> To be clear, CSXT strongly disagrees that movements over such a distance could qualify as switching over a reasonable distance. The point is simply that the NITL Proposal leaves the door open for shippers to seek Board determinations of whether switching over a greater distance is reasonable.

to the aggregate of all traffic of the group at a facility, or to each shipper's traffic individually. Because in some circumstances the difference could be significant, there likely would be litigation over the application of the 75% trigger to "groups of shippers." Similarly, if a shipper(s) sought forced switching at multiple facilities, would the 75% trigger be applied on a facility-by-facility basis, or to all facilities for which switching is sought?<sup>50</sup> As further discussed below, the 75% of traffic for 12 months trigger would create substantial opportunity and incentive for manipulation. *See infra* at V.A. For example, shippers with competitive transportation options might award 75% proportion of their traffic to a rail carrier for a year solely in order to take advantage of the conclusive presumption and resulting eligibility for forced switching. This and other potential manipulation and gamesmanship are a potentially fertile source of litigation over eligibility for, and the propriety of, forced switching under the NITL Proposal.<sup>51</sup>

Other eligibility questions such as what constitutes a "terminal" and what is "regular" switching are left to case-by-case determination by the Board, as NITL admitted in its Petition. *See* NITL Petition at 57 ("The determination of when the carrier has in fact 'established' a 'terminal' is left undefined."); *id.* at 59 ("How 'regular' such switching must be would be left to the Board's determination."). Neither NITL nor any of its allies has proposed a way to simplify or streamline these case-by-case determinations, which therefore would have to be litigated in individual cases.

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<sup>50</sup> The NITL's proposed regulation also inserts the term ("or a controlled affiliate") following a description of the "shipper's facilities . . . for which switching is sought," creating confusion as to how and to whom that "controlled affiliate" modifier would apply. *See id.*

<sup>51</sup> As discussed, NITL and other supporters of its proposal have not even attempted to estimate the volume of traffic or revenues that would be eligible for forced switching under the proposed 75% trigger.

Finally, the fact that many shippers have clamored for the Board to lower the R/VC at which a “conclusive presumption” of no effective competition would arise strongly suggests that, even if the NITL Proposal were adopted without alteration, many shippers with rates below 240% R/VC might seek forced switching orders that would require case-by-case determinations of whether those shippers faced effective competition.

Simply put, shippers’ eligibility for forced switching orders would be a hotly contested and fact-specific issue in many forced switching cases, despite NITL’s proposed “conclusive presumptions.”

**2. There Would Be Significant Disputes Over The Pricing And Conditions Of Forced Switching Orders.**

CSXT’s Opening Comments explained that a Board decision on a forced switching order would not be the end of the regulatory process, but rather only the beginning. The compensation and the conditions of the agreement would be negotiated by the affected railroads in the first instance, and the Board would need to step in if the railroads could not come to an agreement. This process would not be simple and would require resolution of multiple case-specific issues by the affected railroads and potentially the Board. As CSXT’s Opening Comments detailed, the conditions that the Board might be asked to resolve span from pricing, to car compensation, to shipment priority, to liability. *See* Opening Comments of CSXT at 52-53.

**3. The Duration Of Forced Switching Orders Would Require Case-By-Case Resolution.**

CSXT’s Opening Comments also explained that the NITL Proposal fails to address how long a forced switching order would be in effect. *See* Opening Comments of CSXT at 53-54. It remains entirely unclear whether NITL-style forced switching orders would be permanent or would have a fixed duration, and it is not clear what standards the Board would apply to requests to reopen or reconsider forced switching orders.

**4. The Board May Be Required To Consider Labor And Environmental Impacts.**

CSXT's Opening Comments also noted that under Section 11102 the Board may be statutorily required to consider labor effects of a forced switching request, and explained some of the scenarios in which labor protections might apply. *See* Opening Comments of CSXT at 54-55; 49 U.S.C. § 11102(c)(2) (Board may require "reciprocal" switching agreements to include labor protection provisions). Determination of labor protection in forced switching cases could become quite complicated, in part because it may not be clear which party should be responsible for paying for such protection. *See id.* at 55. The interest of United Transportation Union—New York State Legislative Board ("UTU-NY") in this proceeding, and UTU-NY's call for "mandatory employment protection" in any forced switching case, confirms that labor protection would be a contested issue in many such cases. And as CSXT explained on Opening, NEPA likely requires the Board to consider the environmental impacts of forced switching orders. These statutory requirements to consider the labor and environmental impacts of a forced switching order cannot be ignored, and they would significantly complicate and elongate the regulatory process in any forced switching case.

**C. The Many Difficult And Complex Issues That Would Have To Be Litigated In Forced Switching Cases Would Tax The Resources Of All Parties, Including Shippers, Railroads, And The Board, At A Time Of Significant Budgetary Constraints.**

As explained previously, forced access cases under any rules adopted pursuant to the NITL Proposal would entail resolution of a host of difficult and complex issues, including *inter alia*, whether the complaining shipper's facilities qualify under the rules; whether there exist operational difficulties with a particular request, including undue interference with the defendant railroad's operations; whether additional tracks or other facilities would have to be constructed to provide the requested service, and if so who should pay and how much; what the appropriate

level of access charges should be for a particular forced switching request; whether there would be resulting impacts on rail labor and if so, who should pay and how much; and a number of other matters.

Resolution of these issues would require significant and time-consuming evidentiary proceedings addressing, among others, legal, operational, safety, economic, and labor matters. Such proceedings would inevitably include expert testimony from a variety of witnesses with expertise in numerous specialties. As the Board and parties to railroad rate and practices cases know, evidence on these types of issues is often complex, extensive, and costly. In short, the Board ought not to take lightly the burdens and complexities of forced access cases, recognizing as it has in other contexts the likelihood that both railroad and shipper parties may have “to respond to hundreds of discovery requests” and that the Board’s consideration of the evidence on such varied issues would “tax[ ] its resources as well, requiring complex, in-depth analyses of [transportation and] non-transportation issues.” *Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Stations*, Decision at 2 (served March 19, 2013). Certainly the suggestion in the Board’s July 25, 2012 Order in this proceeding that adoption of the NITL Proposal “could permit the agency to rely on competitive market forces to discipline railroad pricing from origin to destination, and regulate only the access price for the first (or last) 30 miles” (July 25 Decision at 2) would appear to be overly simplistic at a minimum, and completely illusory at worst.

**V. NITL’S ANALYSIS OF ELIGIBILITY FOR, AND THE REVENUE IMPACT OF, ITS PROPOSAL FAILS TO ANALYZE THE ACTUAL NITL PROPOSAL, WHICH IS FAR BROADER THAN ASSUMED BY ITS WITNESS.**

NITL submitted comments and witness statements that purported to fully analyze and respond to each of the questions posed by the Board concerning the NITL Proposal. *See, e.g.,*

Opening Comments of NITL at 2-4. However, review of NITL's submission reveals that it neither evaluated its actual proposal nor even attempted to conduct a complete analysis. As a result, NITL's comments are nearly worthless for purposes of estimating the full effects and impact of its actual proposal. Below, CSXT highlights some of the major deficiencies of the NITL studies and comments.<sup>52</sup>

**A. NITL's Economic Analysis Fails To Estimate Either The Number Of Shippers Eligible Under The NITL Proposal Or Its Potential Effect On Revenues Or Contribution Generated By Such Traffic.**

Flaws in the assumptions and analysis of NITL's expert witness render meaningless NITL's estimates of the eligible traffic and economic effects of its forced switching proposal. Several erroneous assumptions and major omissions by NITL's expert witness Roman make his analysis both inaccurate and unreliable as a measure of the potential traffic and revenue effects of the NITL Proposal. *First*, Mr. Roman uses rail miles rather than radial air miles to measure the distance between a solely served customer location and a "working interchange," for purposes of identifying traffic that would be deemed to be within a reasonable distance of a working interchange. The conclusive presumption of the NITL Proposal, however, would apply to all traffic within a 30-mile radius (i.e. air miles) of a working interchange. Because rail mile distances are frequently longer (and never shorter) than radial miles, Roman's use of rail miles systematically understated the number of shippers and carload volumes that would satisfy the "reasonable distance from a working interchange" criterion of the NITL Proposal.

*Second*, the Roman analysis makes no attempt whatsoever to estimate the traffic and revenue that would be swept into the forced switching proposal because a shipper moved 75% of

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<sup>52</sup> These comments do not attempt to address all of the flaws and errors in studies submitted by NITL and others in support of the NITL Proposal. The reply comments submitted by the Association of American Railroads describe additional flaws and erroneous assumptions, analyses, and conclusions of such studies, and CSXT joins and endorses the AAR comments.

its traffic on one carrier during the preceding 12 months. Thus, the analysis conducted on behalf of NITL understates eligible traffic by excluding traffic that would qualify for forced switching under one of two conclusive presumptions of market dominance. *Third*, Roman’s analysis defined “working interchanges” as solely those AAR Rule 260 junctions at which the Waybill Sample indicates cars were switched. This restrictive definition excludes shippers that would be eligible for forced switching because they are located within the boundaries of a terminal area, as well as interchanges at which cars are switched that were not included in the Waybill Sample reviewed by the NITL witness. The effect of each of the foregoing erroneous assumptions and omissions is to understate the number of shippers and hence carload volumes that would be eligible for forced switching under the NITL Proposal. Together, these significant methodological flaws and omissions unquestionably cause a substantial understatement of the number of shippers and volume of traffic that the NITL Proposal would make eligible for forced switching.

**1. Use Of Rail Miles Rather Than Radial Miles Proposed By NITL.**

The analysis conducted on behalf of NITL understated the number of shippers who would be eligible under the NITL Proposal because it used rail miles rather than radial miles to determine the number of shippers within 30 miles of a working interchange. *See* V.S. Roman at 15-16. While this would be a more fair and reasonable way to determine whether a shipper is within 30 miles of a working interchange, it is *not* what the NITL proposed. Rather, the NITL Proposal specifies that a shipper or receiver would be conclusively presumed to be within a reasonable distance of a working interchange if its facility is “within a *radius* of 30 miles of [such] an interchange.” NITL Petition for Rulemaking at 8, 36 and App. B at 67-68 (language of new regulations under NITL Proposal). By definition, “radius” is a straight line from the center of a circle (here the working interchange) to its outer circumference or edge. Because of

topography, bodies of water, and other physical limits and requirements, rail miles between two points are nearly always longer than radial miles, and 30 rail miles almost invariably covers less straight line distance than radial (or “air”) miles.

While using actual rail miles to determine a reasonable rail distance is both more logical and more fair than using rail miles, it is not what the NITL has proposed. As CSX showed in its opening comments, use of radial miles could result in forced switching eligibility for rail shippers who are hundreds of miles apart by rail track-miles.<sup>53</sup> Intended or not, the NITL Proposal could have the effect of forcing rail carriers to carry traffic hundreds of miles for their competitors. Because the Roman analysis used rail track miles rather than the radial miles posited in the NITL Proposal, his analysis significantly understates the number of shippers and carload volumes that would be eligible for forced switching under the NITL Proposal. This disconnect between the actual NITL Proposal and the Roman analysis alone results in a substantial understatement of the volume of traffic and amount of rail carrier revenue that could be subject to forced switching under the NITL Proposal.

**2. NITL Makes No Attempt To Quantify Or Otherwise Analyze Traffic That Would Be Eligible For Forced Switching Under The 75% Presumption.**

The NITL submission entirely ignores one of two proposed conditions triggering a conclusive presumption of lack of transportation competition, that over the preceding 12 months one rail carrier has moved 75% or more of the traffic for which the shipper seeks forced switching. *Compare* NITL Petition at 67 (text of regulations proposed under new 49 C.F.R. § 1145, including proposed 75% market dominance presumption) *with* Opening Comments of NITL at 41, V.S. Roman at 14-24 (determining carloads potentially subject to forced switching

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<sup>53</sup> See Opening Comments of CSXT at 50.

using only the  $R/VC > 240$  presumption). NITL's analysis instead focused exclusively on estimating the shippers and traffic who would be eligible for forced switching under the  $R/VC > 240$  conclusive presumption, thereby ignoring both the 75% presumption and proof of lack of effective competition using other evidence in their estimate of the amount of traffic that would be eligible under the NITL Proposal.<sup>54</sup> Thus, even if NITL's estimate of the volume of traffic eligible under the  $R/VC > 240$  rule were reasonably accurate, its failure to account for the effect of the other two methods of demonstrating eligibility for forced switching would mean the NITL's analysis significantly understates potentially affected rail traffic volumes. This failure alone renders the NITL's estimate of potentially affected traffic volumes and revenues invalid and unusable for purposes of accurate evaluation of the proposal.

Moreover, the 75% of traffic presumption is not an appropriate basis for evaluating whether there is effective transportation competition, let alone to impose forced switching. The fact that a rail carrier transported 75% of a shipper's traffic to or from a particular facility over a one-year period does not prove a lack of effective competition for that transportation. In the first instance, shippers with competitive transportation options can and do award 75% or even all of their traffic to or from a facility to the winning bidder for a year or more, to take advantage of a volume discount or for operational or administrative efficiency. This does not indicate a lack of transportation competition but rather that the shipper has determined shipment of most of its traffic on a single carrier during a particular period best serves the shipper's interests. Second, creation of a conclusive presumption arising from shipment of 75% of a shipper's traffic via one

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<sup>54</sup> In addition to the two conclusive presumptions, the NITL Proposal would also allow shippers to demonstrate a lack of effective transportation competition through other evidence. *See* NITL Petition at 35. Thus the NITL submission did not even attempt to analyze or estimate the volume of traffic or revenue potentially subject to its proposal under two of three methods shippers could use to demonstrate eligibility for forced switching under its proposal.

carrier would create a regulatory incentive for a shipper to manufacture such “market dominance” artificially in order to obtain forced switching. A shipper that has competitive transportation options could nonetheless obtain forced switching simply by shipping 75% of its traffic on a single rail carrier during a 12-month period. Thus, the proposed 75% of traffic volume trigger would not prove lack of effective competition, but rather would encourage gamesmanship by shippers seeking to drive down their transportation rates through forced switching.

**3. NITL’s Restrictive Identification Of “Working Interchanges” Understates The Number Of Shippers And Carloads That Could Be Eligible For Forced Switching Under Its Proposal.**

The NITL analysis substantially understates the number of shippers and volume of traffic that could be eligible for forced switching by including less than ten percent of junctions at which carriers switch or interchange cars. *See* Opening Comments of NITL, V.S. Roman 16-17. By NITL’s count, there are 4,225 “260 Junctions” at which rail carriers “have agreed to switch cars.” *id.* at 16. For purposes of determining the number of cars that would be eligible for forced switching because they are within 30 miles of a “working interchange,” however, NITL used only 407 (9.6 %) of the 4,225 junctions where switching may be performed. *See id.* at 17. NITL’s witness included in his analysis only those junctions at which the 2010 Carload Waybill Sample indicated carriers had switched cars. *Id.* This approach understates the interchanges covered by the NITL Proposal for at least two reasons.

*First*, by its terms the NITL Proposal would apply to all shipper facilities within a reasonable distance of a location where “there is or *can be* a working interchange.” NITL Petition at 67 (text of proposed new 49 C.F.R. § 1145(c)) (emphasis added). The proposal does not define “working interchange,” but any Rule 260 junction (where carriers “have agreed to switch cars”) necessarily would qualify as a location where there “can be” a working

interchange.<sup>55</sup> Once again, NITL’s witness has failed to evaluate the actual NITL Proposal and instead substituted a narrower rule that substantially understates the volume of rail traffic potentially subject to forced switching under the actual NITL Proposal.<sup>56</sup>

*Second*, the fact that the Carload Waybill Sample (“Waybill Sample” or “CWS”) for a single year did not show that cars were switched at a junction does not mean cars have not been switched previously or will not be switched in the future at that location. A single year Waybill Sample is a snapshot of one point in time that does not account for the dynamics of freight movements, shifts in traffic patterns, and changes in carrier interchange arrangements over time. Further, because the Carload Waybill Sample is indeed a sample, it will inevitably fail to capture cars that were switched at some junctions, particularly for relatively low volume interchanges.

Reliance on a single year’s CWS thus likely understates the number of interchanges that would be eligible to serve as a locus for the “within 30 miles of a working interchange” conclusive presumption.

**4. NITL Does Not Estimate How Many Shippers Would Be Eligible For Forced Switching Because They Are Within The Boundaries Of A Terminal.**

The analysis conducted by NITL does not estimate the number of shippers or volume of traffic that would be eligible for forced switching because a shipper or receiver facility is “within the geographic boundaries of a[n existing or future] terminal.” *Compare* Petition at 67-68

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<sup>55</sup> Indeed, under NITL’s definition of Rule 260 junctions as locations “where carriers have agreed to switch cars,” all such junctions could be characterized as “working interchanges,” because they are junctions that carriers have designated as available for switching, regardless of whether, how often, or how many cars were switched or interchanged there during a given time period.

<sup>56</sup> The additional requirement that cars be “regularly switched” between carriers at an interchange applies only to the conclusive presumption of a working interchange within a reasonable distance of a shipper facility. *See* Petition at 68, proposed new regulation 49 C.F.R. § 1145(c)(iii).

(proposing conclusive presumption that there is a “working interchange” within a reasonable distance of a facility located within the boundaries of a terminal, rendering the facility eligible for forced switching) *with* Opening Comments of NITL at 35-44 (considering only the “within 30 miles of an interchange” criterion in estimating the potentially affected shippers and traffic). To be sure, there likely would be overlap between facilities that would qualify because they are within 30 miles of an interchange and those that would qualify as within the geographic boundaries of a terminal. However, NITL’s failure to estimate the number of facilities and traffic volumes that would qualify based exclusively on the “within the boundaries of a terminal” criterion is an implicit assumption that the separate and independent terminal criterion would not make any additional facilities eligible for forced switching beyond those qualified under the 30-mile radius of an interchange criterion. Particularly given the lack of a definition of a “terminal” in the NITL Proposal (discussed below), it is quite unlikely that traffic rendered eligible for forced switching under the terminal boundaries criteria would be limited to a subset of the traffic eligible under the 30-mile radius criterion. Once again, the approach used by NITL’s witness very likely understates the volume of traffic potentially subject to its forced switching proposal.

Moreover, had NITL’s witness attempted to estimate the volume of traffic swept into the NITL Proposal by the “within the boundaries of a terminal” criteria, he would have had to define what NITL means by “terminal,” and identify terminal locations. The NITL Proposal does not define the term “terminal,” a term that has no universal definition in the rail industry. Indeed, agency precedent holds that the questions of whether a particular area is a terminal and the definition of boundaries of any such terminal are fact-and-circumstance-specific determinations requiring individual evaluation of a number of factors in each instance. *See, e.g., Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171, 179, *aff’d sub nom. Midtec Paper Corp v.*

*United States*, 857 F.2d 1487 (D.C. Cir. 1988). Thus, in order to apply “within the geographic boundaries of a terminal” criteria, the Board would be required to conduct a fact-intensive examination of each purported terminal to determine both whether it would qualify as a terminal and the geographic boundaries of such a terminal. Particularly given the lack of a definition or criteria for determining whether an area qualifies as a terminal, proceedings to identify and define the boundaries of terminals alone could consume substantial resources of the Board, carriers, and shippers.

Because NITL has neither defined “terminal” under its proposal nor identified locations it believes would qualify as terminals, it cannot estimate the facilities or traffic that would fall within its terminal criteria. Thus, out of three bases for a conclusive presumption that a “working interchange” between rail carriers exists “within a reasonable distance of” a shipper’s facility, NITL and its witness only even *attempt* to evaluate one. *See* Petition at 67 (proposed 49 C.F.R. § 1145(c)). Any analysis that disregards the effect of two of three conclusive presumptions is incomplete on its face and forms an inadequate and unreliable basis to estimate the impact of proposed regulations triggered by those presumptions.

In sum, the NITL study is woefully incomplete and inadequate to provide a reasonable estimate of the facilities and traffic that could be eligible for forced switching under the NITL Proposal. NITL’s witness used rail miles rather than the radial miles specified by the NITL Proposal to identify eligible facilities. NITL failed entirely to estimate the traffic that would be subject to its proposal by virtue of being located within the boundaries of a “terminal.” It also failed to estimate or take into account the volume of traffic rendered eligible under its 75% of traffic conclusive presumption. Finally, NITL made no attempt to estimate how much additional traffic or revenue would be eligible for forced switching under its proposal without relying on

the 75% or R/VC > 240% presumptions. *See* Petition at 67 (proposed regulation 49 C.F.R. §1145(b) (allowing forced switching orders even when neither criterion for presumption is satisfied)). Thus, contrary to NITL’s suggestion, it did not study the traffic volume and revenues potentially affected by its proposal. Rather, it conducted a study of some of the potential effects of a substantially diluted proposal with significantly fewer conclusive presumptions. The result is a substantially incomplete study that significantly underestimates the likely effects of the actual NITL Proposal in terms of facilities, volume of traffic, lost owning carrier revenues, and negative effects on rail operations and service.

For the foregoing reasons alone the NITL study, and the narrower and less complete studies offered by other proponents of the NITL Proposal, fail to address essential questions posed by the Board and cannot form the basis of a meaningful evaluation of the NITL Proposal and its effects. Based on the record in this inquiry, the Board can only conclude that proponents of the proposal have failed to address (let alone resolve) foundational issues and practical questions that are essential to reasoned review and analysis of the rulemaking proposal.<sup>57</sup> Proponents’ failure to address the Board’s fundamental threshold questions about the NITL Proposal is a failure to meet their burden to demonstrate that a rulemaking is appropriate. Accordingly, rather than consuming further resources considering this ill-advised and indefinite proposal, the Board should terminate this inquiry without further action.

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<sup>57</sup> *See Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities*, STB Docket No. EP 717, slip op. at 7 (served Mar. 19, 2013) (declining to proceed because petitioner failed to present a “practical framework” or resolve “practical difficulties”).

**B. Shippers Provide No Support For The Claim That Forced Switching Would Result In Rail Traffic Volume Increases.**

The American Chemistry Council and other shippers speculate that forced switching may result in shipment of greater volumes by rail and thereby offset reductions in rail revenues caused by lower rates. *See, e.g.*, Opening Comments of ACC at 5. This entirely speculative assertion suffers from at least two fundamental flaws. First, it is unsupported by evidence or analysis. ACC provides no evidence to support the notion that reduced rail rates would result in increased shipment volumes.<sup>58</sup> ACC provides no basis for its speculation that forced switching would result in increased rail traffic volumes beyond the conclusory assertion that if rail rates declined chemical industry output might increase.<sup>59</sup> *See id.* Merely positing a direct causal relationship without any evidence or support proves nothing. Moreover, as ACC concedes, it made no attempt to quantify *either* projected “traffic increases or the resulting [rail] revenue offset.” *Id.* Thus, ACC failed to provide any support for the assumption that rail traffic would increase where forced switching was imposed, while at the same time failing to analyze or estimate the magnitude of any such notional volume increase.

Second, even assuming for the sake of discussion that rail shipment volumes might increase in some circumstances in which rail rates declined significantly as a result of forced

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<sup>58</sup> Indeed, to the extent the prediction of increased rail traffic volumes is based on the assumption that shippers would switch from other modes of transportation to rail, it flouts the primary rationale for forced switching—that the shipper(s) in question lack effective competitive transportation alternatives and as a result pay higher rail rates than they would in a transportation market providing such alternatives.

<sup>59</sup> This notion also misapprehends basic economic principles. To the extent that a rail carrier could lower its price and increase traffic volume by an amount sufficient to add earnings to its bottom line, it would have done so already. It is reasonable to assume that a rail carrier has established its rates at profit maximizing levels, and that any reduction below that level would reduce its earnings even if volume rose. Accordingly, it is manifestly incorrect to assume that a forced rate reduction would be accompanied by an increase in volume that would fully offset earnings that would otherwise be lost as a result of the rate reduction.

switching, there is no evidence to suggest that increased volumes would be sufficient to overcome the revenue losses caused by reduced revenue per car. Again, ACC concedes that increased volumes likely would not generate additional revenues sufficient fully to offset revenue losses resulting from depressed rates. *See* Opening Comments of ACC at 5 (asserting that railroads’ “revenue loss would be at least *somewhat offset* by traffic increases”) (emphasis added). Thus, shipper speculation that traffic volume increases would generate increased traffic volumes or net increases in rail revenue are both dubious and utterly unsupported. They merit no consideration in the Board’s assessment of the NITL Proposal.

**C. NITL’s Assumed Access Prices Are Unsound, And This Fundamental Flaw Further Undermines Its Estimate Of The Effects Of The NITL Proposal On Rail Rates And Service And The Rail Network.**

Independent of other flaws in its analysis, NITL’s assumed access prices render its analysis useless for purposes of evaluating the potential effects of its proposal. The access price assumption that NITL posits as a foundation of its estimate of the financial effect of its proposal on rail shippers and carriers is simplistic and inaccurate, unsupported, and inconsistent with governing law and regulations. Access prices are perhaps the single most important determinant of the financial effects of forced switching regulations on carriers and shippers. Accordingly, NITL’s invalid access price assumptions fatally undermine its assessment of potential effects of its proposal.

**1. Canadian Interswitching Rates Are Not Reasonable Or Accurate Proxy For A Compensatory Access Price.**

Without meaningful explanation or justification, NITL uses a simplified version of “the switching fees established under the Canadian interswitching system as its ‘assumed access pricing methodology.’” Opening Comments of NITL at 30. This simplistic approach fails to apprehend or address the numerous material differences between the Canadian and U.S. rail

transportation systems, including their history and development; governing legal and regulatory systems and requirements; railroad economics; rail network structure and geography; and numerous other differences that make Canadian access fees inapposite to the NITL forced switching proposal for U.S. rail carriers. *See* III.D, *supra*. As summarized below, as a matter of law, policy, and practicality, Canadian access fees could not be engrafted onto the separate and distinct U.S. rail network and regulatory system in the manner posited by NITL.

The access prices developed by Escalation Consultants for several commenters, including NITL and the U.S. Department of Agriculture (“USDA”), rely on the assumption that a single static pair of access prices would apply to all eligible switching under the NITL Proposal. *See, e.g.*, Opening Comments of NITL at 34-35 (positing uniform access price of \$300/car for 1-59 car movements, and \$88/car for movements of 60 or more cars). This rigid one-size-fits-all access price approach suffers from a number of flaws that render it unsuitable and unreliable for purposes of projecting effects of the NITL Proposal. First, unlike the Canadian Transport Act, the Interstate Commerce Act does not authorize the STB to impose any specific access fee on the affected carriers. Instead, ICCTA provides that, in instances in which the Board finds mandated switching is appropriate under statutory standards, it may direct carriers to enter switching agreements. *See* 49 U.S.C. § 11102(c). Critically, the statute further requires that, once the Board directs carriers to enter into such a switching agreement, the *rail carriers* themselves—not the Board—are to negotiate and establish the terms and conditions of such an agreement, including access price. *See id.* (providing, in relevant part, “[t]he rail carriers entering into such a [forced switching] agreement shall establish the conditions and compensation applicable to such an agreement”).

Thus the statute presumes that *carriers* will *negotiate* access prices and other conditions of switching agreements. Like other arms-length transactions between rational economic actors, the access prices established by carriers would reflect market forces and conditions, and the applicable forces and conditions would vary substantially between different junctions, locations, and types of traffic. The fundamental premise of a single set access price assumption, however, is that the regulator would set uniform access prices for all forced switching. Because the statute provides that private carrier negotiations, not regulatory fiat, are the presumptive method for setting access prices, comments and analyses assuming of any single access price (or set of access prices) proceed from a fundamentally flawed and legally untenable premise. This foundational flaw renders all of the analyses that flow from it—including estimates of financial effects of the NITL Proposal on shippers and the rail industry—at least equally flawed and uninformative.

Second, even in those instances in which carriers are unable to agree on terms and conditions of a forced switching arrangement, the Board would nonetheless be required to investigate and determine reasonable and adequately compensatory situation-specific access prices, as well as other terms and conditions to govern the mandated switching. As a backstop to carrier-negotiated switching agreements, the statute provides that if affected carriers are not able to reach agreement, the Board may establish reasonable terms and conditions to govern forced switching in a particular location or circumstances. *See* 49 U.S.C. § 11102(c). Importantly, the statute does *not* authorize the Board to impose a single inflexible access fee to any and all forced switching it may order. Instead, the Board must determine a reasonable fee adequate to compensate the burdened carrier fully for its involuntary loss of the exclusive use of its property, facilities, and equipment. *See, e.g., Southern Pac. Transp. Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir.

1984) (per curiam) (upholding ICC order forcing terminal use, where agency provided for determination of adequate compensation to the terminal owner using condemnation proceeding principles); 49 U.S.C. § 11102.

The myriad variables affecting either negotiated access fees or appropriately calculated reasonable and compensatory fees imposed by the Board preclude a one-size-fits-all access fee, however derived. Railroad negotiations over access prices for voluntary switching arrangements are based upon numerous variables and situation-specific factors. Such factors include, for example, the location of the interchange; volume of eligible traffic in the affected areas; shipper demand characteristics and other market factors in the area served by the new switch; effects on capacity and congestion; operational feasibility; maintenance and capital investment needs; whether and to what extent reciprocity is available; and allocation of risks, particularly risks for hazardous and TIH shipments.<sup>60</sup> To use a hypothetical example, the access fee that might be appropriate to compensate a carrier for (i) a simple switch of grain cars on a low-density line in a rural area serving relatively few shippers; would be much different than the fee necessary to adequately compensate a carrier for forced switching of (ii) a block of cars carrying a TIH commodity in an operationally complex high density urban area with constrained capacity, significant congestion, and large numbers of shippers with relatively inelastic demand for rail transportation services. Imposition of the same access fee for such disparate situations would be illogical, uneconomic, and unfair.

Third, the Canadian access pricing regime is a pure cost-based model under which the regulator conducts extensive cost surveys and analysis, develops interswitching cost estimates,

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<sup>60</sup> This list is only illustrative and far from exhaustive. The many fact-, location-, and circumstance-specific factors that may affect reasonable and compensatory access fees and other terms and conditions governing a switching agreement are too numerous and varied to attempt to catalog thoroughly here.

and then establishes a small set of uniform cost-based access fees. Under United States law and rail transportation policy, in contrast rail rates are market-based, not cost-based. U.S. rail rates are established by rail carriers without regulatory intervention and based on market factors and conditions that properly incorporate various non-cost factors, including demand characteristics. *See, e.g.*, 49 U.S.C. § 10101(1), (2).<sup>61</sup> A purely cost-based fee—like that used in the Canadian regulatory system—is inconsistent with the U.S. system. Therefore, cost-based fees imposed by foreign regulators under a substantially different regulatory regime on a different railroad network with far fewer interchange points provide no reliable proxy or estimate of reasonable access prices for forced switching in the U.S. rail system.

## **2. NITL’s Application Of The Canadian Cost-Based Fee Approach Is Flawed And Internally Inconsistent.**

Even if it were appropriate or feasible to engraft the Canadian interswitching fee system onto the U.S. rail regulatory system—and it assuredly is not—NITL’s implementation of that approach would be deficient and unsupported. NITL did not even apply the actual Canadian interswitching fee system, but rather a “simplified” version of that system. Thus, instead of seeking to adapt a foreign fee system to the requirements of the substantially larger, different, and more complex U.S. rail system, NITL “simplified” the system used in Canada, thereby making it more facile and less applicable to the real world railroad system, operations, and economics in the United States. Some of the resulting inaccuracies and distortions are summarized below.

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<sup>61</sup> Even where the Board considers a challenge to the reasonableness of a carrier-established rate for transportation over which the carrier has market dominance, the Board’s determination of maximum reasonable rates under CMP is based upon the price that would be charged in a competitive market, not simply the costs of providing the service.

First, rather than apply the Canadian approach of dividing the fee structure into multiple zones based on distance from the interchange point, NITL applied a single fee to all switching without regard to distance. Without meaningful explanation or support, NITL's witness states that "it was decided that . . . it was desirable to simplify the analysis to apply a single average fee for each 'cut' of cars" Opening Comments of NITL, V.S. Roman at 12.<sup>62</sup> Thus, for a 61% longer switching distance than that applied by the Canadian system, the NITL analysis applies a single fee rather than the distance-based four-zone system used in Canada.<sup>63</sup>

Second, despite advocating the use of a cost-based system to calculate forced switching fees, NITL conducted no switching cost analysis whatsoever. After describing the extensive cost analysis conducted by Canadian regulators for each zone at each eligible interchange in order to derive applicable interswitching fees, NITL's witness simply posits a single rate to apply to all forced switching of 59 cars or less, throughout the U.S. rail system. NITL's witness made no attempt whatsoever to take account of the actual switching costs that carriers in the U.S. might incur. Instead, he merely averaged the charges per zone under the Canadian system (making a mileage-based adjustment for distances greater than 30 kilometers) to manufacture a single Canadian-rail-cost-based hypothetical access fee to apply to forced switching by carriers operating on the U.S. rail network under the U.S. regulatory regime.

Even assuming that a cost-based approach was appropriate to calculate access fees for rail carriers operating in the United States, that approach could not be based on costs calculated under a foreign rail cost accounting system that is substantially different from that used by the

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<sup>62</sup> The explanation offered for this further simplification was the witness's casual observation that carriers' published switching fees in tariffs "do not appear to be driven by distance . . ." Opening Comments of NITL, V.S. Roman at 12.

<sup>63</sup> The NITL Proposal would apply a 30-mile radius (48.27 km) from a junction as the boundary for areas eligible for forced switching. The Canadian interswitching regime uses a 30 kilometer radius.  $((48.27 - 30)/30 = 61\%)$ .

Board. Moreover, NITL's approach is internally inconsistent. After asserting that the use of mileage zones are not necessary because U.S. carrier switching fees do not appear to be based on distance, NITL calculates its proxy access fee by averaging Canadian fees for different distances (including an adjustment to account for longer distances under the NITL Proposal than those subject to interswitching in Canada). It appears that NITL cannot decide whether its position is that: (i) distance matters; or that (ii) distance does not matter in determining reasonable forced switching fees.

Third, the \$300 interswitching rate that NITL derives from Canadian rates and uses as a one-size-fits-all proxy for fees under the NITL Proposal is, based on its own estimates, at least 33% *lower* than the *average* switching fee charged by carriers in the Eastern United States. *See* Opening Comments of NITL at 23-24 (noting that voluntary reciprocal switching charges are as high as \$1000 or more, that most charges in the East are "in the \$400 to \$500 range," and that the average charge in the East is approximately \$400 per car); *id.* at 34-35 (using fees of \$300 per car, and \$89 per car for blocks of 60 cars or more, as the assumed access fees under the NITL Proposal).<sup>64</sup> Thus, according to NITL's own evidence and assumptions, its assumed access price understates the average existing voluntary switching fees in the East by at least 33%.

Moreover, the existing access fees surveyed by NITL's witness involve reciprocal switching agreements entered voluntarily by carriers that determine the subject switching is to their mutual advantage and operationally workable. In the case of forced switching like that proposed by NITL, in most instances at least one of the affected carriers would not regard the

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<sup>64</sup> NITL does not state whether it determined a separate range of switching fees published by rail carriers in the U.S. for blocks of 60 cars or more, or if its \$400 per car average switching fee included all switching regardless of the size of the cut of cars switched. If it is the latter, then NITL's assumed access fee for larger blocks of cars (60 cars or more) understates average access fees published for the Eastern U.S. by nearly 78%.

arrangement as serving its best interests or those of its customers. Accordingly, the access prices that carriers would negotiate for involuntary forced switching would likely be substantially higher than the current range of access prices for voluntary switching. Thus, even under NITL's own flawed Canadian-style cost-based access fee approach, it substantially understates an assumed access fee, both by failing to account for higher negotiated fees that would result from forced rather than voluntary switching, and by selecting a fee level that is substantially lower than the current average switching fee charged by Eastern carriers (as determined by NITL's own witness) for voluntary, mutually beneficial inter-carrier switching.

In sum, the assumed access fees posited by NITL and others<sup>65</sup> are inconsistent with U.S. law and regulations, seek to impose a foreign regulator's cost-based fees on the market-based American rail rate structure, and fail to apply even the inapplicable Canadian system to the materially different facts and circumstances of U.S. carriers and their networks. Cumulatively, these fundamental flaws render the access price assumptions advocated by NITL invalid and meaningless as a basis to assess the potential effects of access fees under the NITL Proposal. Because access price is an essential factor in estimating the effects of any forced switching proposal, NITL's flawed access price assumption alone dooms its entire analysis by rendering it unreliable and without value for purposes of assessing the impact of the NITL Proposal.

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<sup>65</sup> USDA used the same witness and what appears to be essentially the same analysis to propose Canadian-fee-based one-size-fits-all access fees of \$279/car for single cars and blocks up to 59 cars, and \$84/car for blocks of 60 cars or more. *See* Opening Comments of USDA at 20. USDA's analyses of potential effects of the NITL Proposal, however, used different access price assumptions. *See id.* Moreover, as discussed elsewhere, USDA expressed a number of other concerns and reservations about the NITL Proposal and suggested that the Board should substantially lower eligibility triggers (*e.g.* by reducing the R/VC threshold and/or increasing the distance between a shipper location to a junction that would trigger eligibility for forced switching). Thus, while the assumed access price proposed by USDA is similar to that posited by NITL, USDA's other proposals would result in greater numbers of shippers eligible for forced switching, which would exacerbate all of the operational, service quality, and financial problems and detriments that would be generated by the NITL Proposal.

Overall, the NITL analysis fails to evaluate the actual NITL Proposal, but instead provides an incomplete analysis of an approach that is not what NITL proposed and necessarily substantially misstates the revenue and financial effect of the actual NITL Proposal. It appears that the net effect of the flawed NITL analysis would be to understate the potential revenue and financial effects of its proposal. Even that tentative assessment is subject to doubt, however, because of the lack of lawful, realistic, and properly applicable foundational assumptions, including assumed access prices. Thus, while the myriad negative operational and service effects that would arise from the NITL Proposal are clear, any assessment of its effect on carrier revenues or carrier or shipper finances is entirely speculative and unsupported.

**VI. THE BOARD DOES NOT HAVE THE LEGAL AUTHORITY TO ENACT A FORCED SWITCHING REGIME, AND EVEN IF IT, DID IT WOULD BE IMPRUDENT TO TAKE DRAMATIC ACTION WITHOUT DIRECTION FROM CONGRESS.**

**A. As Opening Comments Demonstrated, The NITL Proposal Is Precluded By Law And Contrary To Well-Established Policies And Regulations.**

CSXT and other parties to this proceeding explained in their opening comments several reasons why the NITL approach conflicts with the statute and with longstanding sound regulatory policies. *See, e.g.*, Opening Comments of CSXT Opening at 4-21; Opening Comments of BNSF at 3; Opening Comments of Norfolk Southern at 21-32.<sup>66</sup> CSXT will not reiterate all of those arguments here, but only offer a brief summary of some of the significant arguments. *First*, NITL’s proposed “new regulatory regime” is inconsistent with the regulatory regime and policies established by Congress in the Staggers Act and ICCTA. *Second*, the premise of NITL’s Proposal—that forced switching would necessarily promote competition and

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<sup>66</sup> CSXT hereby incorporates to these comments its opening comments in this proceeding as well as relevant legal arguments and comments it submitted in its Opening, Reply, and Supplemental Comments in STB Ex Parte 705. *See* Opening Comments of CSXT at 4, n.4.

benefit shippers—is belied by the agency’s experience with automatic requirements for open interchanges in the absence of evidence of anti-competitive behavior. *See generally Rulemaking Regarding Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982) (concluding, *inter alia*, that merger conditions requiring a carrier to maintain all pre-existing routings and gateways were actually anti-competitive and ultimately hurt shippers). *Third*, Congress ratified the current interpretation and application of 49 U.S.C. § 11102 when it refused requests that it overrule *Midtec* at the time it enacted ICCTA. Absent a change in the statute, this legislative ratification doctrine prevents the Board from adopting the new, contrary regulatory regime embodied in the NITL Proposal.<sup>67</sup> Thus, as a matter of law, the Board may not adopt the NITL Proposal.

**B. Even If The NITL Proposal Were Lawful, Good Public Policy, Prudence, And Deference To Congressional Prerogatives Support Denial Of NITL’s Proposal To Adopt Canadian-Style Policies And Regulations Unless And Until Congress Directs The Board To Change Course.**

As CSXT has demonstrated, the NITL forced switching proposal is foreclosed by law and contrary to U.S. rail transportation policy and regulations. However, even assuming for the sake of discussion that the Board had legal authority to depart from current law and adopt new forced switching policies and regulations, repeated congressional refusal to adopt such changes in regulation and other public policy considerations would militate against adopting the NITL Proposal or any other new forced access proposal. Over the past 25 years, Congress has rejected at least 18 different bills that would repeal *Midtec* and change other established access and routing policies. As CSXT and other commenters demonstrated in Ex Parte 705, this uniform and repeated congressional rejection of specific proposals to overturn the agency’s competitive access rules and regulations implementing Section 11102 and its predecessor is compelling

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<sup>67</sup> *See* Opening Comments of CSXT at 11-21.

evidence that Congress approves of the agency's current construction and application of the statute.

It is Congress' responsibility and prerogative to set the general parameters and direction of rail transportation policy in the United States, and it is the Board's responsibility to implement policy. With respect to the general policies governing competitive access, Congress has been remarkably consistent in demonstrating its satisfaction with current policies and standards over the 26-plus years since *Midtec*. During that period, the party controlling the U.S. Senate has changed *six* times, and the party controlling the House has changed three times. Since Congress ratified the agency's application of Section 11102 in enacting ICCTA, the majority party in the Senate has changed three times and majority control of the House has changed twice. One constant through those 26 years is that Congress has consistently rejected bills seeking to overturn the current interpretation and application of competitive access provisions now codified in Section 11102. During that time, Congress has considered 18 bills providing for changes in the standards and regulations adopted and applied in *Intramodal Rail Competition* and *Midtec*, and *none* of those bills has passed either House of Congress. It is difficult to envision a clearer, more consistent indication of congressional support for existing rail access policy and regulations.

More recently, many U.S. Senators and Representatives participated in STB Ex Parte 705, *Competition in the Railroad Industry*, to urge the Board to maintain its current policies.<sup>68</sup> The Chairmen and ranking minority members of the House Transportation Committee submitted a joint letter urging the Board to maintain the current regulatory balance

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<sup>68</sup> NITL cites comments from two members of Congress at the Ex Parte 705 hearing, but ignores the fact that the vast majority of legislators who participated in the proceeding urged the Board not to alter its current policies.

established by the Staggers Act and voicing the Committee's opposition to any changes that would restrict rail carriers ability "to invest, grow their networks and meet the nation's freight transportation needs." *See* Letter from U.S. House Committee on Transportation and Infrastructure Chairman Mica, Subcommittee on Railroads Chairman Bill Shuster, and ranking minority members Nick Rahall and Corrine Brown to STB Chairman Daniel Elliott III, filed in STB Ex Parte Nos. 704, 705 (Jan. 24, 2011). Even more recently Congress cut available agency resources through sequestration, and further cuts are possible. Implementation of the NITL Proposal, including numerous proceedings to determine whether and to what extent forced switching might be ordered and to determine the appropriate access price where carriers are unable to agree, would consume substantial agency time and resources. Particularly in the current federal budget environment, there is no indication that Congress wants the agency to embark on a new re-regulatory initiative, or to adopt a new forced switching regime that would further strain the agency's resources. No matter how much certain shippers might wish otherwise, Congress simply does not support efforts to remake the rail regulatory landscape or a rail transportation system that works well to serve the public interest and advance the overall best interests of shippers, commerce, and the nation.

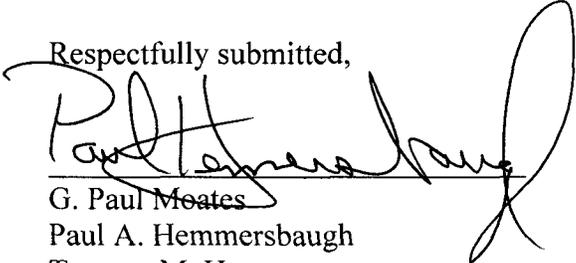
NITL and advocates of its proposal are attempting to circumvent the legislative process by persuading the Board to change policies and regulations that Congress approved and has refused to change despite myriad opportunities. If these parties believe their forced switching proposal or the Canadian rail regulatory regime is superior to the system established by Congress in the Staggers Act, ICCTA and other rail legislation, they may attempt to persuade Congress to change the law. As the eighteen unsuccessful bills attest, shipper interests have repeatedly petitioned Congress for such changes in the past. However, there is no basis in law, regulatory

history, or current rail policy for the Board to undertake such a dramatic revision to rail regulatory policies unless and until Congress enacts legislation directing it to do so.

## VII. CONCLUSION

For the reasons detailed above and in CSXT's Opening Comments, the NITL Proposal should be rejected and the STB should maintain its current competitive access rules.

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Dated: May 30, 2013

**VERIFIED STATEMENT OF  
CINDY M. SANBORN**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Ex Parte No. 711**

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**PETITION FOR RULEMAKING TO ADOPT REVISED  
COMPETITIVE SWITCHING RULES**

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**VERIFIED STATEMENT OF CINDY M. SANBORN**

1. My name is Cindy M. Sanborn, and I am Vice President and Chief Transportation Officer of CSX Transportation, Inc. (“CSXT”), a position I have held since December 31, 2009. I am responsible for safety across the CSXT system and for coordinating operations and service across the CSXT rail network. Among my previous positions with CSXT, I have served as Vice President of the Northern Region and as Assistant Vice President of Network Operations. I am very familiar with our railroad system and the many challenges inherent in maintaining and coordinating our varied and complex operations day to day, week to week, and month to month.
2. I hold a Bachelor’s Degree in Computer Science from Emory University and a Master’s in Business Administration from the University of Miami.
3. The purpose of this brief statement is to sponsor CSXT Reply Exhibit 1, a video exhibit addressing some of the damaging consequences that the NITL proposal under consideration in this proceeding would impose on the CSXT rail system and its customers. In particular, the video exhibit explains some of the significant problems and inefficiencies that would result from adoption of a mandated switching requirement, impacts that would clearly not be in the public interest.

4. Our purpose is to make clear to the Board that the adverse impacts of the NITL proposal would not be minor or limited. We are very concerned about the adverse effects that such a mandated switching regime would have on our carefully crafted operating plan; including such elements as train schedules, blocking plans, dispatch protocols, and a host of other factors that affect the smooth and efficient running of our rail system. At the end of the day, this proposal bears all the indicia of a change in the status quo that would benefit a select few at the expense of the many.

**VERIFICATION**

I, Cindy M. Sanborn, do certify and attest that I have read the foregoing “Verified Statement of Cindy M. Sanborn” and have reviewed CSXT Reply Exhibit 1, that I know the contents thereof, and that the information contained therein is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to file this Statement.

  
\_\_\_\_\_  
Cindy M. Sanborn

Executed on this 22<sup>nd</sup> day of May, 2013

**STB EX PARTE NO. 711**

**CSXT REPLY EXHIBIT 1 - VIDEO**

**VERIFIED STATEMENT  
OF  
MICHAEL J. WARD  
TO  
OPENING COMMENTS OF  
CSX TRANSPORTATION, INC.**

**EX PARTE NO. 711 (SUB-NO. 1)  
*RECIPROCAL SWITCHING***

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**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**EX PARTE NO. 711 (SUB-NO. 1)**

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**RECIPROCAL SWITCHING**

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**VERIFIED STATEMENT OF MICHAEL J. WARD**

**ON BEHALF OF**

**CSX TRANSPORTATION, INC.**

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My name is Michael J. Ward, and I am Chairman and Chief Executive Officer of CSX Corporation, the parent company of CSX Transportation, Inc. (“CSXT”). I have worked for CSXT or a predecessor railroad for almost forty years. Prior to becoming Chairman and CEO of CSX Corp., I held numerous roles with the company including Executive Vice President of the Coal Service Group and Executive Vice President of Coal and Merger Planning, a position created to help integrate Conrail into CSXT’s system following the Conrail transaction. I am therefore intimately familiar with the significant investments made both to acquire Conrail properties and to integrate those properties into the modern CSXT. I also served as Chief Financial Officer for four years.

The proposal put forth by the Board in this Ex Parte 711 (Sub-No. 1) proceeding is promoted as “competitive access,” as if it were unquestionably a public good. But it needs to be understood for what it is: It would compel, using force of

law, one for-profit business that owns and maintains its property for commercial purposes, to make that property available to its competitor. Moreover, it would compel the owner to physically perform services for that competitor using that property. This burden would be imposed upon the owner, but not as a sanction for some wrongful act or other failure, such as anticompetitive behavior or service performance.

I have no doubt that CSXT's chemical customers would object if the government proposed to compel one to produce products for another. Nor would our automotive customers welcome a government mandate that one make its manufacturing facilities available to a competitor. In each case, the government would be expropriating a part of the value of that privately-owned property. And, in each case, the now-regulated company would alter its capital investment decisions for the future to take account of such a new regulatory backdrop. Railroads are no different.

This verified statement addresses several issues related to the Board's involuntary switching proposal. Specifically, I explain CSXT's approach to capital investment, including how capital investments benefit the entire rail network and its customers. I further discuss the layers of risk CSXT and other railroads must consider when making investments, which include market-based risks and regulatory risk. I also discuss how the Board's proposal to make it easier for shippers to obtain mandated reciprocal switching (the "involuntary switching proposal") creates a new regulatory risk that could significantly hamper CSXT's

ability to make needed capital investments going forward and strand investments that were made in reliance on the regulatory landscape that's been in place for thirty-five years. The incentive for future capital investment is reduced when a railroad faces the threat of sharing its privately-owned and maintained assets with its competitor. Finally, I describe some of the potential effects of the proposed rules on customer service, a core value of CSX.

**I. CSXT Invests Heavily in Its Network to Provide Optimal Levels of Service for All Shippers.**

CSXT devotes tremendous resources to maintaining and improving its network. Over the past ten years, CSXT has spent approximately \$21 billion on capital investment. Figure 1 shows CSXT's capital investment by year since 2007, and shows a marked increase in our spending from \$1.8 billion in 2007 to \$2.6 billion in 2015. In 2016, we have projected that capital spending will reach \$2.7 billion.

**Figure 1**



These top line figures include spending on many significant infrastructure

investment projects that have improved our ability to serve our customers, and enhanced the overall capacity and efficiency of the rail network.

Attachment 1 displays graphically many highlights of the CSX \$2.7 Billion capital plan for 2016. Some of these are exciting growth-oriented projects, such as new intermodal facilities and clearances. Others are the more mundane (but equally important) upkeep on the fixed plant such as 1.9 million tons of ballast deployed, 2.8 million crossties replaced, and 5,200 miles of track resurfaced.

In 2016, CSXT will rebuild 103 locomotives. We will also complete delivery of the last 100 units of a multi-year order for 300 new GE locomotives. Over 700 railcars will be purchased or leased.

Approximately 200 major bridge repairs will be performed in 2016, including replacing steel components on a 2,515 foot double track bridge in Washington; rehabilitating a 6,000 foot double track cast-in-place bridge in Philadelphia; and replacing steel components on a 3,880 foot double track deck girder viaduct in Cincinnati.

A great deal of CSX's expenditures on Information Technology must be capitalized as well. One of the most fascinating is the Intermodal X-Gate that automates the processing of containers upon entry to and exit from intermodal facilities. This greatly reduces driver wait times at the gate and reduces human error in record keeping and other functions. Enhancements to our ShipCSX customer interface tool and the tools used by our customer service representatives add to the transparency and user-friendliness of our customers' experiences.

And, of course, CSXT continues its efforts to develop and implement a positive train control system as required by Federal mandate, spending approximately \$300 million in 2016.

CSXT also recently opened, in 2015, our new Casky Yard in southwestern Kentucky. It is the first rail yard built by CSXT from scratch in approximately 40 years. Casky Yard is a staging yard for inspections and fueling. It serves coal traffic moving from the Illinois Basin to utilities in the southeast, provides maintenance for trains moving grain, and conducts refueling for intermodal trains in the region. These functions allow trains to move more quickly through the area and increase network fluidity. CSXT invested almost \$100 million in the new yard.

The National Gateway is a multi-state, over \$850 million public-private infrastructure investment.<sup>1</sup> This project will improve rail connectivity and capacity on westbound traffic between east coast ports and the Midwest, while improving eastbound traffic from west coast ports through Chicago. Central to the public benefits of the project is the fact that it will permit the diversion of tremendous volumes of truck traffic from interstate highways through cities in the CSX service network. This initiative is an outstanding example of how private capital and public funding can combine in a public-private partnership to provide public benefits and private commercial gains. The public benefits when trucks are diverted from the nation's crowded highways, and CSXT benefits from the enhanced

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<sup>1</sup> The public dollars committed were primarily used to raise the clearances under bridges and tunnels to facilitate double-stack railcars, which allow a single train to carry twice the load. This doubles the number of trucks that can be diverted from the nation's crowded highways, and greatly improves rail network fluidity.

growth opportunities that the company is aggressively pursuing as it seeks to replace so much lost coal revenue.

Integral to the success of the National Gateway is the Northwest Ohio Intermodal Terminal to which CSXT invested over \$160 million to construct. It is a state of the art facility located on 500 acres that employs 350 people. The terminal can handle 30 intermodal trains daily and two million containers a year. The terminal draws intermodal traffic from all over CSXT's network, classifies it, and then efficiently ships it out across the United States improving shipping times and velocity. The terminal is technologically advanced and uses 10-story high electric rail mounted cranes weighing more than one million pounds and able to lift more than 40 tons of cargo to efficiently reposition containers across eight processing tracks.

We also have other major infrastructure improvements in progress. For example, CSXT's new Carolina Connector Intermodal Terminal in Rocky Mount, North Carolina is currently under construction. This project is being constructed as a public-private partnership, which will include a \$150 million CSXT contribution to the total project cost of over \$270 million. Like the Northwest Ohio Intermodal Terminal described above, the Carolina Connector Intermodal Terminal will use high-tech cranes to transfer intermodal shipments between trains and trucks efficiently, and expedite the flow of intermodal traffic from the eastern seaboard to points west.

Another infrastructure enhancement that we have under construction is the

Pittsburgh Intermodal Rail Terminal, scheduled to open in mid-2017. Funded by over \$50 million in investment from CSXT, the Pittsburgh Intermodal Rail Terminal will connect shippers in western Pennsylvania to CSXT's intermodal freight rail network and increase long haul shipments. As with the Northwest Ohio Intermodal Terminal, the Pittsburgh investment is part of the National Gateway. The terminal is being developed on a 70-acre site which formerly housed a Pittsburgh & Lake Erie Railroad yard and will directly employ 30 to 40 people.

The Virginia Avenue Tunnel in Washington, DC, is an ongoing infrastructure investment that will exceed \$250 million to which CSXT is contributing over \$230 million. The Virginia Avenue Tunnel project replaces the 110-year old current single-track, single-stack tunnel with a modern double-track, double-stack, two-tunnel structure. The new tunnel is also part of the National Gateway project and will improve traffic flow from Mid-Atlantic ports to the west and significantly reduce network congestion.

These projects and others recognize that one of the best ways to improve service to our customers is to promote efficient long-haul service. We have learned that investments that allow us to reduce car and container handlings and to increase the velocity of long-haul shipments pay dividends in reducing network congestion and helping us meet our customers' needs. To this end, CSXT is working to develop the "Network of Tomorrow" by investing in key corridors designed to support longer and higher speed trains. This core network is essentially a triangle formed by three high-density, high-velocity corridors: Chicago to New York; New

York to Jacksonville (*i.e.*, Waycross, GA); and Jacksonville to Chicago. CSXT is revising its service plan design and focusing its investments so that these three primary corridors can handle more high speed traffic. We are also investing in longer sidings on the primary corridors to allow longer trains to operate efficiently and without interference. We believe that these network enhancements will further improve customer service across our entire rail network.

## **II. A Stable Regulatory Regime Is Critical To Making Capital Investments.**

Capital investments, like those I have discussed above, are essential to meet current and expected future customer traffic demands. CSXT carefully selects its investments to maximize the impact for our operations and our customers.

When CSXT makes these investment decisions, it must account for several types of risk. First, CSXT faces the inherent market risk faced by every business. Any business making a capital investment is necessarily making a prediction about what it will need in the future, and there is always a risk of unpredicted changes. The rail industry is no different. A prime example of this risk is the recent, dramatic change in the coal market. Since 2011, CSXT has seen a nearly *\$2 billion* decrease in annual coal revenue. Our coal business generated \$3.7 billion in 2011, and we estimate 2016 coal revenue to be \$1.7-1.8 billion. Coal previously represented one-third of our overall revenue, and now it's down to roughly fifteen percent. The decrease in coal volumes have been caused by multiple factors, including the shutdown of many coal-fired power plants, the decline in natural gas prices, and reduced coal export demand due to the strong U.S. dollar and continued

global oversupply. This decline in the coal market has left many stranded assets in which CSXT invested, but which can no longer be fully utilized as our customers ship far less coal than was expected just a few years ago. CSXT itself has had to reduce operations at facilities designed to serve coal customers in response to the decline in coal market demand. But, of course, much of our capital is invested in track, signals, bridges, and other structures that cannot be redeployed and therefore are left stranded in place. Another example of the kind of market risks that railroads face is crude oil shipments. Industry-wide crude oil shipments have decreased significantly. According to AAR reports, the number of railcars carrying petroleum products plummeted by over one-third between the summer of 2014 and the summer of 2016.<sup>2</sup>

Second, as a rail carrier, CSXT has always faced regulatory risks under the prevailing regulatory framework. Unlike most non-rail businesses, CSXT is a common carrier that must respond to reasonable requests for service. CSXT cannot refuse to handle traffic that is inconvenient, and it cannot easily leave or reduce its presence in a market that has become unprofitable.

Another regulatory risk we have always faced is the pricing constraint of rate regulation. The Board's rate reasonableness rules have long formed a backdrop to our investment decisions about pricing traffic—a risk element that unregulated

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<sup>2</sup> See AAR U.S. Rail Traffic, Week 30, 2015 – Ended August 1, 2015 *available at* <https://www.aar.org/newsandevents/Press-Releases/Pages/2015-08-05-railtraffic.aspx>; AAR U.S. Rail Traffic, Week 30, 2016 – Ended July 30, 2016 *available at* <https://www.aar.org/newsandevents/Press-Releases/Pages/2016-08-03-railtraffic.aspx>.

businesses do not face.

These and other regulatory constraints have long been a constant background risk that CSXT has had to consider when making investments. Yet, the regulatory regime created by Congress in the Staggers Act and the ICC Termination Act has remained sufficiently balanced and predictable. It has allowed us to make necessary and worthwhile investments. Because the regulatory regime Congress created explicitly encourages differential pricing, and because the STB's rate standards are transparent and understood, we have been more confident that we can price traffic in a way that allows an opportunity in the marketplace for us to recoup our investments. So long as we price in a way that is consistent with market demands and the Board's rate reasonableness rules, we have a fair opportunity to pay for capital investments and to justify those investments to our shareholders. For the past 35 years, the railroad industry has acted—and invested—in reliance on that regulatory regime.

Now, however, the Board is proposing to add a third, wholly new, and deeply troubling layer of risk that totally disregards the industry's decades of reliance on the regulatory system. CSXT's approach to capital investment already accounts for market volatility and the known regulatory risks discussed above, but the Board's new involuntary switching proposal imposes an unprecedented level of regulatory volatility. Involuntary reciprocal switching allows a competing railroad to avail itself (at no risk) of investments made by CSXT in good faith in reliance on a long-established regulatory regime. This would undermine years of CSXT's efforts to

prioritize its investments. It creates a brand new risk under which significant amounts of CSXT traffic could be lost to a competitor at any time.

Regulatory certainty is also an important aspect of CSXT's ability to attract capital. The railroad makes capital investments only when there is an opportunity for the company to earn market-based returns on that investment. But that capital must be raised in the form of new capital (debt or equity) or reinvested earnings that belong to shareholders and are only reinvested with their support. In making these investment decisions, CSXT and its shareholders and investors have long relied upon a stable regulatory regime, which includes the ability to differentially price. The proposed changes in the regulatory regime that have prevailed since the enactment of the Staggers Act would inject uncertainty into the market. Indeed, even the threat of this type of significant regulatory change could stifle investment.

CSXT and the industry have relied upon the Board's current access rules for 35 years. We have acted in reliance on the fact that we can recover our investment by differentially pricing to customers with different demand elasticities, so long as the rates are reasonable under the Board's standards. As I noted earlier, I was intimately involved in the implementation of the Conrail transaction. In 1998, the Board approved the purchase of Conrail by CSXT and NS. Far different than the involuntary switching proposal now before us, the Conrail transaction included three voluntarily agreed upon shared asset areas—jointly purchased and operated by a jointly owned entity providing services exclusively to its owners. Not only did we pay for the actual acquisition, we also incurred large additional costs in the

complicated task of integrating Conrail’s network into our own, which required major investments in extra equipment, training, and personnel. As the Board explained when approving the transaction, “the scope and complexity of the operational aspects of this transaction are unprecedented.”<sup>3</sup>

We made our investment in Conrail because it made good business sense. But there was no guarantee it would be a success. There were risks that a recession might strike, leaving a huge debt with insufficient additional earnings to service it. There was the risk that CSXT might not be successful in winning enough of the former Conrail business to support the cost of acquisition. There was risk that the anticipated synergies of consolidating the acquired portions of Conrail operations into CSXT might not be achieved. And there was the risk that some former Conrail customers might invoke the STB’s longstanding rate regulatory proceedings. But all of these risks were estimable and could be weighed against the anticipated benefits of the transaction. What was not then estimable, or reasonably anticipated, was a sea change in the regulatory background that would make huge numbers of customers located on Conrail’s lines open to forced switching at the behest of regulators in Washington. Had we had reason to expect such a major reshaping of the regulatory background for our decision-making, I can assure the Board that it would have had profound effects on the calculus and could well have led to a different decision about the attractiveness of the transaction.

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<sup>3</sup> *CSX Corp. et al—Control and Operating Leases/Agreements—Conrail, Inc. and Consolidated Rail Corp.* 3 S.T.B. 196, 366 (1998).

### **III. The Board's Involuntary Switching Proposal Threatens CSXT's Ongoing Investments.**

Involuntary switching as proposed by the Board would create uncertainties about current and future traffic that would decrease CSXT's incentive to invest in the rail network. Traffic could appear or disappear on short notice, making it increasingly risky to make capital investments.<sup>4</sup> In making a decision about whether or how much to invest in a branch line used to reach a customer, CSXT will always ask: How much revenue will the customer likely generate? If the answer is: Possibly none, because the customer may invoke STB forced switching, then the risk of investing in the branch line rises markedly.

Similarly, in making a decision about whether to invest in freight cars of a type needed by a customer, CSXT will always ask: How much revenue will CSXT gain from acquiring the cars? If the answer is: Possibly none, because the customer or customers who would use the cars may invoke forced switching, then the risk of investing rises markedly.

It may be that some customers will prefer to subsidize a branch line operation or indeed make the required capital investments directly in the line themselves. However, I have seldom seen businesses choose to make capital investments in other businesses' property. Certainly, some very large customers

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<sup>4</sup> Throughout the statement, I speak primarily about capital investment. But, it is important to keep in mind that much of what I say about capital expense also holds true for maintenance expense. I can assure the Board that CSXT will always maintain lines—even lines on which it has no revenue traffic due to involuntary switching—to comply with FRA standards. But FRA permits carriers to operate track at different classes, and the cost of maintaining to some FRA classes is different than others.

might opt for the Board's proposal, even at the cost of having to acquire their own freight cars. Most smaller customers, though, will not have the capital available to make the investments for which they now may be responsible as a consequence of the new regulatory risk profile the Board's proposal would create.

The Board's proposal could also result in stranded assets that are no longer needed—and could become worthless—because the asset supported a customer who has diverted traffic through involuntary switching to a competitor. It would also create situations where the railroad responsible for the maintenance and upkeep of infrastructure may no longer be the party benefiting from it, as involuntary switching would require railroads to share their privately-owned and maintained assets with their competitors. That disconnect between ownership and benefit will harm any incentive for future capital investments. Moreover, even if this proposed new regulatory system were in place and all the questions about access pricing were answered, that would not remove substantial uncertainty and risk because it is unknown how often or rapidly customers may choose to exercise their involuntary switching “rights.”

CSXT does not shy away from competition, and we accept significant and unavoidable market risk across our business. We vigorously compete with other railroads for business and with other modes, including trucks, vessels, and barges. We also face the reality that our customers may make changes to their business model or shift suppliers or ultimate customers that can alter their rail needs at any

time.<sup>5</sup> But the involuntary switching proposal attempts to add *artificial* competition to the market through regulation in a manner that will undermine the functioning of the rail network. The involuntary switching being proposed would make it difficult for railroads to know where they should invest in their networks and will make it challenging to justify such investments to shareholders who justifiably expect a market return on their investment. Changing the competitive access standards to impose broad-based involuntary switching will undermine investors' willingness to support necessary capital expenditures. The increased regulatory uncertainty created by involuntary switching, particularly the requirement that railroads must share their privately-owned and maintained assets with their competitors, would reduce incentives for future capital investments.

#### **IV. Involuntary Switching Would Make It More Difficult For CSXT To Provide Quality Customer Service.**

“It starts with the customer” is a CSX core value. Indeed, Service Excellence is a core theme of our company's vision of the CSX of Tomorrow. By working to understand our customers' needs and to provide services that meet and even exceed their expectations, we ensure that our customers want to choose us.

Customer service means far, far more than average transit time. It means, for example, how many times a week a customer is served. It means having the right number of empty freight cars of the right type available when the customer

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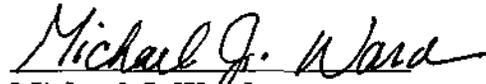
<sup>5</sup> While this product or geographic competition is no longer considered by the Board in rate case market dominance determinations, it has always been a feature of the real-world marketplace and a factor in railroads' real-world decision-making. There can be no better example in today's marketplace of product competition than the displacement of coal by natural gas.

says it needs them. It means operating trains in a predictable way so as to provide more predictable shipment arrivals. It means well-maintained signals that don't fail and cause delays to deliveries. It means having locomotive power and crews where and when they are needed. All of these things depend on predictability of demand and predictability of revenue. The Board's proposal would destabilize investment, impair network operations and ultimately undermine CSXT's efforts to serve all its customers.

**VERIFICATION**

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 25<sup>th</sup> day of October, 2016.

  
Michael J. Ward

**Attachment 1**  
**to**  
**Verified Statement of Michael J. Ward**

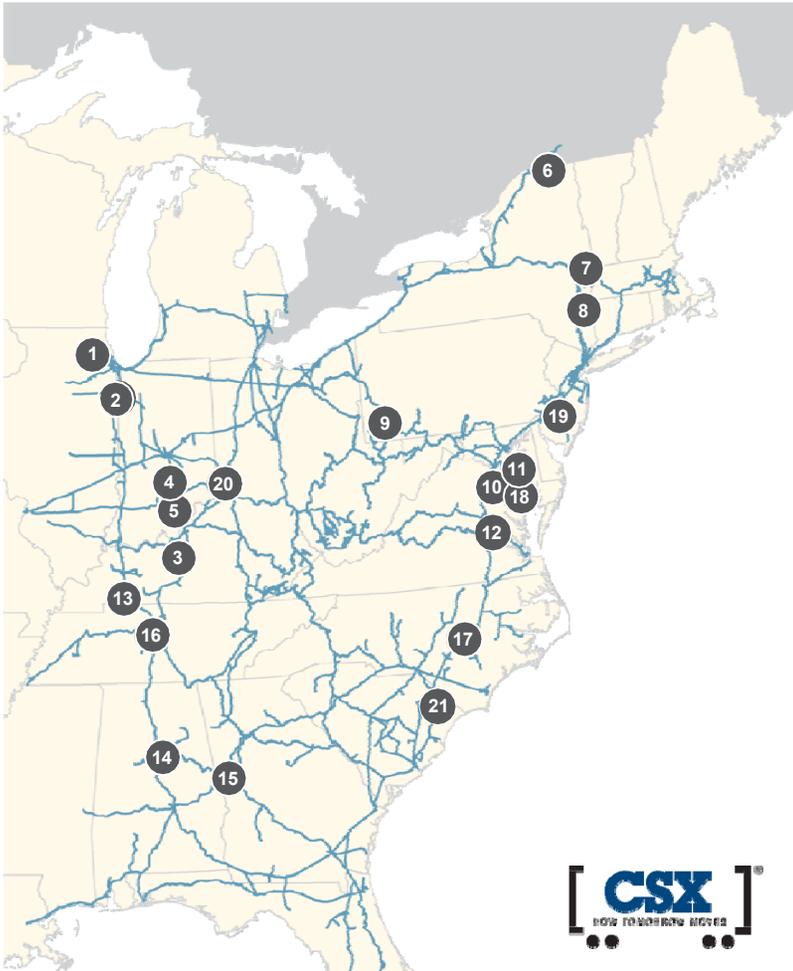
**Opening Comments of**  
**CSX Transportation, Inc.**

**Ex Parte No. 711 (Sub-No. 1)**  
***Reciprocal Switching***

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# CSX'S \$2.7 BILLION CAPITAL PLAN

CSX is investing in resources, infrastructure, and terminal and line-of-road capacity projects to improve CSX's network, help streamline interchange, improve throughput capabilities, increase velocity, and facilitate service and growth.



## NORTHERN REGION

- CREATE** – Continuing the multi-year, public-private partnership to reduce train delay and improve fluidity through Chicago
- Villa Grove Signals** – Upgrading signals south of Chicago to reduce train delay
- Main Line Capacity** – Lengthening sidings and yard tracks between Nashville and Cincinnati to eliminate train length restrictions and bolster corridor fluidity
- LIRC** – Upgrading track along this short line railroad to improve network capacity and connectivity in the Midwest
- Central Avenue Interlocking** – Reconfiguring the connection from the Louisville Terminal to the LIRC to enable improved traffic flow
- Montreal Subdivision** – Completing a new siding to increase capacity into CSX's Valleyfield intermodal terminal opened in 2014
- Selkirk Yard** – Completing a bypass track to enable through trains to pass through the yard more efficiently
- River Line Capacity** – Multi-year capacity program between Albany and Northern New Jersey to add new main line double-track
- Pittsburgh Terminal** – Continuing work on a new facility that will open up a new intermodal market for CSX customers with initial annual capacity of 50,000 loads
- National Gateway** – Finishing clearances to allow double-stack intermodal trains between Chambersburg and Portsmouth
- Virginia Avenue Tunnel** – Continuing construction on CSX's largest double-stack, double-track clearance project near Washington, D.C.

## SOUTHERN REGION

- Richmond ACCA Yard Bypass** – Beginning a series of projects to improve throughput on the I-95 corridor
- Casky Yard** – Upgrading CSX's newest rail yard designed to efficiently service unit trains that support Midwest grain and Illinois Basin coal shipments
- Pelham Connection** – Beginning work on a connection between two CSX main lines south of Birmingham, AL, effectively creating 8 miles of double track
- Manchester, GA** – Upgrading the switches and signals at the intersection of three main line routes
- Nashville, TN** – Increasing speed limit from 10 to 25 MPH through one of CSX's busiest terminals
- Central Carolina Connector (CCX)** – Property purchase and design work for a new intermodal hub

## BRIDGES

- Washington, D.C.** – Replacing steel components on a 2,515 foot double track bridge
- Philadelphia, PA** – Rehabilitating a 6,000 foot double track, cast in place concrete bridge
- Cincinnati, OH** – Replacing steel components on a 3,880 foot, double track, deck girder viaduct
- Poston, SC** – Rebuilding a 3,000 foot, single track, timber bridge with concrete and steel

## TECHNOLOGY

- Intermodal X-Gate** – Reducing wait times at intermodal terminal gates by automating inbound and outbound inspections
- ShipCSX Unit Train Enhancements** – Improving user functionality for unit train customers
- Proactive Customer Service** – Enabling our Customer Service Managers to identify and resolve high priority issues more quickly
- New Mobile Rail Tool** – Improving train crews' ability to report work events more timely and accurately

## CSX'S 2016 CAPITAL PROGRAM BY THE NUMBERS

**1.9 Million**  
TONS OF BALLAST DEPLOYED

**2.8 Million**  
CROSSTIES REPLACED

**10** CUSTOMER-DRIVEN  
DEVELOPMENT PROJECTS

**103 Locomotives**  
REBUILT

**\$114 Million**  
IN TECHNOLOGY ENHANCEMENTS

**100 New Locomotives**  
DELIVERED

**200 Bridge**  
REPAIRS

**425 New Miles**  
DOUBLE-STACK CLEARANCES

**457 Miles**  
OF TRACK REPLACED

**\$300M**  
POSITIVE TRAIN CONTROL

**700 Rail Cars**  
PURCHASED OR LEASED

**5,200 Miles**  
OF TRACK RESURFACED

**VERIFIED STATEMENT  
OF  
CINDY M. SANBORN  
TO  
OPENING COMMENTS OF  
CSX TRANSPORTATION, INC.**

**EX PARTE NO. 711 (SUB-NO. 1)  
*RECIPROCAL SWITCHING***

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**BEFORE THE SURFACE TRANSPORTATION BOARD**

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**EX PARTE 711 (SUB. NO. 1)**

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**RECIPROCAL SWITCHING**

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**VERIFIED STATEMENT OF CINDY M. SANBORN**

**ON BEHALF OF**

**CSX TRANSPORTATION, INC.**

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**I. MY BACKGROUND**

My name is Cindy M. Sanborn. I am Executive Vice President and Chief Operating Officer of CSX Transportation, Inc. ("CSXT"). Prior to assuming my current position in September 2015, I served as Executive Vice President – Operations (February 2015 to September 2015) and as Vice President and Chief Transportation Officer (December 2009 through February 2015) of CSXT. In my current position, I am responsible for all CSXT transportation, mechanical and engineering functions. As Vice President and Chief Transportation Officer, I had responsibility for safety and for coordinating operations and service across the CSXT network. During my 29-year career, I have also served as Vice President of the Northern Region and as Assistant Vice President of Network Operations. Accordingly, I am very familiar with the CSXT rail system and the many challenges that we face in planning and executing our day-to-day operations. I hold a

Bachelor's Degree in Computer Science from Emory University and a Master's in Business Administration from the University of Miami.

The purpose of this Verified Statement is to explain the serious adverse consequences that the Board's proposed reciprocal switching regulations would have for CSXT, the U.S. rail network, and the thousands of customers who depend upon the nation's railroads to deliver timely, reliable and safe transportation service. As my testimony will show, the Board's involuntary switching proposal would undermine many of the initiatives—including consolidating traffic flows in larger trains over high-capacity routes and major hump yards, pre-blocking cars to eliminate handlings at congested terminals, and run-through trains and power sharing arrangements—that have enabled CSXT and other railroads to achieve marked improvements in transit time and service reliability. Adoption of the proposed regulations would result in a significant degradation of service for all shippers.

**II. REDUCING CAR HANDLINGS AND TRANSIT TIME, AND PROVIDING CONSISTENT, RELIABLE SERVICE ARE CRITICAL TO MEETING OUR CUSTOMERS' TRANSPORTATION NEEDS.**

Most rail shippers are physically served by only one carrier—indeed, approximately 85% of the customer facilities located on CSXT's rail network are served exclusively by CSXT. However, this does not mean that those shippers lack competitive alternatives. The ability to ship freight by truck or water carrier, to source (or sell) products from other geographic locations, and to utilize substitutes for the commodities that CSXT transports all require that CSXT deliver excellent

service at a competitive price. If CSXT does not meet the service expectations of our customers, they can (and do) choose to exercise other transportation options.

The intensely competitive environment in which CSXT operates requires us to strive for continuous improvement in the quality and reliability of our service offerings. The key components of the efficient service that our customers demand are transit time (how long it takes to transport a car from origin to destination) and reliability (how consistently we deliver on-time performance). Over the past several decades, CSXT and other railroads have undertaken a variety of initiatives that have produced major improvements in both transit time and service reliability.

As the ICC (correctly) observed in 1980:

Interchanging traffic adds to the total cost of handling traffic, including operational cost (car-switching) and clerical costs (recordkeeping). Interchanging freight also adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars.<sup>1</sup>

What was true then remains true today. Attachment A depicts the number of handlings required by cars transported by CSXT during a representative month, and the corresponding average transit time (in hours) for those cars. For example, Attachment A shows that, during that month, CSXT handled 18,153 cars that required only one switch. The average transit time for those 18,153 cars was 60.8 hours. For 39,327 cars that required two handlings en route, the average transit time rose from 60.8 hours to 116.4 hours, an increase of 55.6 hours (or more than

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<sup>1</sup> *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 940 (1980) (“*BN/Frisco*”) (emphasis added).

two days). Adding a third switch for 44,825 cars increased average transit time by another 40.9 hours, from 116.4 hours to 157.3 hours. As these real-world data graphically demonstrate, there is a direct correlation between the number of times that a rail car must be switched (or otherwise handled) during its journey across the rail network and the time that it takes to complete the movement of that car from origin to destination.

The need to handle individual cars multiple times along their route of movement is the greatest impediment to reducing transit time. Some intermediate switching is unavoidable because most carload shipments move in more than one train during their journey across the rail network. Nevertheless, CSXT has implemented a variety of operating practices designed to minimize the number of times that individual cars must be handled at intermediate yards and interchange points.

Advances in technology have given CSXT new network planning tools that vastly improve our ability to track and transport carload shipments. CSXT has developed a system operating plan designed to direct each carload over the most efficient route for that shipment. An essential feature of that operating plan is to consolidate traffic flows over a smaller number of efficient, high-volume routes. This enables CSXT to run longer trains, thereby reducing the number of trains consuming network capacity, improving locomotive and car utilization, and generating train crew and fuel cost savings. Cars moving over those routes are classified and switched at CSXT's high-capacity hump yards. Concentrating traffic

flows in this manner also makes it possible for CSXT to direct capital investments in new track and facilities to those routes and locations where they generate the greatest benefits.

Similarly, CSXT and connecting carriers have concentrated the movement of interline traffic over a smaller number of high-volume interchange locations. This practice facilitates the transfer of large volumes of traffic (including intact trains that “run through” the interchange point with only a crew change) at locations that link the carriers’ most efficient routes. Moving interline traffic via high-volume interchanges reduces the delays that cars would otherwise incur “dwelling” for longer periods at remote yards and interchange points. Eliminating interchanges that handle only a few cars per day also promotes system-wide efficiency by enabling CSXT to redeploy assets that would be underutilized at those locations.

Routing carload shipments through high-volume hump yards facilitates the efficient practice of “blocking” cars for movement across the network. Cars classified at a hump yard are sorted into blocks with other cars moving to the same yard or interchange point further along the CSXT system. Blocking enables cars to move long distances without requiring additional switching or handling. For example, a block of cars can be “swapped” intact between trains without the need to re-classify or switch individual cars. CSXT and other railroads employ detailed “blocking plans” at major classification yards to ensure that cars move across the network in the most efficient manner possible. Cars can be classified and blocked

more efficiently at hump yards than at smaller flat switching yards (which are better suited to switching cars to/from local trains serving customer facilities).

In addition to blocking cars for movement on their own lines, CSXT and other railroads often “pre-block” cars that are destined for interchange with other carriers. “Pre-blocking” interline shipments eliminates the need for either carrier to switch individual cars at the interchange point, thereby enabling cars to move from a major yard on one railroad’s lines to a major yard on the connecting carrier’s system without any additional handling. For example, CSXT pre-blocks cars destined to Livonia, LA and Houston, TX for UP at both CSXT’s Hamlet, NC and Atlanta, GA yards. The blocks built by CSXT are interchanged to UP at New Orleans, and UP moves the cars directly to Livonia (or Houston) without any further classification or switching. UP reciprocates by pre-blocking at Livonia cars destined to CSXT yards at Hamlet, Atlanta, Birmingham, AL and Waycross, GA (via the New Orleans gateway). CSXT likewise builds blocks of cars destined to North Platte, NE and Kansas City for UP at CSXT’s Avon (Indianapolis) yard, and delivers those blocks to UP at St. Louis. UP, in turn, builds blocks cars destined to Avon at its North Platte yard and delivers them to CSXT at St. Louis.

Consolidating interchange activity at fewer locations increases opportunities for railroads to operate “run-through” trains. Run-through trains are handed off intact without the need for any switching at the interchange location. Often, all that is required is a crew change and a visual inspection of the train prior to departure. Carriers often agree to operate run-through trains via routes that

bypass busy terminal areas. For example, CSXT and BNSF developed an interchange for run-through trains of crude oil at Smithboro, Illinois, in order to avoid the need to operate those trains through the busy Chicago terminal. In many instances, carriers permit locomotives to “run through” with the consist, eliminating the delay that would result from switching locomotives at the interchange point.

CSXT’s system operating plan incorporates “scheduled” train service. Given the ability of trucks to compete for most of CSXT’s merchandise traffic, customer expectations for both service quality and reliability are high. By developing and adhering to a “scheduled” operating plan, CSXT can coordinate the arrival of road trains with the departure of local trains that serve customer facilities, thereby reducing the dwell time that cars experience at local serving yards. Operating a “scheduled” railroad also enables CSXT to coordinate yard assignments with road train arrival and departure times, to anticipate the number of cars that will arrive at classification yards at various times throughout the day, and to call train crews when they are needed. CSXT’s “scheduled” train service also benefits our customers by enabling them to plan their own operations in conjunction with the anticipated arrival and departure times of their rail shipments.

The key to the success of these modern rail operating practices is predictability. Knowledge of our customers’ shipment patterns and service requirements enables CSXT to design train schedules that provide the best possible service to the greatest number of shippers. Stable, repetitive traffic flows allow us to staff our yard operations in a manner that maximizes efficiency and reduces the

possibility of congestion during peak periods. The ability to concentrate traffic over high-volume routes and interchange points makes it possible to implement service-enhancing practices such as “pre-blocking” and run-through train service.

Consistent and predictable traffic flows also enable CSXT and other railroads to allocate locomotives, cars, crews and capital dollars in a manner that maximizes asset utilization and productivity.

### **III. THE BOARD’S PROPOSED INVOLUNTARY SWITCHING REGULATIONS WILL RESULT IN A SERIOUS DEGRADATION OF SERVICE FOR ALL RAIL SHIPPERS.**

The impact of the proposed switching regulations on operating efficiency, rail service quality, and the fluidity and reliability of the rail network would be decidedly negative. The result of the involuntary switching regime envisioned by the Board’s proposal would be a serious degradation of service affecting all shippers.

An involuntary switching order will necessarily increase the number of times that cars subject to the prescription must be handled as they move across the rail network. CSXT’s prior comments explained how diverting a shipment from a single-line routing to a new joint route involving involuntary switching at an interchange point of the shipper’s choosing would add several switch events to even the simplest car movements.<sup>2</sup> As the data set forth in Attachment A show, each additional car handling would increase the transit time for that shipment by 1-2 full

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<sup>2</sup> See *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, STB Ex Parte No. 711, Opening Comment of CSX Transportation, Inc., at 40-42 (filed March 1, 2013).

days.<sup>3</sup> As a result, a car diverted to an alternate route pursuant to a switching order would inevitably experience a substantial degradation in service.

The Board's involuntary switching proposal does not merely allow the shipper who seeks such a prescription to choose for itself between a potentially lower rate and better service quality. Rather, it would impose significant adverse service consequences on other shippers as well. Implementing an involuntary switching order would require the road or local train carrying the subject traffic to stop en route to switch out the cars for interchange to the alternate carrier selected by the shipper. Because the proposed regulations permit a shipper to designate any location at which there "is or can be a working interchange" between the carriers, trains would in many instances be required to stop at locations that are not scheduled stops today. Such additional stops, and the time required to switch out cars for pickup by the alternate carrier, would add to the transit time experienced by all of the cars moving in the train (thereby degrading service for shippers of all of those cars). Where a shipper's demand for involuntary switching necessitated rerouting cars away from high-volume routes and hump yards to secondary rail lines and smaller yards (which have more limited resources and may already be operating at or near capacity), the adverse effects would be felt by shippers whose

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<sup>3</sup> Data regarding terminal dwell time across the rail industry confirm this conclusion. The average terminal dwell for rail cars on all Class I railroads is in the range of 24 hours. See Railroad Performance Measures, "Terminal Dwell," available at <http://www.railroadpm.org/Graphs/Terminal%20Dwell%20Graph.aspx>. A switching prescription would result in at least one additional handling of a car by both the origin carrier and the alternate railroad selected by the shipper. Based on the terminal dwell times reported by Class I carriers, this would increase transit time by approximately 48 hours.

freight moves through the substitute yard even if their traffic does not share a train with the traffic subject to the involuntary switching order.

Indeed, involuntary switching would have a detrimental impact on the efficiency and cost of local train service. CSXT and other railroads design their local train service operations to maximize the utilization of locomotives and crews while providing the frequency of service necessary to meet customer requirements. For example, many CSXT local trains operate in “turn” service, departing from a local serving yard, making stops to pick up and set off cars at several customer facilities, then returning to the same yard with cars gathered from those customer locations. “Turn” service is carefully designed and scheduled to enable the train to operate within the hours of service rules with a single crew. If a “turn” local train were required to perform switching at a new interchange location along its route, the crew (in many instances) would be unable to complete that additional work within a single shift. In such a case, CSXT would be required either to deploy a second crew to complete that train’s work or to add a second local train assignment. Likewise, adding new interchange points and switching work to the assigned duties of local trains that operate between two terminals would, in many instances, make it impossible for them to complete their runs with a single crew. The result would be an increase in the cost of providing local service for all customers.

The diversion of traffic to an alternate route pursuant to an involuntary switching order could also result in a reduction in service frequency. For example, assume that a local train operates in “turn” service over a branch line with three

customer facilities. Customer #1 accounts for the majority of the traffic originating and terminating on the line. Customer #2 and Customer #3 each generate only a few cars per week. The CSXT local train serving the line currently operates five days per week, based on the requirements of Customer #1. While Customer #2 and Customer #3 account for a small portion of the traffic on the line, they enjoy the benefit of having rail service available five days per week. If Customer #1 obtained an involuntary switching order that required CSXT to deliver its traffic to NS at a new interchange, the reduced revenue that CSXT earned from traffic on the line (including Customer #1's shipments, for which CSXT would receive only a switch fee) might no longer support five-day service. A reduction in service to three days per week would adversely impact not only Customer #1 (which would, in theory, benefit economically from the switching arrangement) but Customer #2 and Customer #3 as well.

A proliferation of involuntary switching prescriptions at a minimum would require CSXT to reconfigure its local train operations. But, because the proposed regulations permit shippers to shift their traffic back and forth between the "original" CSXT route and the prescribed alternate route at any time, the routes and interchanges via which traffic moves would lack predictability. In such an environment, it would be extremely difficult for CSXT and other railroads to maintain a proper balance between efficiency, cost and customer requirements in their network planning and train service design.

The proposed regulations would further degrade transit time by shifting certain shipments to more circuitous line-haul routes, including routes that would require cars to move long distances in the “wrong” direction. CSXT’s prior comments described one example of such an out-of-route movement, involving carload traffic originating in Mexico and moving to the customer’s facility in Jacksonville, FL. CSXT currently receives that traffic at New Orleans, and moves it to CSXT’s hump yard at Waycross, GA, where the cars are blocked for delivery by a road train to CSXT’s Busch Yard, a local serving yard near the destination facility. A different CSXT yard near Jacksonville (Moncrief Yard) is an active interchange point with NS. Under the Board’s proposal, the shipper could seek an order prescribing a route substituting NS as the line-haul carrier between New Orleans and Jacksonville, with NS delivering the cars to CSXT at Moncrief Yard.

CSXT does not currently operate trains directly between Moncrief Yard, on the one hand, and Busch Yard or the shipper’s plant, on the other hand. In order to complete the movement of this traffic to the destination facility, CSXT would have to transport the cars from Moncrief Yard 147 miles north to Waycross, GA, where they could be blocked into the same train that delivers them to Busch Yard today. This would add 294 miles (and up to three days of additional transit time) to the overall movement of this traffic. CSXT could not avoid such a circuitous movement via Waycross by serving the destination directly from Moncrief Yard, because Moncrief Yard does not have the capacity to flat-switch and block cars into a new local train serving destinations that are not served by that yard today. Even where

circuitous movement could be avoided by instituting a new local train, doing so would add substantially to the cost of serving the traffic.

Such inefficient movements would not be isolated incidents. Because the track networks and major classification yards operated by CSXT and NS do not precisely mirror each other, there are numerous potential interchange locations at which a transfer of cars from a CSXT-direct route to a joint route with NS (or vice versa) would require the alternate line-haul carrier to move the cars many miles in the “wrong” direction (in relation to the ultimate destination) in order to reach a yard at which they could be classified for further movement. The resulting increase in dwell and transit time would be even greater where an involuntary switching request involved a remote wayside interchange that is not served by both railroads on a daily basis. Moreover, because the preferred high-volume routes in which CSXT and NS participate with Western carriers may involve different lines and gateways, a switching prescription involving transcontinental shipments could also impact the Western carrier’s train and yard operations.

More fundamentally, giving shippers the right to demand service via any location at which there “is or can be a working interchange” would disperse traffic flows away from the high-volume routes and classification facilities that CSXT and other carriers have developed to improve the efficiency and reliability of rail service. The modern operating practices described above are premised on the utilization of a limited number of high-volume routes and interchanges (and, correspondingly, the elimination of low volume routes and interchanges). If traffic flows are diverted

away from those routes and interchanges, CSXT and connecting carriers will have fewer opportunities to utilize efficient practices such as pre-blocking of cars for movement through (or around) major gateways and the consolidation of cars into run-through trains. Until recently, CSXT pre-blocked cars destined to UP's Council Bluffs yard at CSXT's Willard, OH yard, and UP pre-blocked cars moving in the opposite direction to CSXT. However, the downturn in rail traffic volumes in the current economic environment led us to discontinue that arrangement, and CSXT now interchanges the traffic via the BRC at Chicago. The diversion of cars away from efficient routes developed by CSXT and its connections pursuant to an involuntary switching order could similarly threaten pre-blocking agreements, particularly where traffic volumes only marginally support the arrangement. The likelihood that traffic volumes will constantly shift between existing routes and new STB-prescribed routes will itself create disincentives for carriers to establish and maintain pre-blocking arrangements.

Indeed, the frequent shifting of cars back and forth between different routes and interchange points will make it difficult for CSXT to maintain the internal blocking plans that enable our major hump yards to handle high carload volumes efficiently. CSXT's yard blocking plans are developed on the basis of steady, predictable traffic flows between various origins, destinations, and interchange points along the CSXT network. Constant fluctuation in the number of cars destined to particular destinations and interchange points (as a result of shippers changing the routing of their traffic) would make it difficult to predict the size of the

blocks to be built for outbound trains—or, for that matter, whether a particular block would be needed at all. This would make it difficult for CSXT to “right size” the resources (including yard locomotives, crews and hours of operation) at its classification yards. Significant shifts in traffic volumes and block sizes could also require CSXT to operate additional trains (or to cancel scheduled trains) on a daily basis. Such a situation would impair our ability to provide “scheduled” rail service to all of our customers.

Involuntary switching of trainload traffic could create disincentives for carriers to maintain locomotive sharing agreements. Carriers contribute locomotives to a run-through operation and agree to let their locomotives remain with the train beyond their own rail lines because the traffic generates profitable line-haul revenue for both parties. However, if the shipper demanded that the traffic move via an alternate route that resulted in either the origin or destination carrier losing the line-haul revenue (and receiving only a switching fee), that carrier would have little incentive to permit its locomotives to operate off-line. The result would be an increase in transit time due to the need to switch out locomotives at one (or more) interchange points.

In addition to these obvious adverse impacts on rail operations, the Board’s proposal would generate a number of (presumably) unintended consequences. For example, an involuntary switching prescription that resulted in the loss of most or all of the traffic moving to or from a branch line (such as in the example of Customer #1 above) would, in all likelihood, result in reduced investment in that

line. This is illustrated by two situations in which CSXT was involved in recent years. In both cases, CSXT had operating rights over a branch line maintained by a competing carrier. After CSXT won the majority of the business moving over the line through competitive bidding, the owning carrier reduced maintenance to the point where the line became barely serviceable.<sup>4</sup> The Board should anticipate that, where a carrier loses line-haul revenue that supports a branch line as a result of a switching prescription, the carrier will respond in an economically rational manner by reducing its investment in the line. Indeed, the loss of line-haul revenues generated by branch lines can be expected to generate an increase in abandonments or sales of branch lines that are not integral to a Class I carrier's overhead network operations. The *Decision* contains no analysis of the impact of such a development on the public interest.<sup>5</sup>

The involuntary switching regime contemplated by the Board's proposal could also create disincentives for Class I carriers to invest in economic development on their lines. As the Board knows, railroads today expend substantial time and resources to encourage potential customers to site new or expanded facilities along their right-of-way. This is one of the few ways in which a

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<sup>4</sup> The Board's Office of Public Assistance, Government Affairs, and Compliance was closely involved in both situations, and is aware of the circumstances at issue in each case.

<sup>5</sup> Sales of marginal rail lines to short-line or regional railroads have generally been a beneficial development, and some short-line sales will no doubt continue regardless of whether the Board adopts the proposed rule. But the Board's involuntary switching proposal will create new economic incentives for Class I carriers to shed branch lines that originate or terminate traffic that is subject to a switching prescription.

carrier with a fixed infrastructure can grow its traffic base. However, if a railroad faces the threat of losing the prospective customer’s business as a result of a switching prescription, it will have little economic incentive to invest time and scarce capital to attract the customer. Unless the carrier can secure a very long-term contractual commitment from the prospective customer, future investments in economic development will entail significant new risk.

\* \* \* \* \*

By adopting efficient, modern operating practices and better coordinating with our interline partners, CSXT has achieved major improvements in the quality and reliability of our rail service offerings. CSXT is not alone—as the FRA has observed, today’s U.S. freight rail network is more efficient and dependable than it has been at any time in history; indeed, it is the envy of the world.<sup>6</sup> These advances have benefited all shippers, including those who do not have direct access to multiple rail carriers. The Board’s proposal to enable shippers served by a Class I railroad to seek the establishment of an alternate route via any location where there “is or can be a working interchange” would undermine the rail industry’s efforts to deliver faster, more reliable service by consolidating traffic over the most

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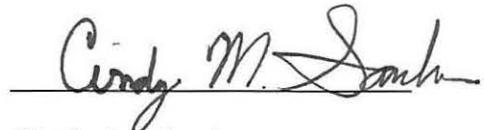
<sup>6</sup> See, e.g., Federal Railroad Administration, *Preliminary National Rail Plan* (October 2009) at 4, 21, available at <http://www.ontrackamerica.org/files/RailPlanPrelim10-15.pdf> (“By many measures, the U.S. freight rail system is the safest, most efficient and cost effective in the world . . . A review of the previous 29 years since the railroads were partially deregulated by the Staggers Act of 1980 reveals improvements in the railroads’ physical plant (infrastructure) as well as their performance metrics. Safety and fuel efficiency have remarkably improved. Rail rates are lower today than in 1980 when compared in constant dollars.”).

efficient rail lines and classification yards. Whatever benefit involuntary switching might have for certain shippers, the overall impact of the Board's proposal on CSXT, the U.S. rail network, and all rail shippers would be decidedly negative.

## VERIFICATION

I declare penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 26<sup>th</sup> day of October, 2016.

A handwritten signature in cursive script, reading "Cindy M. Sanborn", is written over a horizontal line.

Cindy M. Sanborn

**Attachment A**  
**to**  
**Verified Statement of Cindy M. Sanborn**

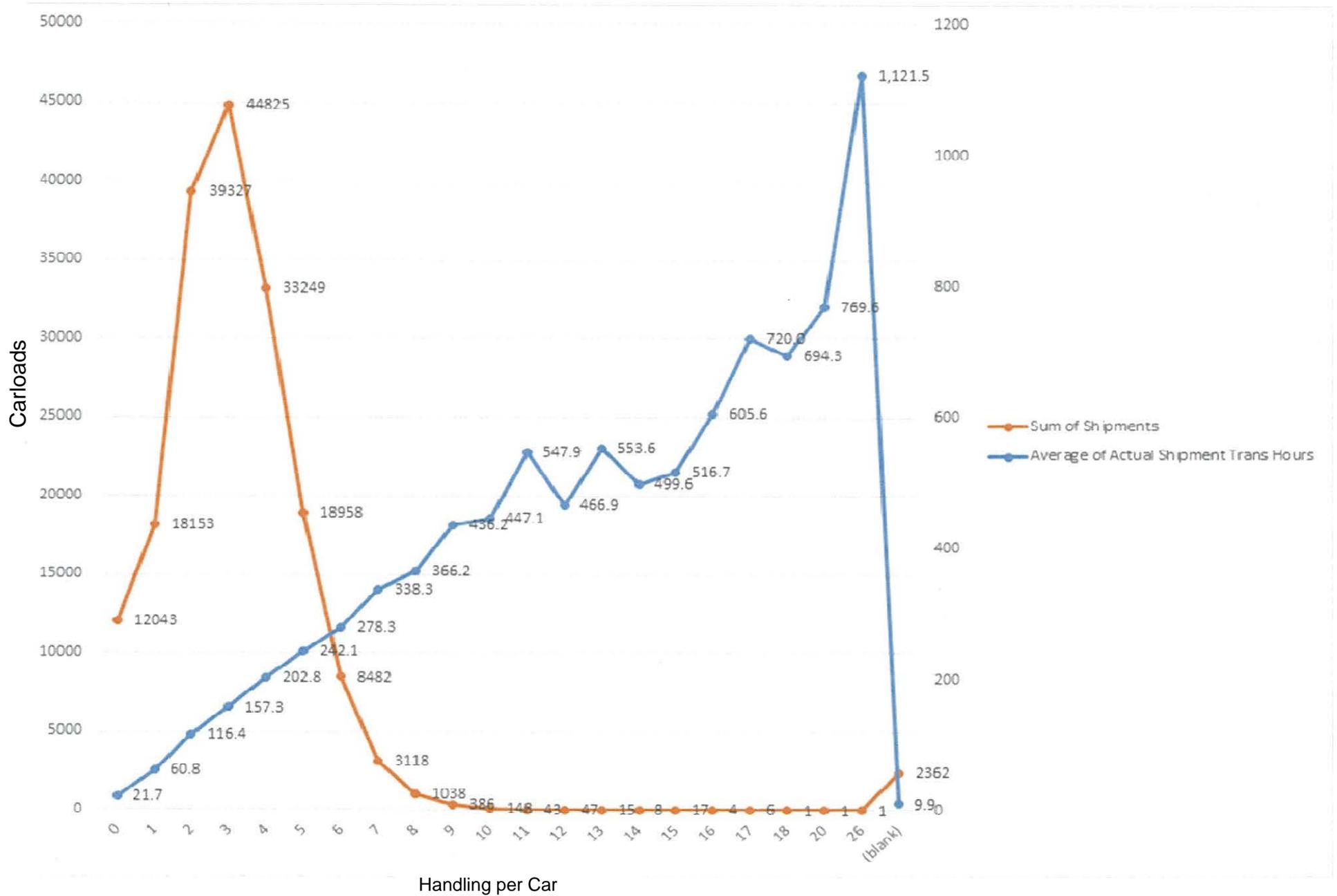
**Opening Comments of**  
**CSX Transportation, Inc.**

**Ex Parte No. 711 (Sub-No. 1)**  
***Reciprocal Switching***

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# Attachment A

## Impact of Car Handlings on Transit Time



**VERIFIED STATEMENT  
OF  
ROBERT WILLIG  
TO  
OPENING COMMENTS OF  
CSX TRANSPORTATION, INC.**

**EX PARTE NO. 711 (SUB-NO. 1)  
*RECIPROCAL SWITCHING***

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Before the  
Surface Transportation Board

**Docket Number EP 711 (Sub-No. 1):  
Petition for Rulemaking to Adopt  
Revised Competitive Switching Rules**

*Statement of*

**Robert Willig  
Professor Emeritus of Economics and Public Affairs  
Princeton University**

October 26, 2016

## **I. Witness Introduction**

### **A. Qualifications**

My name is Robert Willig. I am Professor Emeritus of Economics and Public Affairs in the Economics Department and the Woodrow Wilson School of Public and International Affairs of Princeton University. I also serve as a senior consultant to the economics consulting firm Compass Lexecon.

I have done extensive research and economic analysis on the railroad industry over the course of my career.<sup>1</sup> I have also testified before the Surface Transportation Board (“STB” or “the Board”), and its predecessor, the Interstate Commerce Commission (“ICC”), about issues affecting the rail industry on many occasions.

In general, my academic area of focus for teaching and research is microeconomics, with particular specialization in the field of industrial organization, including competition and regulatory policy. I have extensive experience analyzing such economic issues arising under the law. While on leave from Princeton, I served as Deputy Assistant Attorney General in the Antitrust Division of the United States Department of Justice, and in that capacity served as the Division’s Chief Economist. I have consulted to international public agencies, national governments, private companies and law firms, and appeared as an expert witness before Congress, federal and state courts, federal administrative agencies, and state public utility commissions on subjects

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<sup>1</sup> See, for example, “Competitive Rail Regulation Rules: Should Price Ceilings Constrain Final Products or Inputs?” (with W. J. Baumol); *Journal of Transport Economics and Policy*, vol. 33, part 1, pp. 43-53 ; “Restructuring Regulation of the Rail Industry,” (with Ioannis Kessides), in *Private Sector*, Quarterly No. 4, September 1995, pp. 5 – 8; “Competition and Regulation in the Railroad Industry,” (with Ioannis Kessides), in *Regulatory Policies and Reform: A Comparative Perspective*, C. Frischtak (ed.), World Bank, 1996; "Railroad Deregulation: Using Competition as a Guide," (with W. Baumol), *Regulation*, January/February 1987, vol. 11, no. 1, pp. 28-35; "Pricing Issues in the Deregulation of Railroad Rates" (with W. Baumol), in *Economic Analysis of Regulated Markets: European and U. S. Perspectives*, J. Finsinger (ed.), 1983.

involving microeconomics, competition, and regulation in a wide variety of sectors including transportation and railroading specifically.

## **B. Assignment and Summary of Findings**

I have been asked by CSXT to provide comments on the Decision in “Reciprocal Switching,” Docket No. EP 711 (Sub-No. 1) (served July 25, 2016) (“EP 711 Decision”). Specifically, I have been asked to address the Board’s proposal to relax the requirement that petitioners demonstrate abusive conduct in order to receive reciprocal switching prescriptions and to discuss the fundamental economic principles that apply to pricing prescribed access. My findings with regard to these issues are summarized as follows:

- Railroad regulators have long been guided by the principle that the public interest is best served by reliance on well-functioning, competitive markets to efficiently allocate the economy’s scarce resources and that regulatory intervention is warranted only when competition is not sufficient to produce efficient, effectively competitive, outcomes.
- Applied to requests for mandated reciprocal switching agreements and other types of mandated access, this principle means regulatory intervention is warranted *only* in instances where abusive, anticompetitive conduct has been demonstrated.
- The Board has offered no economically reasonable justifications for its proposal to relax the requirement that petitions for reciprocal switching be granted only in cases where abusive anticompetitive conduct has been demonstrated.
- One fundamental objective in regulation of rates and regulation of access is to allow incumbent railroads to price in accordance with market demand in a manner that promotes the recovery of full economic costs, including the costs of capital. This type of differential pricing is critical to the industry and must be preserved in any access pricing proposal.
- The regulation of rail rates has been guided by the principles of Constrained Market Pricing (“CMP”) for thirty years. These principles dictate that rates for a full origin-to-destination move should be constrained by the costs that an efficient, stand-alone entrant would incur to provide the service. This principle preserves railroads’ ability to price differentially in order to recover

their fixed costs and remain financially viable.

- The Efficient Component Pricing Rule (“ECP”), which flows directly from CMP, governs the pricing of bottleneck inputs. ECP holds that prices for bottleneck components should not be set based on stand-alone or replacement costs of the narrow bottleneck. Rather, where their regulation is necessary, bottleneck component prices should be set at competitively neutral levels that reflect the prices the incumbent railroad charges its own customers for use of the bottleneck asset. This principle fosters competition where regulation is necessary, while preserving the railroad’s ability to recover fixed and common costs that is essential to the on-going financial viability of the industry.
- The pricing proposals put forward by the Board are based on the costs of the bottlenecks rather than the competitively neutral parity principles of ECP. Both proposals identify mechanisms for compensating an incumbent railroad for the cost of a bottleneck asset in isolation, but neither provides a mechanism to compensate the incumbent for the bottleneck asset’s contribution to the fixed and common costs of its network. As currently proposed, both of the Board’s pricing alternatives would compromise railroads’ abilities to recover their full network costs and would threaten the long-term financial stability of the industry.

The remainder of this statement is organized as follows: Section II briefly explains the Board’s current framework for evaluating access petitions, summarizes the Board’s proposals, and analyzes the Board’s asserted justification for its proposal in the context of economically sound regulatory principles. Section III establishes the basic principles for pricing prescribed access. Section IV evaluates the Board’s two pricing proposals in the context of the principles discussed in Section III. Finally, Section V offers a brief conclusion.

## **II. The Current State of Access Regulation**

### **A. The Existing Rules**

In 1985, the Interstate Commerce Commission adopted regulations that “provided that reciprocal switching would only be prescribed if the agency determines that it ‘is necessary to remedy or prevent an act that is contrary to the competition policies of 49

U.S.C. 10101 or is otherwise anticompetitive....”<sup>2</sup> The first decision issued by the ICC under these new regulations clarified the ICC’s approach to evaluating requests for mandated access.<sup>3</sup> In *Midtec Paper Corp. v. Chicago & North Western Transportation Co.* (“Midtec”), the ICC made clear that demonstrating just a lack of competitive alternatives was not a sufficient basis for imposing regulation. Rather, the ICC articulated that an “essential question”<sup>4</sup> in these cases was whether a railroad has “*used* its market power.”<sup>5</sup> The ICC also noted in that decision that the regulators’ responsibility is to correct competitive *abuses*, not just to offer shippers additional rail options.<sup>6</sup> In this decision, the ICC properly recognized that in the rail industry a lack of competitors is not evidence of a lack of competition, and that prescribing any form of competitive access is appropriate only in situations where intervention is necessary to correct abusive anticompetitive conduct.

The Board now proposes to relax this standard of review, characterizing their proposed new rules as “broadening the framework under which reciprocal switching could be justified.”<sup>7</sup> The broader framework proposed by the Board includes a “two-pronged approach” that would allow the Board to impose reciprocal switching when it is either “...practicable and in the public interest *or* when it is necessary to provide

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<sup>2</sup> Surface Transportation Board, “Decision,” Docket No. EP 711 (Sub-No. 1), Petition for Rulemaking to Adopt Revised Competitive Switching Rules, Reciprocal Switching, July 25, 2016 (hereinafter “EP 711 Decision”) at 3.

<sup>3</sup> The current docket focuses specifically on reciprocal switching.

<sup>4</sup> *Midtec Paper Corp. v. Chicago & North Western Transportation Co.*, 3 I.C.C. 2d 171 (1986) (hereinafter “Midtec Decision”) at 181. See also EP 711 Decision at 4.

<sup>5</sup> Midtec Decision at 181 (emphasis added). See also EP 711 Decision at 4.

<sup>6</sup> Midtec Decision at 174 (emphasis added). See also EP 711 Decision at 3-4.

<sup>7</sup> EP 711 Decision at 16.

competitive rail service.”<sup>8</sup> The “broadening” proposed here abandons the principle that regulatory intervention should be narrowly focused on correcting competitive abuses. This is both a significant departure from the current regulatory framework and a significant – and ill-advised – departure from principles of sound economic regulation.

**B. The Abusive Anticompetitive Conduct Standard is Not Too Restrictive and Should Not Be Relaxed**

The Board’s focus on protecting the public’s interest and ensuring competitive rail markets is appropriate and admirable; however, it is not necessary and is likely counterproductive to “broaden the framework” in order to safeguard the public interest and ensure outcomes that are consistent with competition. The current framework does exactly that by ensuring that regulation is imposed only in situations where competition has failed – i.e., where a railroad has abused its market power to anti-competitively restrict access, thereby distorting outcomes and preventing efficient supply and logistical solutions for shippers’ transportation needs.

There is no dispute amongst economists that the public interest in the efficient allocation of an economy’s scarce resources is best served by reliance on well-functioning, competitive markets whenever possible. Prices that are set in properly functioning markets, as the result of the interplay of supply and demand, serve the important functions of allocating resources to where they are most needed in the economy and motivating the needed supplies. However, the mere fact that a market does not include a second railroad is not evidence of a market failure. In some markets, entry of a second railroad may be neither efficient nor economically viable. This is true

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<sup>8</sup> EP 711 Decision at 16.

because duplication of service may unduly elevate costs and render rail service financially unsustainable and because, even in situations with few rail competitors, pricing can be effectively disciplined by alternative transportation options like trucks and barges or product or geographic alternatives available to shippers. A market where there is no evidence of abusive conduct and where there are also few competitive rail alternatives available to shippers may well indicate that the market cannot support additional rail participants.

Where a single-seller has not attained or maintained its position through anticompetitive acts, regulatory intervention that would mandate access for a second seller invites complainants to request, and to be granted, relief that results in an outcome that is neither market-based nor efficient, nor otherwise in the public interest. It may be the case that a single-railroad market is completely consistent with competition and *does* reflect competitive outcomes. If so, even if well-intended by policy-makers, substituting regulatory judgement for competitive outcomes with respect to access arrangements and pricing can cause systematic economic problems and is *contrary* to the public interest.

On the other hand, it could be the case that a single-railroad market without effective intermodal, geographic, or product competition confers genuine market power on the serving railroad that enables it to charge unreasonably high rates. In such situations, it is economically appropriate for regulation to offer protection to the shipper in the form of maximum rate regulation that would mimic the constraints that would discipline pricing were the origin-to-destination market competitive or contestable.

But in such situations it would be counterproductive for regulation to mandate access on terms that would be inconsistent with and destructive of competition.

Mandated access that is inconsistent with the ECP principles of competitive parity tends to foster inefficient logistics, tends to distort and squelch incentives for infrastructure maintenance and investment, and tends to interfere with the efficient pricing needed to maximize rail utilization and support adequate revenues. The ICC and STB's requirement that access be granted only in situations where abusive anticompetitive conduct is demonstrated; i.e., where a rail carrier has foreclosed efficient logistics with exercise of its market power, effectively matches the remedy to the problem, and avoids misuse of mandated access as an inefficient substitute for maximum rate regulation, where that is needed. There is no reason to depart from that approach now.

### **C. The Board's Justifications for Change are Not Persuasive**

The Board cites two primary justifications for the proposed changes, neither of which is persuasive. First, the Board expresses concern that requiring a showing of anticompetitive conduct "set[s] an unrealistically high bar for shippers to obtain reciprocal switching, as demonstrated by the fact that shippers have not filed petitions for reciprocal switching in many years, despite expressing concerns about competition."<sup>9</sup>

Just as one cannot determine based on a simple count of railroads whether a market is competitive, one cannot determine based on a simple count of cases whether a policy is effective. Indeed, one would expect that a well-crafted policy that is consistent with basic principles of economic regulation would be used with declining frequency as parties adjust behavior to avoid costly regulatory proceedings. The knowledge that the STB would discipline any anticompetitive behavior may serve as a powerful deterrent for any railroad contemplating such behavior. One would expect that in situations where a

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<sup>9</sup> EP 711 Decision at 8.

market can support multiple railroads, with practical efficient access arrangements, that mutually beneficial negotiated access agreements would be reached between the parties without the need for regulatory intervention. Under appropriate regulation, the first inference from the absence of such an agreement in a market would be that access would not create efficient logistics that meet shippers' needs.

Second, the Board notes the “improved economic health of the railroad industry” as an additional motivation for revamping the approach to reciprocal switching petitions.<sup>10</sup> The focus on financial performance as justification for increased regulatory intervention seems somehow linked with the incorrect notion that strong financial performance is inconsistent with competitive markets. Such a misapprehension is a fundamental misunderstanding of basic economic principles. In fact, businesses in competitive markets can be expected sometimes to be financially flush and sometimes to be financially stressed as competitive forces of supply and demand drive their prices and their profits up and down over business cycles and through growth or stagnation periods for the products or services they sell. But whether the finances of a competitive business are flush or stressed, the public interest lies in the pricing of the business' products that is driven by and reflective of the market forces of supply and demand. Especially in industries like rail, with high fixed costs, the flush periods are necessary to balance out the stressed periods. Using “financial health” as a trigger for regulatory action means railroads must bear the full risk of down times but can expect to reap only a fraction of the rewards in the flush times. This approach to regulation would have chilling effects on railroad investment and innovation.

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<sup>10</sup> EP 711 Decision at 9.

### **III. Principles for Economically Sound Access Pricing**

#### **A. Differential Pricing Is Critical to the Financial Stability of the Rail Industry**

In addition to proposing a new and broader framework for evaluating reciprocal switching petitions, the Board's proposal also raises the complicated issue of how to price such access once granted. Before addressing the two scenarios the Board put forward, it is useful to review the important principles that have guided rail rate regulation for the past thirty years.

A fundamental objective in regulation of rates and regulation of access is to allow incumbent railroads to price in accordance with market demand in a manner that fosters the recovery of full economic costs, including the costs of capital. Preserving the ability of railroads to price differentially and recover full costs is crucial to the industry and must govern any policies adopted for handling pricing of reciprocal switching or other forms of mandated access.<sup>11</sup>

#### **B. Constrained Market Pricing**

Since 1985, railroad rate regulation has been guided by the principles of Constrained Market Pricing. CMP is designed "as a substitute for competition" and "to constrain the behavior of the regulated firms exactly as would be the case if the market were really competitive, circumscribing these firms' behavior no less and no more."<sup>12</sup>

CMP was "carefully designed on the basis of economic analysis to satisfy competitive

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<sup>11</sup> It is important for the Board to avoid falling into the trap of thinking that SAC-based rates would be appropriate on "bottleneck" rail segments if shippers were allowed to access a second railroad by forcing an interchange. As discussed further below, they would not be appropriate.

<sup>12</sup> Baumol, William J. and Robert D. Willig, *Competitive Rail Regulation Rules: Should Price Ceilings Constrain Final Products or Inputs?* Journal of Transport Economics and Policy, Vol. 33, Part 1, pp 43-54 (hereinafter, Baumol and Willig), at 43.

market guidelines for economic regulation and the principles for public interest pricing.”<sup>13</sup> CMP offers guidance for regulators on both the appropriate pricing of final products (i.e., origin-to-destination (“O-D”) rail service) and, of particular importance with regard to this proceeding, the appropriate pricing of components of that service (i.e., the so-called bottleneck inputs to which petitioners request access).

The CMP rules hold that, in markets that do not support competing railroads, and where the serving railroad has “market dominance,” the price ceiling on rail rates for any given O-D service is the “stand-alone cost” that would be incurred by an efficient entrant providing the same O-D service. By constraining rates to this stand-alone level, CMP ensures that shippers pay no more for the O-D service in question than they would pay to support an efficient competitive alternative in the market.<sup>14</sup> It is important to highlight here that CMP limits the final price of the product (i.e., the O-D service) but does not limit the prices of any individual components of the O-D service.<sup>15</sup> Nor does CMP drive prices (of either the final product or any of the component inputs) to marginal or incremental costs.<sup>16</sup> These features of CMP are central to preserving the financial stability of the industry. If railroads were forced to charge only the incremental costs of providing service they would not be able to recover any of the fixed and common costs of their networks. This, in turn, would preclude railroads from maintaining or investing in their networks and would, over time, lead to the degradation of infrastructure and service and jeopardize the viability of the industry.

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<sup>13</sup> *Id.* at 45.

<sup>14</sup> *Id.* at 43-44.

<sup>15</sup> *Id.* at 44.

<sup>16</sup> *Id.*

### C. Pricing of Bottleneck Components

CMP principles are also central to properly regulating the price of so-called bottleneck inputs (i.e., crucial inputs that are owned by a single railroad and for which there are no substitutes). The principles governing bottleneck pricing flow logically from CMP and are referred to as the Efficient Component Pricing Rule.<sup>17</sup> ECP holds that bottleneck inputs must be priced “in a competitively neutral manner” at rates equal to the price the incumbent railroad charges its own customers for use of the input.<sup>18</sup> It is of central importance to recognize that this rule does not drive the price to any measure based on physical costs, but rather allows bottleneck services to generate enough revenue to cover a railroad’s full costs of providing service.<sup>19</sup>

It may be tempting to argue that because revenue from the full O-D move is not permitted to exceed its stand-alone cost, under CMP where there is market dominance, the same stand-alone cost rule should be applied to pricing the components of the move. However, that practice is not economically sound and would lead to financial disaster for the industry. To see why, consider the classic bottleneck route shown in Figure 1, below.

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<sup>17</sup> *Id.* at 44.

<sup>18</sup> *Id.*

<sup>19</sup> ECP can be described as setting the bottleneck price equal to the owner’s total cost, inclusive of the opportunity cost of conferring access on a rival who, with that access, will cause the owner to lose the contribution to fixed and common costs otherwise forthcoming from the traffic the rival diverts.

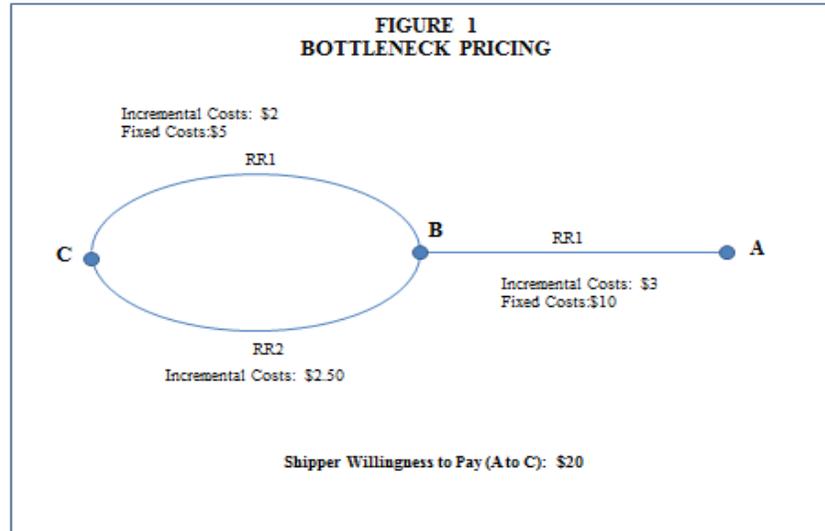


Figure 1 shows a through route originating at A, terminating at C, with a junction at B. The route is served from B to C by both RR1 and RR2, but is served between A and B only by RR1. Shippers between A and C are willing to pay \$20 for rail service and that is what RR1 charges. Figure 1 also identifies the incremental and fixed costs associated with various segments of the route. A simple arithmetic example illustrates the dangers of proposals intended to impose cost-based pricing on bottleneck assets.

Basic economics teaches that competition tends to drive prices toward incremental costs. As applied to our example, this tells us that competition for service between points B and C would push RR1's rates on that segment toward \$2 – its incremental cost. Under such competition, RR1 would be impelled to charge shippers using the B-to-C route rates that cover its incremental costs of \$2.00 but do not exceed its competitor's incremental costs of \$2.50. This pricing pressure leaves little excess revenue to contribute to covering the fixed costs of the B-to-C segment. This is why preserving carriers' ability to price in accordance with demand is so central to the economic health of the industry. To maintain both the A-to-B and B-to-C segments of

the network, RR1 must find sufficient revenue to cover the fixed costs of the B-to-C segment. In this example, that revenue comes from shippers moving over the full A to C route: RR1 charges A-to-C shippers \$20, which covers both the incremental costs of the move and the fixed costs of the needed network infrastructure. Mandated cost-based pricing on bottleneck assets – whether SAC or fully allocated cost-based pricing – would interfere with these market-based dynamics and endanger the economics of the rail industry.

Whether they are the prices charged to shippers by the landlord railroad or whether they are the prices paid by a competitor railroad for access to the network, cost-based bottleneck pricing would completely undermine the landlord railroad's ability to execute differential pricing on shipments from origin-to-destination. To see why this is so, return to Figure 1: under a cost-based pricing scenario the price of the bottleneck segment, A-to-B, would be capped at \$13 (RR1's incremental plus fixed costs). With competition present on the B-to-C route, RR1 would be unable to charge more than \$2.50 for movements from B to C. Shippers on the full A-to-C route, therefore, would pay RR1 no more than \$15.50 for A-to-C service, well below the full costs of providing that service. If RR1 attempted to raise price on A-to-C to \$20 to cover the full cost of A-to-C service, shippers would move to RR2 for the B-to-C segment, at \$2.50, and switch from RR1 at B, paying the mandated, cost-based price of \$13 for the use of the A-to-B service. Under a cost-based bottleneck pricing scenario, RR1 would be systematically unable to recover the full costs of origin-to-destination service, calling into question the long-term viability of that route.

When the components of O-D service are forced by regulatory fiat to be priced

separately (as would be required if access to the bottleneck component was mandated by regulation) prices on competitive segments would fall to incremental cost, meaning rates on the competitive segment provide little contribution to recovering the fixed costs of that segment. Thus, the only viable solution to pricing the bottleneck segment that preserves railroads' ability to recover the total fixed costs of the O-D move *requires* that the price for the bottleneck segment covers the total costs of providing the bottleneck service *and* the contribution needed to cover the fixed costs of the competitive segment. Applied to the industry as a whole, the implications of a regulatory policy that allows bottleneck services to generate only enough revenue to cover the costs associated with the bottleneck access, with no additional recovery of fixed costs, are sobering. Without the ability to cover their full costs, railroads will not be able to attract capital and make long-term investments in infrastructure and equipment, leading to disinvestment, rising prices, and service quality deterioration.

The foregoing example should also allay the Board's worry that shippers have expressed concerns about competition.<sup>20</sup> The example illustrates that the Board's stand-alone cost test adequately protects shippers from paying unreasonable rates on the through movement in situations involving bottleneck service. The SAC test ensures that rates will generate only enough revenue to cover the costs that would be incurred by an efficient new entrant to provide service on the full through route. In the example, RR1's costs are \$20 to provide the A-to-C service. Assuming that an efficient stand-alone railroad would incur the same costs as RR1, any rate for A-to-C service that exceeds \$20 would be reduced to \$20 as a result of a SAC analysis. Changes in the Board's access

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<sup>20</sup> EP 711 Decision at 8-9.

rules are not necessary to ensure that shippers pay reasonable rates because the Board's SAC test already protects shippers from paying more than the full economic costs of the O-D service they receive.

#### **IV. The Board's Pricing Proposals**

With these fundamental principles of economically sound rail rate regulation in mind, we can now turn to an assessment of the two access pricing alternatives the Board highlights in its proposal on reciprocal switching.

The first proposal, Alternative 1, suggests determining access prices "based on a specified set of factors....[which] could include the geography where the proposed switch would occur, the distance between the shipper/receiver and the proposed interchange, the cost of the service, the capacity of the interchange facility, and other case-specific factors."<sup>21</sup> The Board's second proposal, Alternative 2, is based on the agency's SSW Compensation methodology. Under this scenario, "[a] switching fee set by the Board could seek to compensate the incumbent for the expenses incurred to provide the service, plus a fair and reasonable return on capital employed."<sup>22</sup>

In their current form, neither of the alternatives presented by the Board sufficiently protects railroads' ability to recover their full fixed and common costs. The factors enumerated by the Board under Alternative 1 would, in theory, compensate railroads for the full costs of providing the bottleneck service but provide no mechanism for compensating the incumbent for the lost contribution to overall fixed and common costs. The situation under Alternative 2 is similar. The Board proposes establishing a

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<sup>21</sup> EP 711 Decision at 25.

<sup>22</sup> EP 711 Decision at 25-26.

rental fee that would cover the costs actually incurred in providing the bottleneck service, plus a return on the bottleneck capital, but has no provision for compensating the incumbent for lost contribution.

Both of the Board's alternatives seem to be embracing the mistaken idea that it is appropriate to limit the price of bottleneck services to some measure of replacement costs (including some "reasonable" return) for the bottleneck asset. As shown by the example in Figure 1, pricing bottleneck components in this way is, in fact, a recipe for disaster for railroads and shippers alike. Consider the long-term implications of a regulatory policy designed to compensate railroads *only* for the costs (inclusive of a reasonable return) of providing bottleneck services. With vigorous competition on the non-bottleneck portion of the move, prices on that portion will fall to incremental costs, meaning that recovery of all the fixed costs must come from revenues generated on the bottleneck portion. If access price regulation precludes revenues on the bottleneck services from exceeding the costs associated with the bottleneck asset, railroads will have no mechanism for recouping the fixed and common costs of the infrastructure needed for the move, and the on-going viability of the route will be compromised. As this scheme propagates to other bottleneck assets across the network, the consequences can be severe: without adequate revenue to recover infrastructure costs, railroads will not be able to attract capital. Without sufficient capital, investment will stall, railroads won't be able to maintain current assets or improve their network, efficiency will suffer, and variable costs – and consequently rates – will increase. Increasing rates will divert some traffic from the railroads, leaving the network costs to be borne by a yet smaller traffic base, and the end result of the down spiral would eventually be a smaller rail network with lower quality

service, to the harm of shippers as well as the railroads, and to the harm of the general economy.

In specifically seeking comment on whether access pricing methods should include evaluation of carriers' lost contribution (under Alternative 1) and soliciting suggestions for modifications to Alternative 2 to ensure "fair" access fees, the Board acknowledges the complicated issues inherent in developing an appropriate access pricing methodology. The Board's rate regulation has been guided by CMP for thirty years and should continue to be guided by those principles in developing access pricing methods. Those principles hold that economically coherent regulation of bottleneck prices cannot be limited to cost-based approaches. Rather, access prices *must* include a mechanism that compensates the incumbent railroad for its full lost contribution and that preserves the railroads' ability to recover fixed costs. ECP provides economic principles that accomplish these aims where regulation is needed to redress anticompetitive abuse of access.

## **V. Conclusions**

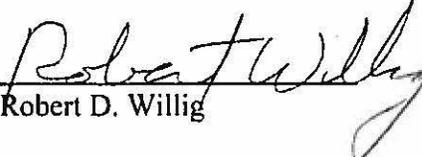
The Board's proposal to move away from the current regulatory approach in favor of advocating regulatory intervention in situations where there is no demonstrable competitive abuse is ill-advised. Preserving the abusive conduct standard is essential to the industry and is necessary for access-related regulation to serve the public interest. The Board has offered no persuasive justification for change.

In situations where access remedies are appropriate, the method for pricing that access must be considered very carefully. It is crucial for the Board to price access in an economically coherent manner that preserves railroads' differential pricing ability and is

in accord with the principles of Constrained Market Pricing and Efficient Component Pricing. The current proposals offered by the Board do not meet this standard and should not be implemented unless modifications are made. To do otherwise threatens the industry's long-term financial viability.

**VERIFICATION**

I, Robert D. Willig, declare under penalty of perjury that my Verified Statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

  
Robert D. Willig

Executed on this 25 day of October 2016.

February 21, 2016

## Curriculum Vitae

**Name:** Robert D. Willig

**Address:** 220 Ridgeview Road, Princeton, New Jersey 08540

**Birth:** 1/16/47; Brooklyn, New York

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**Education:** Ph.D. Economics, Stanford University, 1973  
Dissertation: Welfare Analysis of Policies  
Affecting Prices and Products.  
Advisor: James Rosse

M.S. Operations Research, Stanford University, 1968.

A.B. Mathematics, Harvard University, 1967.

### Professional Positions:

Professor of Economics and Public Affairs, Princeton University, 1978-.

Principal External Advisor, Infrastructure Program, Inter-American Development Bank, 6/97-8/98.

Deputy Assistant Attorney General, U.S. Department of Justice, 1989-1991.

Supervisor, Economics Research Department, Bell Laboratories, 1977-1978.

Visiting Lecturer (with rank of Associate Professor), Department of Economics and Woodrow Wilson School, Princeton University, 1977-78 (part time).

Economics Research Department, Bell Laboratories, 1973-77.

Lecturer, Economics Department, Stanford University, 1971-73.

### Other Professional Activities

ABA Section of Antitrust Law Economics Task Force, 2010-2012

Advisory Committee, Compass Lexecon 2010 -

OECD Advisory Council for Mexican Economic Reform, 2008 - 2009

Senior Consultant, Compass Lexecon, 2008 -

Director, Competition Policy Associates, Inc., 2003-2005

Advisory Bd., Electronic Journal of I.O. and Regulation Abstracts, 1996-2008.

Advisory Board, Journal of Network Industries, 2004-2010.

Visiting Faculty Member (occasional), International Program on Privatization and Regulatory Reform, Harvard Institute for International Development, 1996-2000.

Member, National Research Council Highway Cost Allocation Study Review Committee, 1995-98.

Member, Defense Science Board Task Force on the Antitrust Aspects of Defense Industry Consolidation, 1993-94.

Editorial Board, Utilities Policy, 1990-2001.

Leif Johanson Lecturer, University of Oslo, November 1988.

Member, New Jersey Governor's Task Force on Market-Based Pricing of Electricity, 1987-89.

Co-editor, Handbook of Industrial Organization, 1984-89.

Associate Editor, Journal of Industrial Economics, 1984-89.

Director, Consultants in Industry Economics, Inc., 1983-89, 1991-94.

Fellow, Econometric Society, 1981-.

Organizing Committee, Carnegie-Mellon-N.S.F. Conference on Regulation, 1985.

Board of Editors, American Economic Review, 1980-83.

Nominating Committee, American Economic Association, 1980-1981.

Research Advisory Committee, American Enterprise Institute, 1980-1986.

Editorial Board, M.I.T. Press Series on Government Regulation of Economic Activity, 1979-93.

Program Committee, 1980 World Congress of the Econometric Society.

Program Committee, Econometric Society, 1979, 1981, 1985.

Organizer, American Economic Association Meetings: 1980, 1982.

American Bar Association Section 7 Clayton Act Committee, 1981.

Principal Investigator, NSF grant SOC79-0327, 1979-80; NSF grant 285-6041, 1980-82; NSF grant SES-8038866, 1983-84, 1985-86.

Aspen Task Force on the Future of the Postal Service, 1978-80.

Organizing Committee of Sixth Annual Telecommunications Policy Research Conference, 1977-78.

Visiting Fellow, University of Warwick, July 1977.

Institute for Mathematical Studies in the Social Sciences, Stanford University, 1975.

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"Herfindahl Concentration Index," (with J. Ordover), Memorandum for ABA Section 7 Clayton Act Committee, Project on Revising the Merger Guidelines, March 1981.

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"The Continuing Need for and National Benefits Derived from the REA Telephone Loan Programs - An Economic Assessment," 1981.

"The Economics of Equipment Leasing: Costing and Pricing," 1980.

"Rail Deregulation and the Financial Problems of the U.S. Railroad Industry," (with W.J. Baumol), report prepared under contract to Conrail, 1979.

"Price Indexes and Intertemporal Welfare," Bell Laboratories Economics Discussion Paper, 1974.

"Consumer's Surplus: A Rigorous Cookbook," Technical Report #98, Economics Series, I.M.S.S.S., Stanford University, 1973.

"An Economic-Demographic Model of the Housing Sector," (with B. Hickman and M. Hinz), Center for Research in Economic Growth, Stanford University, 1973.

### **Invited Conference Presentations:**

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|--|------|
| George Mason Law Review Annual Antitrust Symposium: Antitrust in an Interconnected World<br>"GUPPI and the Safe Harbor"  | 2016 |
| Competition Law & Policy Institute of New Zealand Annual Workshop<br>"Merger Analysis Keynote"   | 2015 |
| Economic Studies at Brookings: Railroads, Policy and the Economy<br>"The Industry Perspective"   | 2015 |
| Georgetown University McDonough School of Business Railroad Economics Symposium<br>"The Role of Economic Theory in the 'Deregulated' Rail Industry"  | 2015 |
| Brazilian School of Economics and Finance (FGV EPGE) Seminario<br>"Public Interest Regulation: Lessons from Railroads"   | 2015 |
| NYU School of Law Conference on the Fiftieth Anniversary of United States v. Philadelphia<br>National Bank: The Past, Present and Future of Merger Law<br>"Discussion with Agency Economists"                  | 2013 |
| Brookings Institution Conference on The Economics of the Airline Industry<br>"Airline Network Effects and Consumer Welfare"  | 2012 |
| AGEP Public Policy Conference on Pharmaceutical Industry Economics, Regulation and Legal<br>Issues; Law and Economics Center, George Mason University School of Law<br>"Pharmaceutical Brand-Generic Disputes" | 2012 |
| U.S.-EU Alliance Study Peer Review Conferences<br>"Review of Cooperative Agreements in Transatlantic Airline Markets"  | 2012 |

"The Research Agenda Ahead"	2012
Antitrust in the High Tech Sector Conference "Developments in Merger Enforcement"	2012
Georgetown Center for Business and Public Policy, Conference on the Evolution of Regulation "Reflections on Regulation"	2011
Antitrust Forum, New York State Bar Association "Upward Price Pressure, Market Definition and Supply Mobility"	2011
American Bar Association, Antitrust Section, Annual Convention "The New Merger Guidelines' Analytic Highlights"	2011
OECD and World Bank Conference on Challenges and Policies for Promoting Inclusive Growth "Inclusive Growth From Competition and Innovation"	2011
Villanova School of Business Executive MBA Conference "Airline Network Effects, Competition and Consumer Welfare"	2011
NYU School of Law Conference on Critical Directions in Antitrust "Unilateral Competitive Effects"	2010
Conf. on the State of European Competition Law and Enforcement in a Transatlantic Context "Recent Developments in Merger Control"	2010
Center on Regulation and Competition, Universidad de Chile Law School "Economic Regulation and the Limits of Antitrust Law"	2010
Center on Regulation and Competition, Universidad de Chile Law School "Merger Policy and Guidelines Revision"	2010
Faculty of Economics, Universidad de Chile "Network Effects in Airlines Markets"	2010
Georgetown Law Global Antitrust Enforcement Symposium "New US Merger Guidelines"	2010
FTI London Financial Services Conference "Competition and Regulatory Reform"	2010
NY State Bar Association Annual Antitrust Conference "New Media Competition Policy"	2009
Antitrust Law Spring Meeting of the ABA	

“Antitrust and the Failing Economy Defense”	2009
Georgetown Law Global Antitrust Enforcement Symposium “Mergers: New Enforcement Attitudes in a Time of Economic Challenge”	2009
Phoenix Center US Telecoms Symposium “Assessment of Competition in the Wireless Industry”	2009
FTC and DOJ Horizontal Merger Guidelines Workshop “Direct Evidence is No Magic Bullet”	2009
Northwestern Law Research Symposium: Antitrust Economics and Competition Policy "Discussion of Antitrust Evaluation of Horizontal Mergers"	2008
Inside Counsel Super-Conference "Navigating Mixed Signals under Section 2 of the Sherman Act"	2008
Federal Trade Commission Workshop on Unilateral Effects in Mergers "Best Evidence and Market Definition"	2008
European Policy Forum, Rules for Growth: Telecommunications Regulatory Reform “What Kind of Regulation For Business Services?”	2007
Japanese Competition Policy Research Center, Symposium on M&A and Competition Policy “Merger Policy Going Forward With Economics and the Economy”	2007
Federal Trade Commission and Department of Justice Section 2 Hearings “Section 2 Policy and Economic Analytic Methodologies”	2007
Pennsylvania Bar Institute, Antitrust Law Committee CLE “The Economics of Resale Price Maintenance and Class Certification”	2007
Pennsylvania Bar Institute, Antitrust Law Committee CLE “Antitrust Class Certification – An Economist’s Perspective”	2007
Fordham Competition Law Institute, International Competition Economics Training Seminar “Monopolization and Abuse of Dominance”	2007
Canadian Bar Association Annual Fall Conference on Competition Law “Economic Tools for the Competition Lawyer”	2007
Conference on Managing Litigation and Business Risk in Multi-jurisdiction Antitrust Matters “Economic Analysis in Multi-jurisdictional Merger Control”	2007
World Bank Conference on Structuring Regulatory Frameworks for Dynamic and Competitive	

South Eastern European Markets “The Roles of Government Regulation in a Dynamic Economy”	2006
Department of Justice/Federal Trade Commission Section 2 Hearings “(Allegedly) Monopolizing Tying Via Product Innovation”	2006
Fordham Competition Law Institute, Competition Law Seminar “Monopolization and Abuse of Dominance”	2006
Practicing Law Institute on Intellectual Property Antitrust “Relevant Markets for Intellectual Property Antitrust”	2006
PLI Annual Antitrust Law Institute “Cutting Edge Issues in Economics”	2006
World Bank’s Knowledge Economy Forum V “Innovation, Growth and Competition”	2006
Charles University Seminar Series “The Dangers of Over-Ambitious Antitrust Regulation”	2006
NY State Bar Association Antitrust Law Section Annual Meeting “Efficient Integration or Illegal Monopolization?”	2006
World Bank Seminar “The Dangers of Over-Ambitious Regulation”	2005
ABA Section of Antitrust Law 2005 Fall Forum “Is There a Gap Between the Guidelines and Agency Practice?”	2005
Hearing of Antitrust Modernization Commission “Assessment of U.S. Merger Enforcement Policy”	2005
LEAR Conference on Advances in the Economics of Competition Law “Exclusionary Pricing Practices”	2005
Annual Antitrust Law Institute “Cutting Edge Issues in Economics”	2005
PRIOR Symposium on States and Stem Cells “Assessing the Economics of State Stem Cell Programs”	2005
ABA Section of Antitrust Law – AALS Scholars Showcase “Distinguishing Anticompetitive Conduct”	2005
Allied Social Science Associations National Convention	

“Antitrust in the New Economy”	2005
ABA Section of Antitrust Law 2004 Fall Forum “Advances in Economic Analysis of Antitrust”	2004
Phoenix Center State Regulator Retreat “Regulatory Policy for the Telecommunications Revolution”	2004
OECD Competition Committee “Use of Economic Evidence in Merger Control”	2004
Justice Department/Federal Trade Commission Joint Workshop “Merger Enforcement”	2004
Phoenix Center Annual U.S. Telecoms Symposium “Incumbent Market Power”	2003
Center for Economic Policy Studies Symposium on Troubled Industries “What Role for Government in Telecommunications?”	2003
Princeton Workshop on Price Risk and the Future of the Electric Markets “The Structure of the Electricity Markets”	2003
2003 Antitrust Conference “International Competition Policy and Trade Policy”	2003
International Industrial Organization Conference “Intellectual Property System Reform”	2003
ABA Section of Antitrust Law 2002 Fall Forum “Competition, Regulation and Pharmaceuticals”	2002

Fordham Conference on International Antitrust Law and Policy “Substantive Standards for Mergers and the Role of Efficiencies”	2002
Department of Justice Telecom Workshop “Stimulating Investment and the Telecommunications Act of 1996”	2002
Department of Commerce Conference on the State of the Telecom Sector “Stimulating Investment and the Telecommunications Act of 1996”	2002
Law and Public Affairs Conference on the Future of Internet Regulation “Open Access and Competition Policy Principles”	2002
Center for Economic Policy Studies Symposium on Energy Policy “The Future of Power Supply”	2002
The Conference Board: Antitrust Issues in Today’s Economy “The 1982 Merger Guidelines at 20”	2002
Federal Energy Regulatory Commission Workshop “Effective Deregulation of Residential Electric Service”	2001
IPEA International Seminar on Regulation and Competition “Electricity Markets: Deregulation of Residential Service”	2001
“Lessons for Brazil from Abroad”	2001
ABA Antitrust Law Section Task Force Conference “Time, Change, and Materiality for Monopolization Analyses”	2001
Harvard University Conference on American Economic Policy in the 1990s “Comments on Antitrust Policy in the Clinton Administration”	2001
Tel-Aviv Workshop on Industrial Organization and Anti-Trust “The Risk of Contagion from Multimarket Contact”	2001
2001 Antitrust Conference “Collusion Cases: Cutting Edge or Over the Edge?”	2001
“Dys-regulation of California Electricity”	2001
FTC Public Workshop on Competition Policy for E-Commerce “Necessary Conditions for Cooperation to be Problematic”	2001
HIID International Workshop on Infrastructure Policy “Infrastructure Privatization and Regulation”	2000
Villa Mondragone International Economic Seminar “Competition Policy for Network and Internet Markets”	2000

New Developments in Railroad Economics: Infrastructure Investment and Access Policies “Railroad Access, Regulation, and Market Structure”	2000
The Multilateral Trading System at the Millennium “Efficiency Gains From Further Liberalization”	2000
Singapore – World Bank Symposium on Competition Law and Policy “Policy Towards Cartels and Collusion”	2000
CEPS: Is It a New World?: Economic Surprises of the Last Decade “The Internet and E-Commerce”	2000
Cutting Edge Antitrust: Issues and Enforcement Policies “The Direction of Antitrust Entering the New Millennium”	2000
The Conference Board: Antitrust Issues in Today’s Economy “Antitrust Analysis of Industries With Network Effects”	1999
CEPS: New Directions in Antitrust “Antitrust in a High-Tech World”	1999
World Bank Meeting on Competition and Regulatory Policies for Development “Economic Principles to Guide Post-Privatization Governance”	1999
1999 Antitrust Conference “Antitrust and the Pace of Technological Development”	1999
“Restructuring the Electric Utility Industry”	1999
HIID International Workshop on Privatization, Regulatory Reform and Corporate Governance “Privatization and Post-Privatization Regulation of Natural Monopolies”	1999
The Federalist Society: Telecommunications Deregulation: Promises Made, Potential Lost? “Grading the Regulators”	1999
Inter-American Development Bank: Second Generation Issues In the Reform Of Public Services “Post-Privatization Governance”	1999
“Issues Surrounding Access Arrangements”	1999
Economic Development Institute of the World Bank -- Program on Competition Policy “Policy Towards Horizontal Mergers”	1998
Twenty-fifth Anniversary Seminar for the Economic Analysis Group of the Department of	

Justice		
	“Market Definition in Antitrust Analysis”	1998
HIID International Workshop on Privatization, Regulatory Reform and Corporate Governance		
	“Infrastructure Architecture and Regulation: Railroads”	1998
EU Committee Competition Conference – Market Power		
	“US/EC Perspective on Market Definition”	1998
Federal Trade Commission Roundtable		
	“Antitrust Policy for Joint Ventures”	1998
1998 Antitrust Conference		
	“Communications Mergers”	1998
The Progress and Freedom Foundation Conference on Competition, Convergence, and the Microsoft Monopoly		
	Access and Bundling in High-Technology Markets	1998
FTC Program on The Effective Integration of Economic Analysis into Antitrust Litigation		
	The Role of Economic Evidence and Testimony	1997
FTC Hearings on Classical Market Power in Joint Ventures		
	Microeconomic Analysis and Guideline	1997
World Bank Economists --Week IV Keynote		
	Making Markets More Effective With Competition Policy	1997
Brookings Trade Policy Forum		
	Competition Policy and Antidumping: The Economic Effects	1997
University of Malaya and Harvard University Conference on The Impact of Globalisation and Privatisation on Malaysia and Asia in the Year 2020		
	Microeconomics, Privatization, and Vertical Integration	1997
ABA Section of Antitrust Law Conference on The Telecommunications Industry		
	Current Economic Issues in Telecommunications	1997
Antitrust 1998: The Annual Briefing		
	The Re-Emergence of Distribution Issues	1997
Inter-American Development Bank Conference on Private Investment, Infrastructure Reform and Governance in Latin America & the Caribbean		
	Economic Principles to Guide Post-Privatization Governance	1997

Harvard Forum on Regulatory Reform and Privatization of Telecommunications in the Middle East	
Privatization: Methods and Pricing Issues	1997
American Enterprise Institute for Public Policy Research Conference	
Discussion of Local Competition and Legal Culture	1997
Harvard Program on Global Reform and Privatization of Public Enterprises	
“Infrastructure Privatization and Regulation: Freight”	1997
World Bank Competition Policy Workshop	
“Competition Policy for Entrepreneurship and Growth”	1997
Eastern Economics Association Paul Samuelson Lecture	
“Bottleneck Access in Regulation and Competition Policy”	1997
ABA Annual Meeting, Section of Antitrust Law	
“Antitrust in the 21st Century: The Efficiencies Guidelines”	1997
Peruvian Ministry of Energy and Mines Conference on Regulation of Public Utilities	
“Regulation: Theoretical Context and Advantages vs. Disadvantages”	1997
The FCC: New Priorities and Future Directions	
“Competition in the Telecommunications Industry”	1997
American Enterprise Institute Studies in Telecommunications Deregulation	
“The Scope of Competition in Telecommunications”	1996
George Mason Law Review Symposium on Antitrust in the Information Revolution	
“Introduction to the Economic Theory of Antitrust and Information”	1996
Korean Telecommunications Public Lecture	
“Market Opening and Fair Competition”	1996
Korea Telecommunications Forum	
“Desirable Interconnection Policy in a Competitive Market”	1996
European Association for Research in Industrial Economics Annual Conference	
“Bottleneck Access: Regulation and Competition Policy”	1996
Harvard Program on Global Reform and Privatization of Public Enterprises	
“Railroad and Other Infrastructure Privatization”	1996

FCC Forum on Antitrust and Economic Issues Involved with InterLATA Entry “The Scope of Telecommunications Competition”	1996
Citizens for a Sound Economy Policy Watch on Telecommunications Interconnection “The Economics of Interconnection”	1996
World Bank Seminar on Experiences with Corporatization “Strategic Directions of Privatization”	1996
FCC Economic Forum on the Economics of Interconnection Lessons from Other Industries	1996
ABA Annual Meeting, Section of Antitrust Law The Integration, Disintegration, and Reintegration of the Entertainment Industry	1996
Conference Board: 1996 Antitrust Conference How Economics Influences Antitrust and Vice Versa	1996
Antitrust 1996: A Special Briefing Joint Ventures and Strategic Alliances	1996
New York State Bar Association Section of Antitrust Law Winter Meeting Commentary on Horizontal Effects Issues	1996
FTC Hearings on the Changing Nature of Competition in a Global and Innovation-Driven Age Vertical Issues for Networks and Standards	1995
Wharton Seminar on Applied Microeconomics Access Policies with Imperfect Regulation	1995
Antitrust 1996, Washington D.C. Assessing Joint Ventures for Diminution of Competition	1995
ABA Annual Meeting, Section of Antitrust Law Refusals to Deal -- Economic Tests for Competitive Harm	1995
FTC Seminar on Antitrust Enforcement Analysis Diagnosing Collusion Possibilities	1995
Philadelphia Bar Education Center: Antitrust Fundamentals Antitrust--The Underlying Economics	1995
Vanderbilt University Conference on Financial Markets	

Why Do Christie and Schultz Infer Collusion From Their Data?	1995
ABA Section of Antitrust Law Chair=s Showcase Program Discussion of Telecommunications Competition Policy	1995
Conference Board: 1995 Antitrust Conference Analysis of Mergers and Joint Ventures	1995
ABA Conference on The New Antitrust: Policy of the '90s Antitrust on the Super Highways/Super Airways	1994
ITC Hearings on The Economic Effects of Outstanding Title VII Orders "The Economic Impacts of Antidumping Policies"	1994
OECD Working Conference on Trade and Competition Policy "Empirical Evidence on The Nature of Anti-dumping Actions"	1994
Antitrust 1995, Washington D.C. "Rigorous Antitrust Standards for Distribution Arrangements"	1994
ABA -- Georgetown Law Center: Post Chicago-Economics: New Theories - New Cases? "Economic Foundations for Vertical Merger Guidelines"	1994
Conference Board: Antitrust Issues in Today's Economy "New Democrats, Old Agencies: Competition Law and Policy"	1994
Federal Reserve Board Distinguished Economist Series "Regulated Private Enterprise Versus Public Enterprise"	1994
Institut d'Etudes Politiques de Paris "Lectures on Competition Policy and Privatization"	1993
Canadian Bureau of Competition Policy Academic Seminar Series, Toronto. "Public Versus Regulated Private Enterprise"	1993
CEPS Symposium on The Clinton Administration: A Preliminary Report Card "Policy Towards Business"	1993
Columbia Institute for Tele-Information Conference on Competition in Network Industries, New York, NY "Discussion of Deregulation of Networks: What Has Worked and What Hasn't"	1993
World Bank Annual Conference on Development Economics "Public Versus Regulated Private Enterprise"	1993

Center for Public Utilities Conference on Current Issues Challenging the Regulatory Process	
"The Economics of Current Issues in Telecommunications Regulation"	1992
"The Role of Markets in Presently Regulated Industries"	1992
The Conference Board's Conference on Antitrust Issues in Today's Economy, New York, NY	
"Antitrust in the Global Economy"	1992
"Monopoly Issues for the '90s"	1993
Columbia University Seminar on Applied Economic Theory, New York, NY	
"Economic Rationales for the Scope of Privatization"	1992
Howrey & Simon Conference on Antitrust Developments, Washington, DC	
"Competitive Effects of Concern in the Merger Guidelines"	1992
Arnold & Porter Colloquium on Merger Enforcement, Washington, DC	
"The Economic Foundations of the Merger Guidelines"	1992
American Bar Association, Section on Antitrust Law Leadership Council Conference, Monterey, CA	
"Applying the 1992 Merger Guidelines"	1992
OECD Competition Policy Meeting, Paris, France	
"The Economic Impacts of Antidumping Policy"	1992
Center for Public Choice Lecture Series, George Mason University Arlington, VA	
"The Economic Impacts of Antidumping Policy"	1992
Brookings Institution Microeconomics Panel, Washington, DC,	
"Discussion of the Evolution of Industry Structure"	1992
AT&T Conference on Antitrust Essentials	
"Antitrust Standards for Mergers and Joint Ventures"	1991
ABA Institute on The Cutting Edge of Antitrust: Market Power	
"Assessing and Proving Market Power: Barriers to Entry"	1991
Second Annual Workshop of the Competition Law and Policy Institute of New Zealand	
"Merger Analysis, Industrial Organization Theory, and Merger Guidelines"	1991
"Exclusive Dealing and the <u>Fisher &amp; Paykel</u> Case"	1991
Special Seminar of the New Zealand Treasury	
"Strategic Behavior, Antitrust, and The Regulation of Natural Monopoly"	1991

Public Seminar of the Australian Trade Practices Commission "Antitrust Issues of the 1990's"	1991
National Association of Attorneys General Antitrust Seminar "Antitrust Economics"	1991
District of Columbia Bar's 1991 Annual Convention "Administrative and Judicial Trends in Federal Antitrust Enforcement"	1991
ABA Spring Meeting "Antitrust Lessons From the Airline Industry"	1991
Conference on The Transition to a Market Economy - Institutional Aspects "Anti-Monopoly Policies and Institutions"	1991
Conference Board's Thirtieth Antitrust Conference "Antitrust Issues in Today's Economy"	1991
American Association for the Advancement of Science Annual Meeting "Methodologies for Economic Analysis of Mergers"	1991
General Seminar, Johns Hopkins University "Economic Rationales for the Scope of Privatization"	1991
Capitol Economics Speakers Series "Economics of Merger Guidelines"	1991
CRA Conference on Antitrust Issues in Regulated Industries "Enforcement Priorities and Economic Principles"	1990
Pepper Hamilton & Scheetz Anniversary Colloquium "New Developments in Antitrust Economics"	1990
PLI Program on Federal Antitrust Enforcement in the 90's "The Antitrust Agenda of the 90's"	1990
FTC Distinguished Speakers Seminar "The Evolving Merger Guidelines"	1990
The World Bank Speakers Series "The Role of Antitrust Policy in an Open Economy"	1990
Seminar of the Secretary of Commerce and Industrial Development of Mexico "Transitions to a Market Economy"	1990

Southern Economics Association	
"Entry in Antitrust Analysis of Mergers"	1990
"Discussion of Strategic Investment and Timing of Entry"	1990
American Enterprise Institute Conference on Policy Approaches to the Deregulation of Network Industries	
"Discussion of Network Problems and Solutions"	1990
American Enterprise Institute Conference on Innovation, Intellectual Property, and World Competition	
"Law and Economics Framework for Analysis"	1990
Banco Nacional de Desenvolvimento Economico Social Lecture	
"Competition Policy: Harnessing Private Interests for the Public Interest"	1990
Western Economics Association Annual Meetings	
"New Directions in Antitrust from a New Administration"	1990
"New Directions in Merger Enforcement: The View from Washington"	1990
Woodrow Wilson School Alumni Colloquium	
"Microeconomic Policy Analysis and Antitrust--Washington 1990"	1990
Arnold & Porter Lecture Series	
"Advocating Competition"	1991
"Antitrust Enforcement"	1990
ABA Antitrust Section Convention	
"Recent Developments in Market Definition and Merger Analysis"	1990
Federal Bar Association	
"Joint Production Legislation: Competitive Necessity or Cartel Shield?"	1990
Pew Charitable Trusts Conference	
"Economics and National Security"	1990
ABA Antitrust Section Midwinter Council Meeting	
"Fine-tuning the Merger Guidelines"	1990
"The State of the Antitrust Division"	1991
International Telecommunications Society Conference	
"Discussion of the Impact of Telecommunications in the UK"	1989
The Economists of New Jersey Conference	
"Recent Perspectives on Regulation"	1989

Conference on Current Issues Challenging the Regulatory Process	
"Innovative Pricing and Regulatory Reform"	1989
"Competitive Wheeling"	1989
Conference Board: Antitrust Issues in Today's Economy	
"Foreign Trade Issues and Antitrust"	1989
McKinsey & Co. Mini-MBA Conference	
"Economic Analysis of Pricing, Costing, and Strategic Business Behavior"	1989
	1994
Olin Conference on Regulatory Mechanism Design	
"Revolutions in Regulatory Theory and Practice: Exploring The Gap"	1989
University of Dundee Conference on Industrial Organization and Strategic Behavior	
"Mergers in Differentiated Product Industries"	1988
Leif Johanson Lectures at the University of Oslo	
"Normative Issues in Industrial Organization"	1988
Mergers and Competitiveness: Spain Facing the EEC	
"Merger Policy"	1988
"R&D Joint Ventures"	1988
New Dimensions in Pricing Electricity	
"Competitive Pricing and Regulatory Reform"	1988
Program for Integrating Economics and National Security: Second Annual Colloquium	
"Arming Decisions Under Asymmetric Information"	1988
European Association for Research in Industrial Economics	
"U.S. Railroad Deregulation and the Public Interest"	1987
"Economic Rationales for the Scope of Privatization"	1989
"Discussion of Licensing of Innovations"	1990
Annenberg Conference on Rate of Return Regulation in the Presence of Rapid Technical Change	
"Discussion of Regulatory Mechanism Design in the Presence of Research, Innovation, and Spillover Effects"	1987
Special Brookings Papers Meeting	
"Discussion of Empirical Approaches to Strategic Behavior"	1987
"New Merger Guidelines"	1990
Deregulation or Regulation for Telecommunications in the 1990's	
"How Effective are State and Federal Regulations?"	1987

Conference Board Roundtable on Antitrust	
"Research and Production Joint Ventures"	1990
"Intellectual Property and Antitrust"	1987
Current Issues in Telephone Regulation	
"Economic Approaches to Market Dominance: Applicability of Contestable Markets"	1987
Harvard Business School Forum on Telecommunications	
"Regulation of Information Services"	1987
The Fowler Challenge: Deregulation and Competition in The Local Telecommunications Market	
"Why Reinvent the Wheel?"	1986
World Bank Seminar on Frontiers of Economics	
"What Every Economist Should Know About Contestable Markets"	1986
Bell Communications Research Conference on Regulation and Information	
"Fuzzy Regulatory Rules"	1986
Karl Eller Center Forum on Telecommunications	
"The Changing Economic Environment in Telecommunications: Technological Change and Deregulation"	1986
Railroad Accounting Principles Board Colloquium	
"Contestable Market Theory and ICC Regulation"	1986
Canadian Embassy Conference on Current Issues in Canadian -- U.S. Trade and Investment	
"Regulatory Revolution in the Infrastructure Industries"	1985
Eagleton Institute Conference on Telecommunications in Transition	
"Industry in Transition: Economic and Public Policy Overview"	1985
Brown University Citicorp Lecture	
"Logic of Regulation and Deregulation"	1985
Columbia University Communications Research Forum	
"Long Distance Competition Policy"	1985
American Enterprise Institute Public Policy Week	
"The Political Economy of Regulatory Reform"	1984
MIT Communications Forum	
"Deregulation of AT&T Communications"	1984

Bureau of Census Longitudinal Establishment Data File and Diversification Study Conference "Potential Uses of The File"	1984
Federal Bar Association Symposium on Joint Ventures "The Economics of Joint Venture Assessment"	1984
Hoover Institute Conference on Antitrust "Antitrust for High-Technology Industries"	1984
NSF Workshop on Predation and Industrial Targeting "Current Economic Analysis of Predatory Practices"	1983
The Institute for Study of Regulation Symposium: Pricing Electric, Gas, and Telecommunications Services Today and for the Future "Contestability As A Guide for Regulation and Deregulation"	1984
University of Pennsylvania Economics Day Symposium "Contestability and Competition: Guides for Regulation and Deregulation"	1984
Pinhas Sapir Conference on Economic Policy in Theory and Practice "Corporate Governance and Market Structure"	1984
Centre of Planning and Economic Research of Greece "Issues About Industrial Deregulation"	1984
"Contestability: New Research Agenda"	1984
Hebrew and Tel Aviv Universities Conference on Public Economics "Social Welfare Dominance Extended and Applied to Excise Taxation"	1983
NBER Conference on Industrial Organization and International Trade "Perspectives on Horizontal Mergers in World Markets"	1983
Workshop on Local Access: Strategies for Public Policy "Market Structure and Government Intervention in Access Markets"	1982
NBER Conference on Strategic Behavior and International Trade "Industrial Strategy with Committed Firms: Discussion"	1982
Columbia University Graduate School of Business, Conference on Regulation and New Telecommunication Networks "Local Pricing in a Competitive Environment"	1982
International Economic Association Roundtable Conference on New Developments in the Theory of Market Structure	

"Theory of Contestability"	1982
"Product Dev., Investment, and the Evolution of Market Structures"	1982
N.Y.U. Conference on Competition and World Markets: Law and Economics "Competition and Trade Policy--International Predation"	1982
CNRS-ISPE-NBER Conference on the Taxation of Capital "Welfare Effects of Investment Under Imperfect Competition"	1982
Internationales Institut für Management und Verwaltung Regulation Conference "Welfare, Regulatory Boundaries, and the Sustainability of Oligopolies"	1981
NBER-Kellogg Graduate School of Management Conference on the Econometrics of Market Models with Imperfect Competition "Discussion of Measurement of Monopoly Behavior: An Application to the Cigarette Industry"	1981
The Peterkin Lecture at Rice University "Deregulation: Ideology or Logic?"	1981
FTC Seminar on Antitrust Analysis "Viewpoints on Horizontal Mergers"	1982
"Predation as a Tactical Inducement for Exit"	1980
NBER Conference on Industrial Organization and Public Policy "An Economic Definition of Predation"	1980
The Center for Advanced Studies in Managerial Economics Conference on The Economics of Telecommunication "Pricing Local Service as an Input"	1980
Aspen Institute Conference on the Future of the Postal Service "Welfare Economics of Postal Pricing"	1979
Department of Justice Antitrust Seminar "The Industry Performance Gradient Index"	1979
Eastern Economic Association Convention "The Social Performance of Deregulated Markets for Telecom Services"	1979
Industry Workshop Association Convention "Customer Equity and Local Measured Service"	1979
Symposium on Ratemaking Problems of Regulated Industries "Pricing Decisions and the Regulatory Process"	1979

Woodrow Wilson School Alumni Conference "The Push for Deregulation"	1979
NBER Conference on Industrial Organization "Intertemporal Sustainability"	1979
World Congress of the Econometric Society "Theoretical Industrial Organization"	1980
Institute of Public Utilities Conference on Current Issues in Public Utilities Regulation "Network Access Pricing"	1978
ALI-ABA Conference on the Economics of Antitrust "Predatoriness and Discriminatory Pricing"	1978
AEI Conference on Postal Service Issues "What Can Markets Control?"	1978
University of Virginia Conference on the Economics of Regulation "Public Interest Pricing"	1978
DRI Utility Conference "Marginal Cost Pricing in the Utility Industry: Impact and Analysis"	1978
International Meeting of the Institute of Management Sciences "The Envelope Theorem"	1977
University of Warwick Workshop on Oligopoly "Industry Performance Gradient Indexes"	1977
North American Econometric Society Convention "Intertemporal Sustainability"	1979
"Social Welfare Dominance"	1978
"Economies of Scope, DAIC, and Markets with Joint Production"	1977
Telecommunications Policy Research Conference "Transition to Competitive Markets"	1986
"InterLATA Capacity Growth, Capped NTS Charges and Long Distance Competition"	1985
"Market Power in The Telecommunications Industry"	1984
"FCC Policy on Local Access Pricing"	1983
"Do We Need a Regulatory Safety Net in Telecommunications?"	1982
"Anticompetitive Vertical Conduct"	1981
"Electronic Mail and Postal Pricing"	1980
"Monopoly, Competition and Efficiency": Chairman	1979

"A Common Carrier Research Agenda"	1978
"Empirical Views of Ramsey Optimal Telephone Pricing"	1977
"Recent Research on Regulated Market Structure"	1976
"Some General Equilibrium Views of Optimal Pricing"	1975
National Bureau of Economic Research Conference on Theoretical Industrial Organization	
"Compensating Variation as a Measure of Welfare Change"	1976
Conference on Pricing in Regulated Industries: Theory & Application	
"Ramsey Optimal Pricing of Long Distance Telephone Services"	1977
NBER Conference on Public Regulation	
"Income Distributional Concerns in Regulatory Policy-Making"	1977
Allied Social Science Associations National Convention	
"Merger Guidelines and Economic Theory"	1990
Discussion of "Competitive Rules for Joint Ventures"	1989
"New Schools in Industrial Organization"	1988
"Industry Economic Analysis in the Legal Arena"	1987
"Transportation Deregulation"	1984
Discussion of "Pricing and Costing of Telecommunications Services"	1983
Discussion of "An Exact Welfare Measure"	1982
"Optimal Deregulation of Telephone Services"	1982
"Sector Differentiated Capital Taxes"	1981
"Economies of Scope"	1980
"Social Welfare Dominance"	1980
"The Economic Definition of Predation"	1979
Discussion of "Lifeline Rates, Succor or Snare?"	1979
"Multiproduct Technology and Market Structure"	1978
"The Economic Gradient Method"	1978
"Methods for Public Interest Pricing"	1977
Discussion of "The Welfare Implications of New Financial Instruments"	1976
"Welfare Theory of Concentration Indices"	1976
Discussion of "Developments in Monopolistic Competition Theory"	1976
"Hedonic Price Adjustments"	1975
"Public Good Attributes of Information and its Optimal Pricing"	1975
"Risk Invariance and Ordinally Additive Utility Functions"	1974
"Consumer's Surplus: A Rigorous Cookbook"	1974
University of Chicago Symposium on the Economics of Regulated Public Utilities	
"Optimal Prices for Public Purposes"	1976
American Society for Information Science	
"The Social Value of Information: An Economist's View"	1975
Institute for Mathematical Studies in the Social Sciences Summer Seminar	

"The Sustainability of Natural Monopoly"	1975
U.S.-U.S.S.R. Symposium on Estimating Costs and Benefits of Information Services "The Evaluation of the Economic Benefits of Productive Information"	1975
NYU-Columbia Symposium on Regulated Industries "Ramsey Optimal Public Utility Pricing"	1975

**Research Seminars:**

Bell Communications Research (2)	University of California, San Diego
Bell Laboratories (numerous)	University of Chicago
Department of Justice (3)	University of Delaware
Electric Power Research Institute	University of Florida
Federal Reserve Board	University of Illinois
Federal Trade Commission (4)	University of Iowa (2)
Mathematica	Universite Laval
Rand	University of Maryland
World Bank (3)	University of Michigan
Carleton University	University of Minnesota
Carnegie-Mellon University	University of Oslo
Columbia University (4)	University of Pennsylvania (3)
Cornell University (2)	University of Toronto
Georgetown University	University of Virginia
Harvard University (2)	University of Wisconsin
Attachment 1 Hebrew University	University of
Wyoming Johns Hopkins University (2)	Vanderbilt
University	
M. I. T. (4)	Yale University (2)
New York University (4)	Princeton University (many)
Northwestern University (2)	Rice University
Norwegian School of Economics and Business Administration	Stanford University (5) S.U.N.Y. Albany