

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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 switching¹ 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 1980² and the Interstate Commerce Commission Termination Act of 1995³ 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*

¹ 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).

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

³ 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.⁴ 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-

⁴ 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,⁵ 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

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

issue.⁶ 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 alternatives⁷—and that the Board should not give weight to arguments that place the existence of market dominance entirely within one party’s control.⁸

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).⁹

⁶ *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.

⁷ *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.”).

⁸ *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).

⁹ *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,¹⁰ factors that it should not consider,¹¹ the appropriate time frame for processing rate complaints,¹² the need to create expedited procedures for SAC cases,¹³ and the need to establish simplified standards for cases in which the creation of a full stand-alone cost

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”).

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

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

¹² *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).

¹³ *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.¹⁴ Legislative history similarly reveals that Congress viewed rate litigation as the primary remedy for unreasonably high rates.¹⁵

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.

¹⁴ 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").

¹⁵ 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.”¹⁶ 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

¹⁶ *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.”¹⁷ FRA similarly concluded that the DTI Conditions were themselves “anticompetitive.”¹⁸

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

¹⁷ *Id.* at 11.

¹⁸ 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 ICCTA¹⁹ 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)).²⁰ 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.

¹⁹ 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).

²⁰ 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,²¹ and it has been repeatedly applied by the Supreme Court²² and the federal courts of appeal.²³ 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.²⁴ In other words, once Congress has given its

²¹ 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).

²² 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).

²³ 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).

²⁴ 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 change²⁵; (2) evidence that Congress was “made aware of the administrative interpretation”²⁶; and (3) some “affirmative indication” that the re-enactment was intended to ratify the agency interpretation.²⁷ 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

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”).

²⁵ *AAR v. ICC*, 564 F.2d at 493.

²⁶ *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”).

²⁷ *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,²⁸ 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.²⁹ 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

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

²⁹ *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.”³⁰ 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.”³¹ 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.”³² 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.”

³⁰ *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.

³¹ *See id.* at 259-60.

³² *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.”).³³

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

³³ *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.³⁴ 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

³⁴ *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 order³⁵; that railroads were sufficiently profitable to allow more forced switching³⁶; that forced switching would be a

³⁵ *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*).

³⁶ *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 cases³⁷; that Canadian interswitching should be a model for a forced access scheme in the United States³⁸; and that changing the law to allow more forced switching cases would be “pro-competitive” and “deregulatory.”³⁹ 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.

³⁷ 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).

³⁸ 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).

³⁹ 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,⁴⁰ to create simplified methodologies for smaller rate cases,⁴¹ and to lower filing fees.⁴² As CSXT’s Supplemental Comments in Ex Parte 705 demonstrated,

⁴⁰ 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).

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

⁴² 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.⁴³ 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 181-82.⁴⁴ 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

⁴³ *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).

⁴⁴ *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.⁴⁵ 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

⁴⁵ 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.⁴⁶ 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

⁴⁶ 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.⁴⁷ 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

⁴⁷ 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

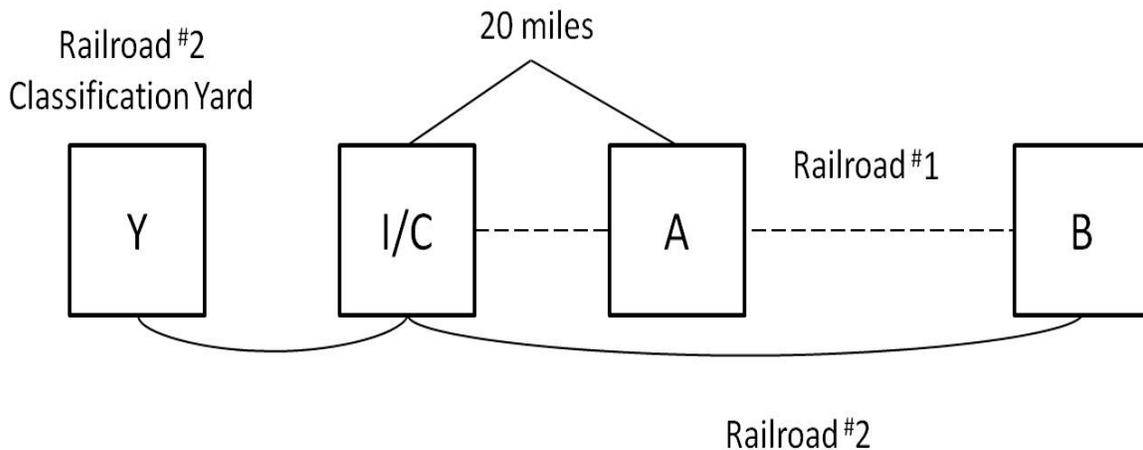
manufacturer could obtain line-haul transportation from New Orleans from NS and require CSXT to receive the traffic at Moncrief Yard for delivery to its Jacksonville facility.

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.⁴⁸ In 2012, CSXT averaged terminal dwell of approximately 24 hours across its system (about average for the industry as a whole).⁴⁹ 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.

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

⁴⁹ 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*.⁵⁰ 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.”

⁵⁰ 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.⁵¹ Indeed, NITL admits that this question will often

⁵¹ 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).

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,⁵² significant increases in rail traffic,⁵³ or significant increases in rail yard activity.⁵⁴ These thresholds are significantly lower in nonattainment areas under the Clean Air Act.⁵⁵ 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.⁵⁶

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

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

⁵³ 49 C.F.R. § 1105.7(e)(5)(i)(A).

⁵⁴ 49 C.F.R. § 1105.7(e)(5)(i)(B).

⁵⁵ *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.

⁵⁶ *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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