

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**RECIPROCAL SWITCHING**

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**Docket No. EP 711 (Sub-No. 1)**

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**JOINT COMMENTS OF  
WESTERN COAL TRAFFIC LEAGUE  
AND  
MINNESOTA POWER**

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The Western Coal Traffic League (“WCTL”) and Minnesota Power (“MP”) (collectively “WCTL/MP”) submit these Joint Comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking (“NPR”) served in this proceeding on July 27, 2016.

**SUMMARY**

WCTL/MP’s Joint Comments address issues of particular interest and concern to unit train coal shippers. WCTL/MP support the Board’s proposal to eliminate the requirement in the Board’s current reciprocal switching rules<sup>1</sup> that require a shipper to demonstrate the incumbent carrier has engaged in anticompetitive conduct before the shipper can obtain reciprocal switching relief. WCTL opposed the Interstate Commerce Commission’s (“ICC”) adoption of the anticompetitive conduct standard in

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<sup>1</sup> See 49 C.F.R. § 1144.2(a)(1).

1985 for application to coal movements and has continued to oppose the continuing use of the standard ever since because proving relief under the standard, as construed by the ICC and the Board, is impossible.

In conjunction with its proposal to eliminate the anticompetitive conduct standard, the Board proposes to replace its current reciprocal switching rules<sup>2</sup> with proposed new reciprocal switching rules.<sup>3</sup> The proposed new rules contain two relief avenues the Board calls prongs: (i) reciprocal switching to increase competition and (ii) reciprocal switching required in the public interest. The Board states that the two prongs correspond to the statutory directives set forth at 49 U.S.C. § 11102(c)(1).<sup>4</sup> This statute authorizes the Board to order carriers to enter into a reciprocal switching agreements if the Board finds such agreements “to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.”<sup>5</sup>

The Board’s two-pronged approach appears to be a reasonable one, and WCTL/MP support many aspects of it, including the proposed pre-filing negotiation period, the ban on consideration of revenue adequacy evidence, and the consideration of reciprocal switching requests on an expedited basis. WCTL/MP do respectfully request that the Board make some changes, and/or clarifications, to its proposals to make them better suited for actual use by unit train coal shippers, including the following:

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<sup>2</sup> See 49 C.F.R. § 1144.

<sup>3</sup> See NPR at 40-42 (proposing new 49 C.F.R. § 1145).

<sup>4</sup> NPR at 17.

<sup>5</sup> 49 U.S.C. § 11102(c)(1).

- The Board should expand the class of qualified shipper facilities for reciprocal switching to include not just facilities that are physically sole-served by a single Class I rail carrier, but shippers who are served by short-lines subject to paper barriers. For all practical purposes these shippers are solely served from a pricing standpoint by a single Class I railroad.

- The Board should not exclude potential new interchanges for reciprocal switching relief simply because some additional infrastructure may be needed to perfect the interchange. The need for new infrastructure, and issues concerning who should pay for that infrastructure, should be considered on a case-by-case basis.

- The Board should adopt a rebuttable presumption that a maximum reasonable switching distance between an interchange and the shipper's facilities for reciprocal switching purposes is the greater of (i) 30 rail route miles or (ii) 10% of the rail route miles between the traffic origin and traffic destination.

- The Board should not require shippers to prove market dominance when seeking relief under the Board's proposed competitive reciprocal switching prong. Instead, shippers should be able to prove their entitlement to competitive switching using simpler, and less costly, forms of proof demonstrating the absence of effective transportation competition for reciprocal switching purposes.

- The Board should confirm that a grant of public interest reciprocal switching relief is available, and intended to apply in, cases where a sole-served utility coal shipper has experienced severe rail service problems that have threatened electric grid reliability.

If the Board adopts these modest changes and clarifications to its proposed rules, the proposals might prove to be beneficial for some coal shippers if the nation's major railroads decide to aggressively compete for coal transportation business subject to Board-ordered reciprocal switching agreements.

## **IDENTITY AND INTEREST**

WCTL is a voluntary association comprised of member organizations that purchase and ship coal from origins west of the Mississippi River. WCTL members collectively consume more than 150 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

MP, an operating division of ALLETE, Inc., generates, transmits and distributes electricity in a 26,000 square mile region in northern Minnesota to 144,000 residents, 16 municipalities and some of the nation's largest industrial customers. MP owns and operates the coal-fired Boswell Energy Center ("Boswell"), located in Cohasset, MN. MP obtains coal for use at Boswell from mines in the Wyoming and Montana Powder River Basin. Boswell is served by a single railroad – BNSF Railway Company ("BNSF") – and BNSF transports MP's coal from Wyoming and Montana to Boswell. MP is a long-time member of WCTL.

WCTL/MP have actively appeared in many proceedings before the Board involving rail competition and rail service issues, including proceedings conducted by the ICC that resulted in the initial adoption in 1985 of what are now the Board's current reciprocal switching rules. WCTL/MP support changes in those rules, which, if adopted, would allow unit train coal shippers to obtain reciprocal switching relief in appropriate cases.

## JOINT COMMENTS

WCTL/MP's Joint Comments address those portions of the Board's proposed rules of particular interest and concern to unit train coal shippers.

### **A. Elimination of the Anti-Competitive Conduct Test**

In the Staggers Rail Act of 1980,<sup>6</sup> Congress added what is now called the reciprocal switching remedy. Specifically, Congress directed that the STB's predecessor, the ICC, "require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."<sup>7</sup>

Congress intended that the ICC aggressively implement this new remedy to "increase . . . intermodal competition"<sup>8</sup> and to alleviate "inadequate service."<sup>9</sup> Initially, the ICC adhered to these statutory directives. *See, e.g., Delaware and Hudson Ry. v. Consolidated Rail Corp. – Reciprocal Switching Agreement*, 366 I.C.C. 845 (1982), *aff'd*, 367 I.C.C. 718 (1983) (ordering reciprocal switching within the entire Philadelphia metropolitan area).

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<sup>6</sup> Pub. L. No. 96-448, 94 Stat. 1895 (1980) ("Staggers Act").

<sup>7</sup> Staggers Act, § 223.

<sup>8</sup> S. Rep. No. 96-470, at 41 (1979). *Accord* H.R. Rep. No. 96-1035, at 96 (1980) ("[R]eciprocal switching has been limited to situations where competition between rail carriers has not been threatened. The Committee intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.").

<sup>9</sup> H.R. Rep. No. 96-1035, at 66 (1980).

Unfortunately, the ICC's adherence to its statutory mandate was short-lived. In 1985, a group of shippers and the Association of American Railroads ("AAR") requested that the ICC adopt rules that required shippers to demonstrate the incumbent carrier was engaging in anticompetitive conduct before the ICC could grant shippers any reciprocal switching relief.<sup>10</sup>

WCTL actively participated in the ensuing proceedings before the ICC, and strongly opposed the ICC's across-the-board adoption of the anti-competitive conduct standard for application in cases involving bulk commodities. WCTL argued at the time that adoption of the proposed rules including this standard would likely be the death-knell for any meaningful form of reciprocal switching relief for coal shippers.<sup>11</sup> WCTL's objections fell on deaf ears, and the ICC proceeded to adopt new reciprocal switching rules that required shippers to prove anticompetitive conduct before any reciprocal switching relief could be ordered.<sup>12</sup>

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<sup>10</sup> See NPR at 3, citing *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom. Balt. Gas & Elec. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

<sup>11</sup> See Joint Comments of the Western Coal Traffic League and the Consumer Owned Power Coalition, *Intramodal Rail Competition*, EP 445 (Sub-No. 1), at 4 (filed May 31, 1985) (proposals under consideration do not "offer[] meaningful relief to captive shippers"); Comments of the Western Coal Traffic League, *Review of Rail Access and Competition Issues*, EP 575, at 17 (filed Mar. 26, 1998) ("Following . . . the ICC's adoption of access rules in Ex Parte No. 445 . . . no shipper has obtained any . . . reciprocal switching access relief. WCTL predicted this result in its Ex Parte No. 445 comments . . . and urged the ICC to adopt and apply a pro-competitive construction of its statutory access powers.") (internal citations omitted).

<sup>12</sup> See NPR at 3.

WCTL's prediction proved to be correct. Since 1985, no shipper has obtained any reciprocal switching relief because none could prove anticompetitive conduct, as that conduct was defined by the ICC/STB, and shippers stopped trying years ago.<sup>13</sup> Some 30+ years later, the Board has come full circle. In the NPR, the Board candidly acknowledges that the anticompetitive conduct standard "set an unrealistically high bar for shippers to obtain reciprocal switching,"<sup>14</sup> and proposes to eliminate the standard.

WCTL/MP support the Board's proposal to eliminate the anticompetitive conduct standard for the reasons articulated by the Board in the NPR:

- Nothing in the text of 49 U.S.C. § 11102 "mandates a finding that a rail carrier has engaged in anticompetitive conduct."<sup>15</sup>
- Nothing in the legislative history of § 11102 indicates that Congress intended the ICC or the Board to impose the anticompetitive conduct test. In fact, the legislative history of § 11102 shows that Congress "clearly intended to empower the agency to encourage the availability of reciprocal switching when appropriate."<sup>16</sup>
- While Congress "gave the Board the power to order reciprocal switching, . . . our existing anticompetitive standard has essentially nullified this power."<sup>17</sup>

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<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 10.

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.* at 32 (Vice Chairman Miller, commenting).

- “[T]he Board has broad discretion under § 11102(c) to require carriers to enter into reciprocal switching arrangements when they are practicable and in the public interest or necessary to provide competitive rail service.”<sup>18</sup>

- The Board’s exercise of its broad discretion removes an extra-statutory requirement to obtain relief under § 11102(c) that mistakenly “operated as a bar to relief rather than as a standard under which relief could be granted.”<sup>19</sup>

- The Board’s removal of the anticompetitive conduct standard is consistent with the Board’s policy that when “important available remedies have become dormant, the agency has examined the underlying regulations and pursued modifications, where appropriate.”<sup>20</sup>

- The Board’s proposed actions also properly recognize that the railroad industry has changed dramatically since the current reciprocal switching rules were initially promulgated in 1985 and takes into account “the reduced competitive options for some shippers,” and “the better overall economic health of the rail industry.”<sup>21</sup>

- When the ICC adopted the anticompetitive conduct standard in 1985, it recognized that it was exercising its discretion to adopt “one approach of several it could take.”<sup>22</sup>

- The STB “retains broad authority to revise its statutory interpretation and the resulting regulations” so long as it provides a “reasoned explanation for departing from past precedent and has explained why the rules are a permissible exercise of its jurisdiction under § 11102.”<sup>23</sup>

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<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 10.

<sup>23</sup> *Id.*

- The STB has provided a reasonable explanation in the NPR for removing the anticompetitive conduct test, and the result constitutes a permissible construction of § 11102.<sup>24</sup>

- Congress did not “even mention[,]” much less “ratif[y] the anticompetitive conduct test when it enacted the ICC Termination Act of 1995.”<sup>25</sup>

WCTL/MP urge the Board to adopt final reciprocal switching rules that remove the anticompetitive conduct test for the reasons set forth by the Board in the NPR.

## **B. Switching Proposals**

The Board states in the NPR that it “prefers a reciprocal switching standard that makes the remedy more equally available to all shippers, rather than a limited subset of shippers.”<sup>26</sup> WCTL/MP’s comments on the Board’s proposed switching proposals are directed at making the reciprocal switching remedy “equally available” to unit train coal shippers.

### **1. Overview**

The Board proposes to promulgate reciprocal switching rules in a new section of the Code of Federal Regulations – 49 C.F.R. § 1145.<sup>27</sup> Proposed 49 C.F.R. § 1145 is divided into three parts: 49 C.F.R. 1145.1 (which calls for a 5-day negotiation period before a shipper can file a reciprocal switching request with the Board); 49 C.F.R.

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<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.* at 12.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.* at 40-42.

§ 1145.2 (which establishes the standards a shipper must meet to obtain reciprocal switching relief); and 49 C.F.R. § 1145.3 (which states the proposed rules will apply to cases filed after the effective date of the new rules, and that discovery in reciprocal switching cases be conducted under the Board’s discovery rules set forth at 49 C.F.R. § 1114).<sup>28</sup>

Key portions of the Board’s proposed new rules are set forth in proposed 49 C.F.R. § 1145.2.<sup>29</sup> In proposed § 1145.2(a), the Board states that it will grant reciprocal switching relief “if the Board determines that such arrangement is either practicable and in the public interest, or necessary to provide competitive rail service.”<sup>30</sup> Thus, the Board is proposing a two-pronged relief standard: (i) relief under the public interest prong and (ii) relief under the competitive rail service prong.

To obtain reciprocal switching relief under the public interest prong, a shipper must show: (i) the involved facility is served by a single Class I railroad (§ 1145.2(a)(1)(i)); (ii) there is or can be a working interchange within a reasonable distance of the shipper’s facility (§ 1145.2(a)(1)(ii)); and (iii) the benefits of switching outweigh the potential detriments (§ 1145.2(a)(1)(iii)); however, (iv) the Board will not order public interest switching if the involved carriers show it is not feasible (§ 1145.2(a)(1)(iv)).<sup>31</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 41-42

<sup>30</sup> *Id.* at 41.

<sup>31</sup> *Id.* at 41.

To obtain relief under the competitive switching prong, a shipper must show that: (i) the involved facility is served by a single Class I railroad (§ 1145.2(a)(2)(i)); (ii) the incumbent carrier faces no effective transportation competition for the movement for which switching is sought (§ 1145.2(a)(2)(ii)); and (iii) there is or can be a working interchange within a reasonable distance of the shipper's facility (§ 1145.2(a)(2)(iii)); however (iv) the Board will not order competitive switching if the involved carriers show it is not feasible (§ 1145.2 (a)(2)(iv)).<sup>32</sup>

The text of the Board's two-pronged proposals are virtually identical on common items (sole-served facility, reasonable distance from a working interchange, and carrier burden to show infeasibility), but differ in one respect – a shipper seeking public interest switching relief must show the benefits of switching outweigh the burdens and a shipper seeking competitive switching must show that the incumbent carrier faces no effective transportation competition.

## **2. Proposed 49 C.F.R. §§ 1145.2 (a)(1)(i) and 1145(a)(2)(i)**

The Board proposes that a “party seeking [competitive or public interest] switching show[] that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by a single Class I rail carrier.” Proposed 49 C.F.R. §§ 1145(a)(1)(i), 1142(a)(2)(i).<sup>33</sup> WCTL/MP have no objection to limiting the statutory reciprocal switching remedy to sole-served shippers.

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<sup>32</sup> *Id.* at 41-42.

<sup>33</sup> *Id.*

Shippers that are physically served by a short line which is subject to a paper barrier imposed by a Class I railroad are required for economic reasons to utilize the service of that Class I carrier, and, as a result, are sole-served by the Class I carrier from a pricing and competitive standpoint. Shippers faced with such paper barriers should be entitled to the benefits of reciprocal switching.

This suggestion is consistent with the Board’s observation that “[p]articularly relevant to reciprocal switching, the consolidation of Class I carriers and the creation of short lines that may have strong ties to a particular Class I likely reduces the chance of naturally occurring reciprocal switching as carriers seek to optimize their own large networks.”<sup>34</sup>

**3. Proposed 49 C.F.R. §§ 1145.2(a)(1)(ii) and 1145.2(a)(2)(iii)**

The Board proposes that a “party seeking [competitive or public interest] switching show[] that there is or can be a working interchange between the Class I carrier serving the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities seeking switching.” Proposed 49 C.F.R. §§ 1145.2(a)(1)(ii), 1145(a)(2)(iii).<sup>35</sup>

**(a) Working Interchange**

The Board’s proposal covers existing interchanges where switching is occurring as well as locations where there “can be” an interchange. For prospective

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<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 41-42.

“can be” interchanges, the Board asks for comments on whether these locations should be limited to locations where “the infrastructure currently exists to support switching.”<sup>36</sup>

WCTL/MP urge the Board not to limit prospective interchanges to those where “the infrastructure currently exists to support switching.”<sup>37</sup> This limitation finds no support in the text, or legislative history of § 11102, and contravenes the Congressional directive that the Board utilize its power to order reciprocal switching to promote competition. In some cases, promoting competition may require the construction of new rail facilities.

The Board appears to be concerned that imposing a construction requirement on incumbent carriers would be unfair to them.<sup>38</sup> Other regulators have not shied away from requiring regulated entities to make necessary infrastructure investments,<sup>39</sup> nor should the Board, if the Board finds that making such investments is in the public interest or necessary to promote competitive reciprocal switching.

Moreover, the Board’s concerns would be mooted in cases where a shipper or shippers, or the non-incumbent carrier, agree to fund any necessary new

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<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> For example, electric utilities are required to spend substantial sums on facilities to comply with electric grid reliability standards established by their regulators related to cyber and physical requirements. *See, e.g.*, Edison Electric Institute, *Protecting the Energy Grid for Customers* at 2 (“In 2016, electric companies are projected to invest \$52.8 billion to enhance the energy grid and to further support our grid security efforts.”), available at [http://ww.eei.org/issuesandpolicy/cybersecurity/Documents/Protecting\\_the\\_Energy\\_Grid.pdf](http://ww.eei.org/issuesandpolicy/cybersecurity/Documents/Protecting_the_Energy_Grid.pdf).

infrastructure. For example, a unit train coal shipper might propose to fund the construction of a new side-track in order to facilitate the interchange of unit train shipments between the incumbent carrier and a second carrier.

WCTL/MP recommend that the Board not arbitrarily exclude otherwise qualifying interchanges simply because perfection of the interchange may require construction of some new facilities. Instead, the Board can and should consider infrastructure construction issues on a case-by-case and consider such factors as the cost of the new facilities, who will bear the cost, and related case-specific considerations, in determining whether to grant the requested reciprocal switching relief.

**(b) Reasonable Distance**

The National Industrial Transportation League (“NITL”) proposed that if the mileage between the involved shipper facility and the carrier interchange was 30 miles or less, the distance would be conclusively presumed to be a “reasonable distance” for reciprocal switching purposes.<sup>40</sup>

The Board rejected this proposal on fairness grounds because, according to the Board, its application tended to favor chemical shippers, whose facilities typically located within 30 miles of a carrier interchange, whereas other shippers, such as agricultural shippers, typically had facilities located more than 30 miles from the nearest carrier interchange:

The record here suggests that shippers of certain commodities, particularly chemical shippers, would be the

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<sup>40</sup> NPR at 21.

major beneficiaries of the conclusive presumptions . . . . A significant number of chemical shippers . . . are also located within 30 miles of multiple railroads. In contrast, shippers of other commodities, particularly agricultural shippers, would tend not to qualify under the conclusive presumptions proposed by NITL, as agricultural shippers tend to be located in more remote locations that are generally only served by one railroad, and thus are less likely to be within 30 miles of an interchange.<sup>41</sup>

The Board proposes to leave determination of what constitutes a “reasonable distance” to determination on a case-by-case basis, but “nonetheless, invites comments on defining the term ‘reasonable distance’ in an effort to provide guidelines to parties that may seek switching under the proposed regulations.”<sup>42</sup>

Commissioner Begeman also addresses the “reasonable distance” issue in her separate expression. Of particular concern to WCTL/MP is Commissioner Begeman’s observation that the Board may limit reciprocal switching to “a very short distance:”

What is the “reasonable distance” that is surprisingly left undefined in the proposal? While the language that dismisses the NITL’s conclusive presumptions implies that the Board’s proposal could involve switches of more than 30 miles, my briefings suggest it may only be a very short distance (i.e., the distances that have historically been involved with reciprocal switching). How could historical norms of switching be relied on while the decision cites massive industry changes that would make those historical norms uninformative at best?<sup>43</sup>

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<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.* at 21.

<sup>43</sup> *Id.* at 35 (Commissioner Begeman, dissenting in part).

WCTL/MP have no objection to the Board’s determining what constitutes a “reasonable distance” on a case-by-case basis, but WCTL/MP agree with Commissioner Begeman that the public needs some additional guidance from the Board on what constitutes a “reasonable distance,” particularly in light of her statement that the Board may be considering limiting reciprocal switching to “very short distance[s].”<sup>44</sup>

WCTL/MP suggest that the Board consider adopting a rebuttable presumption that a “reasonable distance” for reciprocal switching purposes be the greater of (i) 30 miles or (ii) 10% of the total rail route miles from the movement origin to movement destination. Adoption of this presumption would give the shipping public some practical guidance, while leaving the actual determination of “reasonable distances” to adjudication on a case-by-case basis.

The proposed presumption also responds to the Board’s concerns about exclusion of classes of shippers to include those long-haul shippers (such as agricultural and coal shippers) whose facilities may not be located within 30 miles of carrier interchange locations, and its adoption would let the public know that the Board does not intend to limit reciprocal switching to “very short distance[s].”<sup>45</sup>

**4. Proposed 49 C.F.R. § 1145.2(a)(2)(ii)**

The Board proposes that a “party seeking [competitive] switching shows that intermodal and intramodal competition is not effective with respect to the

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 35 (Commissioner Begeman, dissenting in part).

movements of the shipper(s) and/or receiver(s) for whom switching is sought.”

Proposed 49 C.F.R. § 1145.2(a)(2)(ii).<sup>46</sup>

The Board further proposes “to apply the market dominance test to determine whether a movement is without effective intermodal or intramodal competition” within the meaning of proposed 49 C.F.R. § 1145.2(a)(2)(ii).<sup>47</sup> The Board asserts that use of the market dominance test is appropriate because it “is familiar to litigants before the Board” and is a “mature analytical framework.”<sup>48</sup>

WCTL/MP support the Board’s proposal to limit reciprocal switching to sole-served facilities where the incumbent carrier faces no effective intermodal or intramodal transportation competition. However, WCTL/MP urge the Board not to interpret this new standard as requiring a showing of market dominance. Certainly if Congress had wanted to impose a market dominance requirement as a prerequisite to obtaining competitive reciprocal switching, it could have done so, but it did not.

The absence of such a requirement strongly suggests that Congress did not intend that the reciprocal switching standard be subject to a market dominance requirement. And, that is exactly what the ICC found in prior cases. *See* NPR at 22 (“The ICC . . . held that market dominance is not a jurisdictional prerequisite to obtaining relief in an access proceeding under § 11102.”).

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<sup>46</sup> *Id.* at 22, 42.

<sup>47</sup> *Id.* at 23.

<sup>48</sup> *Id.* at 22-23.

The Board acknowledges that Congress did not impose a market dominance requirement in § 11102, and that the ICC did not impose one, but argues that “there is nothing in § 11102 that prohibits the use of the market dominance test here as part of the analysis, rather than as a jurisdictional prerequisite.”<sup>49</sup> Even assuming this to be the case, the Board should not impose the market dominance test “as part of the [competitive switching] analysis.”<sup>50</sup>

The Board contends it should use the market dominance analysis because it is a “familiar” test and a “mature analytical framework.” However, anyone that has reviewed the STB rate case docket knows that defendant carriers can and do take this “familiar” test and “mature analytical framework” and try to bludgeon complainant shippers with vast amounts of market dominance discovery, and market dominance evidence, which shippers must respond to in order to meet their burden of proof.

Despite all of the time, effort and expense shippers devote to market dominance, the STB has never found the absence of market dominance in a coal rate case, and recently rejected most market dominance challenges in the Chemical Cases.<sup>51</sup> There is no need for the Board to try to graft on the costly, and time consuming, market dominance analysis into its reciprocal switching rules. If it does, it will import the same

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<sup>49</sup> *Id.* at 22.

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

<sup>51</sup> See *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry* (“*DuPont*”), NOR 42125, slip op. at 30 (STB served Mar. 24, 2014); *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry.*, NOR 42130, slip op. at 4 (STB served June 20, 2014); *Total Petrochemicals & Refining USA, Inc. v. CSX Transp. Inc.*, NOR 42121, slip op. at 1, 5 (STB served May 31, 2013) (collectively “Chemical Cases”).

excessive costs and delays caused by its current administration of the “familiar” market dominance test – costs and delays that discourage all but the most financially able shippers from even considering seeking rate relief at the Board.

WCTL/MP recommend that the Board adopt simpler, far more cost-effective, effective transportation competition tests for reciprocal switching purposes that focus on basic metrics such as: (i) the number of carriers involved; (ii) commodity/type of service at issue; and (iii) market share information over a specified time frame.

For example, a unit train coal shipper seeking reciprocal switching relief should be able to demonstrate that it lacks effective transportation alternatives for reciprocal switching purposes if: (i) it is served by a single rail carrier at the traffic origin or destination of the involved coal move; (ii) its coal haul is over 50 miles long; and (iii) the incumbent carrier has handled 95% or more of the transported volumes for the movement at issue for the last five (5) years.

The Board’s adoption of simpler, more cost-effective proof standards strikes a proper balance. As a practical matter, a shipper that faces effective competition has no interest in seeking reciprocal switching relief for what it already has – effective competition. However, a shipper that lacks effective competition will not seek reciprocal switching relief if the cost of proving its lack of competition is cost-prohibitive.

Nor should a coal shipper that can afford to pay for a detailed market dominance case analysis be required to incur those costs in a reciprocal switching case

because, as the rate case law demonstrates, this slow and costly exercise ends up demonstrating the obvious – the coal shipper lacks effective transportation alternatives – otherwise it would not have brought its case in the first instance.

**5. Proposed 49 C.F.R. § 1145.2(a)(1)(iii)**

The Board proposes that a “party seeking [public interest] switching show[] that the potential benefits from the proposed switching arrangement outweigh the potential detriments.” Proposed 49 C.F.R. § 1145.2(a)(1)(iii).<sup>52</sup> The Board further proposes to “consider any relevant factor” in making this determination, including issues involving “service quality.”<sup>53</sup>

As the Board is aware, there are only four major railroads in the United States. When one of those four systems breaks down, chaos ensues, and can wreak havoc on utility coal shippers. For example, BNSF’s highly publicized service crisis in 2013-2015 caused severe reliability problems for MP and other similarly situated captive shippers that depended on BNSF for long-haul coal moves to their BNSF-captive utility generating stations.<sup>54</sup>

The Board’s proposed public interest reciprocal switching prong may, if properly administered, serve as a regulatory mechanism where coal shippers can obtain alternative reciprocal switching routes in advance of the next service crisis. Those

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<sup>52</sup> NPR at 41.

<sup>53</sup> *Id.*

<sup>54</sup> *See, e.g., Petition of the W. Coal Traffic League to Inst. a Proceeding to Address the Adequacy of Coal Transp. Serv. Originating in the W. U.S.*, EP 723 (filed Mar. 24, 2014).

routes, which did not exist in 2013-2015, could provide a very valuable routing alternative for shippers like MP that depend on reliable coal transportation to “keep the lights on” and further the national interest in electric grid reliability.

WCTL/MP support the Board’s proposed “public interest” reciprocal switching standard, and urge the Board to carefully consider requests to grant “public interest” reciprocal switching requests that, if granted, will promote electric grid security and reliability by giving captive, high-volume coal shippers viable rail service alternatives.

## **6. Additional Board Proposals**

The Board proposes that: (i) the parties negotiate before a reciprocal switch request is filed (proposed 49 C.F.R. § 1145.1); (ii) the Board may deny a reciprocal switching request if the involved carriers demonstrate the proposal is “not feasible” (proposed 49 C.F.R. §§ 1145.2(a)(1)(iv) and 1145(a)(2)(iv)); (iii) the Board will not consider revenue adequacy or product/geographic competition evidence in deciding a reciprocal switching request (proposed 49 C.F.R. § 1145.2(b)(1),(2)); (iv) the Board will consider reciprocal switching requests on an “expedited basis” (proposed 49 C.F.R. § 1145.2(b)(3)); and (v) discovery in reciprocal switching cases will be governed by the Board’s discovery rules codified at 49 C.F.R. § 1114 (proposed 49 C.F.R. § 1145.3).<sup>55</sup>

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<sup>55</sup> See NPR at 40, 42.

WCTL/MP generally support these additional proposals provided they are applied in an even-handed manner and are adjunct to final rules that conform to WCTL/MP's Joint Comments.

### **C. Other Issues**

For reciprocal switching to be effective, rail carriers must aggressively compete for the shipper's long-haul business. Whether rail carriers will do so remains to be seen. *See, e.g.,* Comments of the Western Coal Traffic League, *Competition in the Railroad Industry*, EP 705 (filed Apr. 13, 2011) (discussing the absence of effective competition for the transportation of western coal).

In addition, reciprocal switching fees – either fees agreed upon by the carriers or those set by the Board<sup>56</sup> – must be set at competitive levels for reciprocal switching to provide an effective competitive alternative. WCTL/MP will review the comments filed by other participants in this proceeding concerning the mechanics of how the Board should set reciprocal switching fees, but regardless of the internal mechanics, the Board must adopt an approach that, when applied in individual cases, produces fees that are set at levels that facilitate effective, aggressive competition.

Finally, WCTL/MP agree with the Board that a shipper's obtainment of a reciprocal switching order is not in and of itself proof that the shipper enjoys effective

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<sup>56</sup> Under 49 U.S.C. § 11102(c), “[t]he rail carriers entering into [an STB prescribed reciprocal switching] agreement shall establish the conditions and compensation applicable to such agreement, but, if the rail carriers cannot agree upon such conditions and compensation with a reasonable period of time, the Board may establish such conditions and compensation.” *Id.*

rail competition for the transportation subject to the order. *See* NPR at 23 (citing comments filed by the Joint Coal Shippers).

### CONCLUSION

WCTL/MP appreciate the opportunity to file these Joint Comments and urge the Board to adopt final rules that are consistent with the views set forth above.

Respectfully submitted,

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