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Ex Parte No. 711

PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

PETITION FOR RULEMAKING
of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League
1700 North Moore Street
Arlington, VA 22209

By its attorneys:

Karyn A. Booth
Jeffrey O. Moreno
Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 263-4108

Dated: July 7, 2011

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The National Industrial Transportation League (“League”) submits this Petition seeking the institution of a rulemaking under 5 U.S.C. §553 for the adoption of new rules for competitive switching that would replace the rules that are currently in effect under 49 C.F.R. §1144 (and the precedent that flows from those rules). The new rules would implement the statutory standards for reciprocal switching under 49 U.S.C. §11102(c) and establish a new regulatory regime that would facilitate competitive switching where appropriate.

This Petition is set forth in six major parts, and also includes a summary of the League’s Competitive Switching proposal in Appendix A and the text to implement the new competitive switching rules in Appendix B.

- Part I sets forth an Introduction explaining the purpose of this Petition and the need for regulatory changes to implement new competitive switching rules.
- Part II sets forth the identity and interest of the League.

- Part III sets forth the Board’s current statutory authority, its legislative history, and the existing regulatory structure implementing the statutory language. It also discusses existing precedent based on the agency’s current rules.
- Part IV sets forth the Board’s authority to replace its current rules on reciprocal switching and to adopt new rules, and discusses the record in Ex Parte No. 705 and other information, which confirms that the Board should do so.
- Part V explains the League’s proposal on competitive switching, and why the Board should initiate a rulemaking to adopt this competitive switching proposal.
- Part VI discusses the issue of compensation for competitive switching arrangements.
- Appendix A to this Petition sets forth a summary of the League’s Competitive Switching proposal.
- Appendix B to this Petition sets forth the actual language of proposed regulations that the League urges the Board to adopt in order to implement a new regime for competitive switching under 49 U.S.C. §11102(c).

I. INTRODUCTION

This Petition flows from the inquiry that the Board initiated in Ex Parte No. 705, *Competition in the Railroad Industry*. The League has participated actively in that proceeding, and has examined very closely the comments filed by other parties and the oral testimony presented at the public hearing on June 21-22. The League believes that the record in that proceeding shows that there have been substantial changes in the railroad industry since the Interstate Commerce Commission (“ICC”), the Board’s predecessor, implemented rules to govern the grant of “reciprocal switching” under current 49 U.S.C. §11102(c) over 25 years ago,

in Ex Parte 445 (Sub-No. 1), *Intramodal Rail Competition*.¹ The record in Ex Parte No. 705 also shows that there has been a significant loss of rail-to-rail competition since the Ex Parte 445 Rules were implemented; and that more balanced switching rules could provide a more competitive and efficient rail system for shippers without harming rail carriers.

A. The Need For Regulatory Changes

During the Ex Parte No. 705 proceeding, the Board heard from many parties who believe that changes to its competition policies are required to create a better balance between the business needs of the railroads and those of their customers. The parties seeking changes were not of a single type but rather included government interests, trade associations of shippers, and individual shippers from a variety of industries and locations across the country. At the hearing on June 22, Senator John D. Rockefeller (D-WV), Chairman of the Senate Commerce, Science and Transportation Committee, appeared and in compelling testimony directed the Board “to act boldly where you can” and “to make incremental changes to regulate for the future” because the problems of the past have been resolved. Chairman Rockefeller stated that there is a need to restore rail competition and to modernize the STB’s rules, and he identified three key priorities for the Board: (1) to increase rail competition and to fix existing rules and policies; (2) to make the STB more accessible to shippers; and (3) to make the STB more robust.

Two other Senators appeared at the hearing and also asked this Board to make changes to its competition policies. Senator David Vitter (R-LA) and Senator Al Franken (D-MN) appeared on the second day, each with compelling stories of businesses in their States who lack rail transportation options and have been disadvantaged competitively in their own respective industries as a result. The testimony from Senators Rockefeller, Vitter, and Franken provide this

¹ *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff’d sub nom. Baltimore Gas & Elec Co v United States*, 817 F.2d 108 (D.C. Cir. 1987) [hereinafter *BG&E*]. The rules established by that decision will be referred to in this document as the “Ex Parte 445 Rules”

Board with clear direction and guidance to change its current policies on rail competition, and the League is filing this petition in an effort to assist the Board with this objective.

As explained in greater detail on pages 26-28, many other interests are seeking changes by the Board and support the adoption of new rules for competitive switching, including:

- The US Department of Agriculture was direct in its support of “mandatory reciprocal switching:” “USDA urges the Board to use mandatory reciprocal switching agreements as one means to increase rail-to-rail competition.”²

- The “Interested Parties,” a group of twenty-five individual associations of shippers, of which the League is a member, who represent a broad cross section of industries including agriculture, clay, chemicals, coal, glass, paper, petroleum and others urged the Board to implement changes to its rules on reciprocal switching.³

- The Fertilizer Institute (“TFI”) in its separate comments stated flatly that “[i]t is time for the Board to revisit and revamp its competitive access rules on reciprocal switching.”⁴

- Consumers United For Rail Equity (“CURE”) in separate comments recommended that reciprocal switching should be reformed by removing *Midtec’s* “competitive abuse” test.⁵

- Dow Chemical Company (“Dow”) indicated that it particularly supports changes to expand access to reciprocal switching.⁶

- E.I. du Pont de Nemours and Company (“DuPont”) argued that the agency’s current reciprocal switching standards are too stringent, and urged the STB to adopt a reciprocal

² See Comments of U.S. Dep’t of Agric. at 6, *Competition in the R R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

³ Comments of The Am. Chemistry Council et al. at 67, *Competition in the R R. Indus.*, STB Docket No. EP 705, (Apr. 12, 2011).

⁴ Comments of The Fertilizer Institute at 8, *Competition in the R R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁵ Comments of Consumers United for Rail Equity at 12, *Competition in the R R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁶ Comments of The Dow Chemical Co. at 1, *Competition in the R R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

switching system similar to the Canadian system for inter-switching, which requires no costly or time-consuming regulatory proceedings and costs are known up front.⁷

- Olin Corporation (“Olin”) indicated that broadened reciprocal switching is needed to provide competitive service to captive shippers. Olin indicated that “[m]andatory reciprocal switching is a logical way to deal with the lack of competition”⁸

- PPG Industries, Inc. (“PPG”) stated that the agency should “revise its competitive access rules to facilitate rail competition through expanded reciprocal switching.”⁹

- Total Petrochemicals USA, Inc. (“Total”) asked the Board to consider aspects of the Canadian interswitching policy as it considers its own policy changes to enhance rail-to-rail competition.¹⁰

- Westlake Chemical Corporation (“Westlake”) urged the Board to affirmatively promote reciprocal switching.¹¹

In its individual Comments submitted in Ex Parte No. 705, the League stated that the STB should “initiate a proceeding expeditiously after the June 22 hearing” in Ex Parte No. 705 to “revise its competitive access rules” with respect to reciprocal switching.¹² The League described generally the principles that should inform the Board’s consideration of new competitive switching rules. These included the need to simplify the burdens of proof that are currently required to establish reciprocal switching; and to align the rules more closely with the statute’s public interest requirements. The League stated that new competitive switching rules

⁷ Comments of E. I. du Pont de Nemours & Co. at 12, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁸ Comments of Olin Corp. at 12, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹ Comments of PPG Indus., Inc. at 8, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

¹⁰ Comments of Total Petrochemicals USA, Inc. at 5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

¹¹ Comments of Westlake Chem. Corp. at 5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

¹² Comments of The Nat’l Indus. Transp. League at 12, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

should be much less complex and costly to administer than the current rules; and should address more effectively existing competitive concerns.¹³ The League indicated in these individual Comments that it had “not yet determined what specific changes should be adopted by the Board in any future proceedings” but that it had “begun and will continue to discuss such issues during the pendency of this proceeding.”¹⁴

B. The STB Has Requested That New Proposals And Solutions Be Developed To Address The Competitive Problems Faced By Shippers

This Petition is the end result of the League’s careful consideration of the issues, comments and testimony submitted in the Ex Parte No. 705 proceeding.

During that proceeding, the STB requested interested parties to develop specific proposals to facilitate competitive rail service, and the subject of a new competitive switching standard was mentioned repeatedly at the June hearing. This Petition proposes specific changes to the Board’s existing rules on reciprocal switching, in order to implement a new competitive switching regime. It provides the Board with not just a concept, but an actual proposal, including regulatory language that would replace the rules currently set forth at 49 C.F.R. Part 1144 for reciprocal switching. In developing this proposal, the League has attempted to create a balanced system, one that would take into account both the needs of shippers who currently lack competitive transportation alternatives, as well as the needs of carriers to continue to earn adequate revenues. The objective of the League’s proposal is also to establish clear rules that may be implemented in a straightforward manner and that reduce the need for complex and expensive litigation in many cases. The proposed competitive switching regime also does not over-reach, since it would not apply to shippers who already have effective transportation alternatives. This proposal to establish new rules for competitive switching under 49 U.S.C.

¹³ *Id*

¹⁴ *Id*

§11102(c) is one step in a process to bring more competition to the rail industry and is founded on four basic principles:

1. Competitive switching would be available only to shippers at facilities that are rail-served only by a single Class I rail carrier.
2. Competitive switching would be available only for movements that are without effective inter- or intra-modal competition. However, there would be conclusive presumptions of a lack of effective competition that would simplify application of the rules, eliminate lengthy and costly litigation, and permit the market to work efficiently in cases where railroad market power is clear.
3. Competitive switching would be available only where there is or can be a working interchange between a Class I rail carrier and another carrier within a reasonable distance of the shipper's origin or destination facilities. However, there would be conclusive presumptions that a working interchange exists under certain conditions within a reasonable distance of the shipper's origin or destination facilities to simplify application of the rules, eliminate lengthy and costly litigation, and to permit the market to work efficiently.
4. Competitive switching would not be available if the carrier can show that the switching would be infeasible or unsafe, or would unduly hamper the ability of that carrier to serve its existing shippers.

A summary of the League's proposal is set forth immediately below and in Appendix A to this Petition.

SUMMARY OF THE LEAGUE'S COMPETITIVE SWITCHING PROPOSAL

A. Elimination Of Current Rules And Current Precedent On Reciprocal Switching

The Board should eliminate the agency's current competitive access rules in Ex Parte 445 (Sub-No. 1), *Intramodal Rail Competition* (49 C.F.R. Part 1144) insofar as such rules apply to reciprocal switching. The Board should also vacate the agency's existing precedent insofar as such precedent applies to reciprocal switching under the agency's existing rules.

B. Establishment Of New Rules On Competitive Switching

The Board should adopt new rules for reciprocal switching, under which the Board "shall require" a Class I rail carrier to enter into a competitive switching agreement if the following four conditions are met for a shipper (or group of shippers) and/or a receiver (or group of receivers):

1. The petitioner shows that the shipper's/receiver's facility(ies) for which competitive switching is/are sought are served by rail only by a single, Class I rail carrier (the "Landlord Class I Carrier").
2. The petitioner shows that there is no effective inter- or intramodal competition for the movements for which competitive switching is sought. There would be no consideration of product or geographic competition. There would be a conclusive presumption that there is no such effective competition where either: (a) a movement for which competitive switching is sought has an R/VC ratio of 240% or more; or (b) the Landlord Class I carrier has handled 75% or more of the freight volume transported for a movement for which competitive switching is sought in the twelve months prior to the petition seeking switching.
3. The petitioner shows that there "is or can be" a "working interchange" between the Landlord Class I Carrier and another carrier within a "reasonable distance" of such facility(ies). There would be a conclusive presumption that there is a "working interchange" within a "reasonable distance" if either one of two circumstances exist:
 - (a) the shipper's/receiver's facility(ies) for which competitive switching is/are sought are within the boundaries of a "terminal" of the Landlord Class I Carrier existing on July 7, 2011, the date of this Petition for Rulemaking; or are within the boundaries of any new "terminal" established by the Landlord Class I Carrier; or
 - (b) such facility(ies) are within a radius of 30 miles of an interchange between the Landlord Class I Carrier and another carrier, at which cars are "regularly switched."
4. Competitive switching shall not be imposed if either rail carrier between which competitive switching is to be established shows that the proposed switching is not feasible or is unsafe; or that the presence of reciprocal switching will unduly hamper the ability of that carrier to serve its own shippers.

II. IDENTITY AND INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and currently has over 600 company members. These company members range from some of the largest users of the nation's and the world's transportation system, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Rail transportation is vitally important for many League members and especially for those who ship chemicals, petroleum, agricultural, cement, and paper and forest products. Some of the League's members are "captive shippers" operating facilities or shipping to customers that have access to only a single rail carrier.

In response to the Board's opening of the Ex Parte No. 705 proceeding, the League surveyed its diverse Rail Committee members to determine what competition policies are most important to their company, and what policies should be changed by the Board. They responded that greater access to competitive switching would help their companies achieve more efficient, reliable and cost-competitive rail transportation and improve their ability to compete. Although several policy changes were supported by the League's rail members, changes to reciprocal switching policies were rated as the most important.

III. DESPITE THE INTENT OF CONGRESS TO FACILITATE RAIL COMPETITION VIA RECIPROCAL SWITCHING, THE CURRENT RULES AND PRECEDENT HAVE NEVER CREATED SUCH COMPETITION

Current 49 U.S.C. §11102(c), which was added by Section 223 of the Staggers Rail Act of 1980,¹⁵ provides that the Board “may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” Thus, by its terms, the statutory language provides the Board with discretion to order “reciprocal switching agreements” between carriers (*i.e.*, it “may require” such arrangements), when the agency makes either one of two findings: (1) that competitive switching would be “practicable and in the public interest”; or, (2) that competitive switching would be “necessary to provide competitive rail service.” Both the language and, as discussed immediately below, the legislative history of this section indicate that Congress intended to broaden the agency’s power to establish competitive switching arrangements, in order to encourage the development of such arrangements.

Prior to the Staggers Act of 1980, the authority of the ICC to impose reciprocal switching arrangements upon carriers or to decide the terms and conditions of reciprocal switching arrangements was not clear.¹⁶ In adding a provision on reciprocal switching to the legislation that eventually became the Staggers Act, Congress indicated that reciprocal switching was to be a pro-competitive benefit for shippers. The Senate Report noted, for example, that “[i]n areas where reciprocal switching is feasible, it provides an avenue of relief for shippers served by only

¹⁵ Section 223 of the Staggers Act added this section as 49 U.S.C. §11103(c). The ICC Termination Act of 1995 revised the section to be 49 U.S.C. §11102(c), without changing the wording of the provision. Unless the context otherwise requires, the statutory provision in 49 U.S.C. added by Section 223 of the Staggers Act will be referred to by its current numbering of 49 U.S.C. §11102(c).

¹⁶ See, S. Rep. No. 96-470, at 42 (1979); H.R. Rep. No. 96-1035, at 67 (1980).

one railroad where service is inadequate.”¹⁷ This same language was repeated by the Stagers Act Conference Committee Report.¹⁸

Congress, in clarifying the agency’s authority to prescribe reciprocal switching, fully expected the agency to utilize its new power in a pro-competitive manner. The House Report, for example, noted that “[t]he Committee *intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.*”¹⁹ Accordingly, the Conference Committee accepted the slightly broader version of the provision adopted by the House in incorporating Section 223 in the bill that eventually became the Stagers Act. Indeed, the Stagers Act Conference Committee Report *specifically* noted that the reciprocal switching agreement provision in the Act, among others, was “included to foster greater competition.”²⁰

Just six months after the passage of the Stagers Act, the ICC ordered the imposition of reciprocal switching under the provisions of the new statutory language between the Delaware and Hudson Railway Company and Consolidated Rail Corporation covering service within the entire city of Philadelphia. In ordering such competitive switching, the ICC found that there were four broad criteria in determining whether such switching was “practicable and in the public interest” under the statute: (1) the interchange and switching must be feasible; (2) the terminal facilities must be able to accommodate the traffic of both competing carriers; (3) the presence of reciprocal switching must not unduly hamper the ability of either carrier to serve its

¹⁷ S. Rep. No 96-470, at 42.

¹⁸ See, H R. Rep. No. 96-1430, at 116 (1980).

¹⁹ H R. Rep. No 96-1035, at 67 [emphasis added].

²⁰ H.R. Rep. No. 96-1430, at 80. See also, *Cent States Enters, Inc. v. ICC*, 780 F.2d 664, 679 (7th Cir 1985) (“The purpose of the Stagers Act was to encourage, under the appropriate circumstances, but not require, the Commission to approve railroad switching agreements”).

shippers; and, (4) the benefits to shippers from improved service or reduced rates must outweigh the detriments.²¹

In the *D&H* case, the agency found that each of these four tests were met.²² In determining the “public interest,” the agency note that “[a]dditional rail competition is a clear public benefit from the proposed operation, one which is endorsed by the rail transportation policy announced in the Staggers Act.”²³ The ICC also found that the alternative test of “necessary to provide competitive rail service” was also met.²⁴ The agency concluded its analysis in the *D&H* decision by noting that “Congress’ aim in creating section 11103(c) of the Staggers Act was to *provide a competitive counterbalance*” to the broadened rate freedom that was also part of the Staggers Act reforms.²⁵ It buttressed this conviction by quoting the Conference Committee Report on the Staggers Act that “[a] number of provisions are included [in the Staggers Act] to *foster greater competition* by simplifying coordination, minor merger procedures, entry and *reciprocal switching agreements*.”²⁶

However, the approach set forth in *D&H* was abandoned just four years later, in 1985. In that year, the ICC adopted rules to govern the handling of various issues generally referred to as “competitive access,” including the cancellation of joint rates and through routes, the prescription of joint rates and through routes, and reciprocal switching. in Ex Parte No. 445 (Sub-No.1), *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985). At that time, the agency had been dealing with numerous cancellations of through routes by Conrail under certain provisions of the statute, and the bulk of the decision in *Intramodal Rail Competition* governed notification,

²¹ *Del & Hudson Ry. v Consol. Rail Corp. - Reciprocal Switching Agreement*, 367 I.C.C. 718, 721-25 (1981) [hereinafter *D&H*]

²² *Id*

²³ *Id* at 723.

²⁴ *Id* at 727-29

²⁵ *Id.* at 729 [emphasis added]

²⁶ *Id* (citing H.R. Rep. 96-1430, at 80 (1980)) [first emphasis added and second emphasis in original].

explanation, justification for, and the investigation and suspension of, proposed cancellations of through routes and joint rates.²⁷ However, the decision and new rules also dealt with the prescription of reciprocal switching under then-numbered Section 11103(c).²⁸

Under its decision in *Intramodal Rail Competition*, the agency decided that “a switching arrangement shall be established” under the statute only if the agency determined that the establishment of such a switching arrangement “(A) is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive, and (B) otherwise satisfies the criteria of 49 U.S.C. . . . 11103” In making that determination the agency was to take into account “all relevant factors,” including the revenues of the involved railroads, the efficiency of the routes in question, the rates sought to be charged, and the revenues of the involved railroads after the prescription; and that the complaining shipper “has used or would use the . . . reciprocal switching for a significant amount of traffic.”²⁹ The agency would also consider intramodal, intermodal, and geographic competition.³⁰ The reviewing court, in *Baltimore Gas and Electric Company v. United States*,³¹ affirmed the rules in concluding that the regulations arrived at were a “reasonable accommodation of the conflicting policies” set out in the Staggers Act,³² though the court made clear that the agency’s accommodation was not the only one possible.³³

Ironically in light of later history, despite the limitations and considerations inherent in the agency’s Ex Parte No. 445 Rules, in its decision the ICC made clear that its intention in promulgating these rules was to facilitate the establishment of competitive switching: “[t]he rules

²⁷ See *id.* at 823-30.

²⁸ *Id.* at 830.

²⁹ *Id.* at 840-41.

³⁰ *Id.* at 841.

³¹ *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

³² *Id.*

³³ *Id.* (“Certainly, [the agency’s interpretation of the statute in the challenged rules] is not the *only* reasonable interpretation.”).

we are adopting here respond to many of the shipper and small carrier concerns and *should facilitate efforts to ensure reasonable competitive access where needed. This in turn will give shippers more routing alternatives, while promoting competition among railroads. . . .* these various actions should improve our implementation of the twin Staggers Act goals of railroad revenue adequacy and shipper protection of monopoly pricing.” *Id.* at 837 [emphasis added]; see also, concurrence by Commissioner Strenio, *id.* at 838 (“The decision in this proceeding amounts to a *giant stride forward in responding to complaints the Commission has received about a lack of access encountered by some shippers and carriers. As a result, the Commission has substantially liberalized the conditions under which we will grant competitive access to shippers and competing carriers when requested.*” [emphasis added]). However, that intent, and those prognostications, were seriously in error when the agency adjudicated the first cases and established its precedent for reciprocal switching under the Fx Parte 445 Rules.

The very first case adjudicated under the new rules was a request by Midtec Paper Corporation for an order to impose reciprocal switching at its paper mill in Wisconsin. The agency, after first denying relief, ordered the case to be reopened and reconsidered in light of the new Fx Parte No. 445 Rules. In a 3-to-2 decision in *Midtec Paper Corporation v. Chicago and North Western Transportation Company (Use of Terminal Facilities and Reciprocal Switching Agreement)*, 3 I.C.C.2d 171 (1986) [“*Midtec*”], a bitterly-divided ICC denied the request for reciprocal switching. The majority found that, in determining whether reciprocal switching was “necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive,” the agency would need to find “classical categories of competitive abuse: foreclosure, refusal to deal; price squeeze” or “other forms of monopolization

or predation”; or “inadequate service or excessive prices.”³⁴ Whether or not “abuse” had occurred would involve an antitrust-type inquiry.³⁵ The decision rejected claims that the railroad had refused to offer competitive rates and services, in part because the agency wanted more information regarding unspecified revenues, costs, efficiency of the routings, etc.³⁶ The decision also rejected claims of service inadequacies.³⁷ In defending its decision in court, the agency argued, and the court held, that the ICC’s new competitive access rules substantially narrowed the agency’s discretion under the statute to grant competitive remedies.³⁸

The agency’s second attempt to interpret its competitive access rules for reciprocal switching came just three years later in *Vista Chemical Company v. The Atchison, Topeka and Santa Fe Railway Company*.³⁹ The agency found that, where a railroad’s failure to provide competitive rates is cited as evidence of anticompetitive activity, the agency must address the issue of whether the rates are unreasonably high, thus seemingly requiring an inquiry into the agency’s unreasonable rate standards as well as its competitive access standards.⁴⁰ In the decision, the agency rejected assertions that the market was uncompetitive; that the carrier had offered uncompetitive rates; that the rates were unreasonably high; that the railroad’s behavior was uncompetitive; that the railroad’s behavior was discriminatory; or that the routing the shipper was forced to use was inefficient.⁴¹ *Vista Chemical* appeared to erect barriers to relief that were even higher than the demanding tests outlined in *Midtec*.

³⁴ *Id.* at 173-74.

³⁵ *Id.*

³⁶ *Id.* at 182.

³⁷ *Id.* at 182-84.

³⁸ *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1500 (D.C. Cir. 1988) [“*Midtec Court Review*”].

³⁹ *Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331 (1989).

⁴⁰ *Id.* at 336.

⁴¹ *Id.* at 337-42.

Just eight months later, in *Shenango Incorporated, et al. v. Pittsburgh Chartiers and Youghiogheny Railway Company*,⁴² the ICC again rejected a complaint seeking prescription of the terms for terminal trackage rights, applying its standards in *Intramodal Rail Competition*. The agency rejected claims of anticompetitive conduct; allegations that the rate was above stand-alone costs; claims of routing inefficiencies; and other allegations.¹³

Finally, in *Golden Cat Div of Ralston Purina Co. v. St. Louis SW Ry.*,⁴⁴ the last case construing its competitive access rules, the agency again denied relief, ruling that the determination of whether a terminal area exists requires a full inquiry into the nature and use of a facility, including switching or classification activities, the activities of other shippers, and other facts;⁴⁵ and that in order to obtain competitive access on the basis of poor service, the service failures have to be severe.⁴⁶

Four decisions. four denials.

In the last fifteen years, *i.e.*, since the *Golden Cat* decision in 1996, in the face of this daunting precedent, no other requests for reciprocal switching have even been filed, despite the dramatic losses of rail competition following the mega-rail mergers of the 1990s.

IV. THE BOARD HAS THE AUTHORITY TO DISCARD ITS CURRENT RULES ON RECIPROCAL SWITCHING AND TO ADOPT NEW RULES, AND THE RECORD IN EX PARTE NO. 705 AND OTHER INFORMATION CONFIRMS THAT THE BOARD SHOULD TAKE SUCH ACTION

Section III of this Petition makes plain that the Board's current rules on reciprocal switching effectively erect insuperable barriers to shippers and are not consistent with the statutory purpose. Although the statute gave the agency new authority to order reciprocal

⁴² *Shenango Inc v. Pittsburgh, Chartiers & Youghiogheny Ry*, 5 I.C.C 2d 995 (1989).

⁴³ *Id.* at 1000-03.

⁴⁴ *Golden Cat Div of Ralston Purina Co v. St. Louis Sw. Ry.*, ICC Docket No. 41550, slip op. (served April 25, 1996).

⁴⁵ *Id.* at 7-8.

⁴⁶ *Id.* at 9.

switching, the agency's rules and precedent have never even once permitted the agency to actually exercise that authority, and the discovery and litigation requirements are so formidable that, for the last fifteen years, not a single shipper has even tried. Although the legislative history of the statutory provision indicates that the purpose of the provision was to "encourage reciprocal switching as a way to encourage greater competition" and to "foster greater competition," the agency's rules have failed miserably in that regard.⁴⁷ Although the courts have indicated their understanding that the purpose of the new reciprocal switching provision was to "encourage the [agency] to approve reciprocal switching agreements" and to "provide a competitive counterbalance" to railroad market power and "foster greater competition," the current rules have failed to do that.⁴⁸ And although the agency expected its current rules to "facilitate efforts to ensure reasonable competitive access" and "promot[e] competition among railroads," those rules as actually applied have stymied those expectations.

Fortunately, the Board can change direction. Indeed, in 1998, the railroads themselves admitted that the Board could change direction in at least one area of competitive access when they "concur[red] that the competitive access rules should be revisited as they pertain to service failures."⁴⁹ In the Ex Parte No. 575 proceeding, the Board agreed that it had the authority to make changes, noting that it would "expeditiously begin a rulemaking proceeding to consider revisions to the competitive access regulations to address quality of service issues."⁵⁰ The fact of

⁴⁷ See, H.R. Rep. No. 96-1035, at 67 (1980); H.R. Rep. No. 96-1430, at 116 (1980).

⁴⁸ See, *Central States Enters., Inc v ICC*, 780 F.2d at 679 (7th Cir. 1985); *Del. & Hudson Ry v Consol. Rail Corp. – Reciprocal Switching Agreement*, 367 I.C.C. 718, 729 (1981).

⁴⁹ *Review of Rail Access and Competition Issues*, STB Docket No. EP 575, 3 S.T.B. 92, 98 (1998).

⁵⁰ See also, *Railroad Shipper Issues and S. 919, the Railroad Competition Act of 2003: Hearing on S. 919 Before the Subcomm. on Surface Transportation and Merchant Marine of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. (statement of the Honorable Roger Nober, Chairman, Surface Transportation Board) ("[I]he doctrines that many of the shippers would like to see changed which are our bottleneck doctrine and our Midtek [sic] or terminal trackage rights doctrine. are administrative doctrines and as a matter of law an administrative agency can change administrative doctrines Not everyone on our board has always acknowledged that but I as a student of Congress can tell you that we certainly can").

the matter is that the Board has full discretion to make changes to its current rules on reciprocal switching.

A. The Board Has Broad Discretion Under The Statute To Change Its Current Rule On Reciprocal Switching

On its face, the wording of the statutory provision gives the agency wide discretion to determine how to provide for broadened reciprocal switching. The language of the provision indicates that the Board “may” require carriers to enter into reciprocal switching arrangements, under the two broad “practicable/public interest” or “necessary to provide competitive rail service” standards. The statutory wording underscores the Board’s discretion: the use of the discretionary term “may”; the broad requirement for “findings” determined solely by the Board; the use of the broad “public interest” standard as one alternative to establishing reciprocal switching; and an alternative standard in which the Board could find simply that it is “necessary” to provide competitive rail service.

Congress used the word “may” in this statute to indicate the Board has broad discretion to require reciprocal switching agreements. Courts have noted that the words of Section 11102(c) give the agency wide discretion. In *Midtec Paper Corp. v. United States*,⁵¹ the court noted the “permissive” language of the reciprocal switching provision as embodied in the use of the word “may,” and indicated that the statute “was cast in discretionary terms.”⁵² More generally, the United States Supreme Court has noted that the use of the term “may” “usually implies some degree of discretion.”⁵³

Here, the legislative intent behind §11102(c) and the statutory landscape support the conclusion that the Board has discretion. First, Congress intended to broaden the Board’s

⁵¹ *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988)

⁵² *Id.* at 1499.

⁵³ *United States v. Rodgers*, 461 U.S. 677, 706 (1983).

regulatory power with §11102(c), clarifying the agency's authority to order reciprocal switching⁵⁴ and expanding the agency's ability to "permit and *encourage* reciprocal switching as a way to encourage greater competition."⁵⁵ Second, the broader purpose of the statutes governing rail transportation — to achieve the goals of the national rail transportation policy⁵⁶ — suggests that the Board has discretion because it requires the Board to weigh multiple, competing factors when regulating the railroad industry.

Similarly, the "public interest" standard of §11102(c) invites the Board to use its discretion. Congress did not define "public interest," leaving the definition to the Board. In situations like this — where a statute is silent or ambiguous — the Board has broad discretion to resolve the ambiguity.⁵⁷ The only limit on this discretion is that it must "represent[] a reasonable accommodation of the conflicting policies that were committed to the agency's care by the statute."⁵⁸ Thus, the D.C. Circuit has upheld Commission determinations of public interest under §11102(c) that were reasonable in light of the national rail transportation policy.⁵⁹ Accordingly, the Board's discretion is reviewed under the broad standard of reasonableness.

Likewise, the Board's discretion to determine what is "necessary to provide competitive rail service" is broad. Congress directed the Board to determine what is "necessary" but did not provide clear guidance. To resolve the ambiguity, the Board may construe the provision in any manner that is reasonable.⁶⁰

The wording of Section 11102(c) gives no indication beyond the broad "public interest/practicable" and "necessary to provide competitive rail service" standards as to how the

⁵⁴ *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 113 (D.C. Cir. 1987).

⁵⁵ H.R. Rep. No. 96-1035, at 67 (1980) (emphasis added).

⁵⁶ 49 U.S.C. §10101 (establishing the policy of the U.S. in regulating the railroad industry).

⁵⁷ See, *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984).

⁵⁸ *Id.*

⁵⁹ *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1501 (D.C. Cir. 1988); *BG&E*, 817 F.2d at 115.

⁶⁰ *Chevron*, 467 U.S. at 844.

reciprocal switching provision is to be construed, nor does the legislative history of Section 11102(c) give any firm direction. The matter is up to the agency's discretion, within the confines, however, of the pro-competitive purpose of the provision.

Court review of the Board's decisions in Ex Parte 445 and *Midtec* indicate that the Board has wide discretion in the area of reciprocal switching. Those decisions were both appealed to the courts, the former in *BG&E* and the latter in the *Midtec Court Review Decision*. In both cases, the court affirmed the agency's decision. However, in both cases the court made clear that it was affirming the agency's decision *not* because the agency's interpretation was the only one permissible under the statute, but rather because the statute gave the agency discretion, and the agency's exercise of that discretion in the case at hand was properly explained. Thus, these court decisions make clear that the agency retains wide discretion under the statute, and that the agency's current policies are not the only ones possible.

In *BG&E*, the petitioner challenged the agency's decision to establish reciprocal switching arrangements *only* to remedy or prevent "anticompetitive" acts, as the ICC's Ex Parte 445 rules prescribed, as inconsistent with the statute. The court noted that while *BG&E*'s position might be a reasonable interpretation of the statute (a question the court did not decide), it was not the *only* reasonable interpretation because "the statutory directives under which the ICC operates do not all point in the same direction . . . Our task thus is only to determine whether the ICC has arrived at a reasonable accommodation of the conflicting policies set out in its governing statute . . ."⁶¹ In coming to that conclusion, the court noted "the Staggers Act's strong emphasis on preserving and enhancing competition . . ."⁶² Thus, the court was clear that,

⁶¹ *BG&E*, 817 F.2d at 115.

⁶² *Id.*

while the agency's interpretation of the statute set forth in its Ex Parte 445 rules was permissible, the agency might also come to some other permissible interpretation.

The same was true in the *Midtec Court Review Decision*. In that decision, the court noted the "permissive" language and "discretionary terms" of the statute. The court noted that it would review the agency's "exercise of discretion" by examining whether it had provided a "reasoned analysis that is not manifestly contrary to the purposes of the legislation it administers."⁶³ The court found only that the agency's interpretation of the statute was a "reasonable accommodation" of the fifteen different and not-entirely-consistent goals of the national rail transportation policy set out in the Staggers Act, and saw "no basis in the text of the statute or in its legislative history for concluding that the Commission acted unreasonably. . ."⁶⁴ Thus, it is abundantly clear that the court in the *Midtec Court Review Decision*, like the court in *BG&E*, recognized that Section 11102(c) did not mandate one result, but rather gave the agency wide discretion to interpret the provision in light of current circumstances and the need to weigh and balance the policies of the Act at a particular time. Thus, it is also abundantly clear from these court decisions reviewing the agency's authority under Section 11102(c) that any future court, in reviewing any future change to the agency's rules and precedent on reciprocal switching, would review any such action under the same broad parameters.

Administrative agencies are permitted to change their policies and reverse prior conclusions as long as the statute permits such discretion and as long as the agencies explain themselves adequately.⁶⁵ Indeed, an agency's view of what is in the public interest may change,

⁶³ *Midtec*, 857 F 2d at 1500.

⁶⁴ *Id.* at 1501.

⁶⁵ *Motor Vehicle Mfrs Ass'n v. State Farm*, 463 U.S. 29, 42, 57 (1983).

with or without a change in circumstances.⁶⁶ But the agency must supply a reasoned analysis to support its change.⁶⁷

As noted by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, an agency interpretation “is not instantly carved in stone.”⁶⁸ The Board may change its policies, to the extent that the Interstate Commerce Act permits, so long as it acknowledges its prior policy and provides a reasoned basis for the changed policy.⁶⁹ Thus, if the STB concludes that circumstances now require a different accommodation of the conflicting goals of the National Transportation Policy, that new interpretation will also enjoy the deference of the courts under the *Chevron* doctrine, as long as the new interpretation is also a reasonable reading of the statute and the agency adequately explains the reason for its change.

Indeed, in the Ex Parte No. 705 proceeding, a number of parties specifically argued that the Board has discretion to change its competitive access policies,⁷⁰ and many parties asked the Board to change its policies. Most significantly, other federal agencies themselves confirmed that the Board has discretion to change its policies. The United States Department of Transportation and the United States Department of Justice, in a joint filing, indicated that they believed it appropriate for the Board “to investigate the extent to which relevant circumstances . . . have changed. and *whether a proper balance of these and other considerations warrants different policy choices* (e.g., on rate regulation, *access*, or trackage rights) to serve the same

⁶⁶ *Id.* at 58; see also, *Burlington N & Santa Fe Ry v. STB*, 526 F.3d 770, 779-80 (D.C. Cir. 2008) (the STB may change how it implements its statutory duties with or without a change in circumstances)

⁶⁷ *Id.*

⁶⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 863 (1984)

⁶⁹ See, e.g., *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (U.S. 2009) (finding that to change its position, an agency must show that: (1) the new policy is permissible under the statute, (2) good reasons exist for the policy; and (3) the agency believes the new policy is better), *Greater Boston Television Corp v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert denied* 403 U.S. 923 (1971) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”).

⁷⁰ See, e.g., Comments of The Am. Chemistry Council et al. at 20-46, *Competition in the R.R. Indus*, STB Docket No. EP 705, (Apr. 12, 2011); Comments of Consumers United for Rail Equity at 12, *Competition in the R.R. Indus*, STB Docket No. EP 705 (Apr. 12, 2011).

underlying statutory goals.” The two agencies urged the STB “to consider the extent to which current circumstances *warrant a different application* to achieve its underlying statutory mission.”⁷¹ Similarly and even more directly, the United States Department of Agriculture (“USDA”) noted specifically in its reply comments that “the Board has legal authority to make changes” in its competitive access policies.⁷²

The railroads were the only parties in Ex Parte No. 705 to contest the Board’s authority to change its policies on reciprocal switching, and beyond the specious “ratification” argument discussed immediately below, even the railroads did not seriously contest the Board’s wide discretion in the reciprocal switching context.

The railroads did, however, argue that the Board cannot change its policies because the Congress, in passing ICCTA, “ratified” all of the Board’s existing precedent.⁷³ But in passing ICCTA, the Congress did not “ratify” the complex web of pre-ICCTA policies – it “ratified,” by repeating in ICCTA the very same discretionary words that it had given the ICC in the Staggers Act and even before – the Board’s *discretion* to make changes when and if the agency believed that change was necessary.

In any event, the railroads are simply wrong legally. It is well-settled that administrative agencies have very broad discretion to change their policies, with or without a change in circumstances, as long as they adequately explain their reasons for doing so.⁷⁴ Indeed, the *Bob*

⁷¹ Comments of U.S. Dep’t of Transp. & U.S. Dep’t of Justice at 4, 5 *Competition in the R R Indus.*, STB Docket No. EP 705 (Apr. 12, 2011) (emphasis added).

⁷² Reply Comments of U.S. Dep’t of Agric. at 3 *Competition in the R R Indus.*, STB Docket No. EP 705 (May 27, 2011).

⁷³ Comments of the Ass’n of Am. R.Rs. at 31-32, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of CSX Transp., Inc. at iii, 5-10, 26-29, 52, *Competition in the R R Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Norfolk S. Ry. at 15-28, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁷⁴ *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (U.S. 2009); *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 863 (1984), *Motor Vehicle Mfrs. Ass’n v. State Farm*, 463 U.S. 29, 43, 57 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert denied*, 403 U.S. 923 (1971).

Jones University case, cited by the AAR for its “ratification” argument, itself notes that administrative agencies are given broad discretion “to meet changing conditions and new problems.”⁷⁵ The railroads’ “ratification” argument was thoroughly responded to, and the cases cited by the railroads thoroughly distinguished, in the Reply Comments of the Interested Parties (of which the League is a member) in Ex Parte No. 705, dated May 27, 2011, pp. 39-47, which filing is incorporated herein by reference.

In short, the agency has broad authority, under its authorizing statute, under general administrative law, and under specific court precedent interpreting Section 11102(c), to change its rules on reciprocal switching, whether or not there has been a change in conditions. The fact is, however, that the record in Ex Parte No. 705 shows that the transportation market has changed substantially since the agency adopted its reciprocal switching rules in 1985, a subject to which we will now briefly turn.

B. The Record In The Ex Parte No. 705 Proceeding Shows That The Transportation Market Has Changed Substantially Since The Agency Adopted Its Reciprocal Switching Rules In 1985

In its decision initiating its inquiry in Ex Parte No. 705, the Board declared:

The United States railroad industry has changed in many significant ways since the Board’s competitive access standards were originally adopted in the mid-1980s. Among the more salient developments have been the improving economic health of the railroad industry, increased consolidation of the Class I railroad sector [footnote omitted], the proliferation of a short line railroad network, and an increased participation of rail customers in car ownership and maintenance, as well as other activities previously undertaken by the carrier. Since 1980, railroad productivity improved dramatically, resulting in lower transportation rates. However, productivity gains appear to be diminishing and, since 2004, overall transportation prices have increased. See Christensen Update at I & 3-26. Taken together, these events suggest

⁷⁵ *Bob Jones Univ. v United States*, 461 U.S. 574, 596 (1983).

that it is time for the Board to consider the issues of competition and access further.⁷⁶

This Petition will not attempt to repeat or even summarize the large record developed in the Ex Parte No. 705 proceeding showing that the rail industry has changed substantially in the 26 years since the Board promulgated its competitive access rules in 1985 -- a conclusion that is almost self-evident on its face.⁷⁷ Suffice it to say that the Board's own declaration in its order initiating the Ex Parte No. 705 proceeding -- that the industry had "changed in many significant ways" -- was fully supported by the comments submitted by federal agencies,⁷⁸ associations,⁷⁹ and individual companies⁸⁰ in that proceeding.

⁷⁶ *Competition in the R.R. Indus.*, STB Docket No. EP 705, slip op. at 3 (served Jan. 11, 2011). Indeed, this is not the first time that the Board itself determined that there have been significant changes in the railroad industry since the competitive access rules were implemented. Thirteen years ago, in *Review of Rail Access and Competition Issues*, STB Docket No. EP 575, 3 S.T.B. 82, 98 (1998), the Board declared that "[g]iven the changes that have taken place in the rail industry since 1980, we will also consider whether to revise the competitive access rules with respect to competitive issues that are not related to quality of service "

⁷⁷ The Reply Comments of the Interested Parties, of which the League is a member, and which are incorporated herein by reference, summarized much of this testimony. See Reply Comments of The Am. Chemistry Council et al. at 10-36, *Competition in the R.R. Indus.*, STB Docket No. EP 705, (May 27, 2011).

⁷⁸ Comments of U.S. Dep't of Agric. at 2, 4, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of the N.C. Dep't of Transp. at 1-2, 4, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁷⁹ See, e.g., Comments of The Fertilizer Institute at 2-8, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Nat'l Coal Transp. Ass'n at 3-7, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Nat'l Ass'n of Chem. Distribs. at 2, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁸⁰ See, e.g., Comments of Ameren Corp. at 3-5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Omaha Pub. Power Dist. et al. at 5-17, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Arkema Corp. at 3-4, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of E.I. du Pont de Nemours & Co. at 2-11, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of M&G Polymers USA, LLC at 2-7, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Occidental Chem. Corp. at 2-5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Olin Corp. at 3-8, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of PPG Indus., Inc. at 3-7 *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Total Petrochemicals USA, Inc. at 2-5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Miss. Lime Co. at 3-5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011)

C. The Record In Ex Parte No. 705 Shows That There Is Substantial Support For A Revision To The Board's Rules On Reciprocal Switching

As noted in the introduction to this Petition, the League's comments in Ex Parte No. 705 asked the Board to consider changes to its competitive access rules on reciprocal switching. However, a significant number of other parties in the Ex Parte No. 705 proceeding also supported substantial revision to the Board's rules governing reciprocal switching. These included governmental bodies, trade associations and associations of shippers, and individual shippers.

The USDA was direct in its support of "mandatory reciprocal switching": "USDA urges the Board to use mandatory reciprocal switching agreements as one means to increase rail-to-rail competition."⁸¹ It noted that this would "increase rail to rail competition in some areas, while enhancing the marketing opportunities for some agricultural shippers and would not substantially affect overall rail profitability and investment."⁸²

The "Interested Parties," a group of twenty-five individual associations, of which the League is a member, who represent shippers in numerous industries and numerous commodities, urged the Board to implement changes to its rules on reciprocal switching.⁸³ The Fertilizer Institute ("TFI") in its own separate comments stated flatly that "[i]t is time for the Board to revisit and revamp its competitive access rules on reciprocal switching."⁸⁴ TFI noted that, when Congress included Section 11102(c) in the Act, its intent was to encourage greater competition.⁸⁵ But the agency's *Midtec* decision has "turned reciprocal switching into a provision to be invoked

⁸¹ See Comments of U.S. Dep't of Agric. at 6, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁸² *Id.* at 7.

⁸³ Comments of The Am. Chemistry Council et al. at 67, *Competition in the R.R. Indus.*, STB Docket No. EP 705, (Apr. 12, 2011)

⁸⁴ Comments of The Fertilizer Institute at 8, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011)

⁸⁵ *Id.* at 9.

only in the rarest and most exceptional circumstances . . . ,” a standard that is “not appropriate” today.⁸⁶ TFI requested the Board to relax its competitive access standards to allow for reciprocal switching at a broad number of locations.⁸⁷ In doing so, TFI indicated that the Board should look at the model of Canadian inter-switching.⁸⁸ Consumers United For Rail Equity (“CURE”), again in separate comments, recommended that reciprocal switching should be reformed by removing *Midtec*’s “competitive abuse” test.⁸⁹

These views were echoed by a number of individual companies. E.I. DuPont de Nemours and Company (“DuPont”) argued that the agency’s current reciprocal switching standards are too stringent, and urged the STB to adopt a reciprocal switching system similar to the Canadian system for inter-switching, which requires no costly or time-consuming regulatory proceedings and costs are known up front.⁹⁰ Olin Corporation (“Olin”) indicated that broadened reciprocal switching is needed to provide competitive service to captive shippers. Olin indicated that “[m]andatory reciprocal switching is a logical way to deal with the lack of competition . . .” and noted that the Board’s current “competitive abuse” standard interpreting Section 11102 fails to consider the anti-competitiveness inherent when only a single track reaches a competitive shipper.⁹¹ Westlake Chemical Corporation (“Westlake”) urged the Board to affirmatively promote reciprocal switching.⁹² Total Petrochemicals USA, Inc. (“Total”) asked the Board to consider aspects of the Canadian interswitching policy as it considers its own policy changes to

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 10.

⁸⁹ Comments of Consumers United for Rail Equity at 12, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹⁰ Comments of E.I. du Pont de Nemours & Co. at 12, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹¹ Comments of Olin Corp. at 12, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹² Comments of Westlake Chem. Corp. at 35, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

enhance rail-to-rail competition.⁹³ PPG Industries, Inc. (“PPG”) stated that the agency should “revise its competitive access rules to facilitate rail competition through expanded reciprocal switching.”⁹⁴ PPG suggested that the Board examine the Canadian inter-switching model “to determine if it would be workable in whole or in part in the U.S.”⁹⁵ And, Dow Chemical Company (“Dow”) indicated that it particularly supports changes to expand access to reciprocal switching.⁹⁶

D. A Revision To The Board’s Rules On Reciprocal Switching Is Also Supported By The Board’s Own Consultants And Its Own Railroad-Shipper Transportation Advisory Council

1. The Christensen Report Concludes That Broadened Competitive Switching Would Produce Substantial Public Benefits And Would Not Harm The Railroads

In 2008, the Board commissioned Christensen Associates, Inc. to perform an independent study to examine competitive access issues, and in 2009, that firm issued a report analyzing a variety of proposals that might enhance competition.⁹⁷

The Christensen Competition Report noted that, for open-access policies to produce an overall gain in economic welfare, “the effects of lower prices to shippers, increased output, and/or increased service quality due to competitive pressures must outweigh any increase in railroad costs. Furthermore, . . . the economic assessment of the likely effects of these proposals must include the impacts on railroad profitability and investment incentives.”⁹⁸ The Christensen Competition Report went on to present a summary of the likely economic effects of various

⁹³ Comments of Total Petrochemicals USA, Inc. at 5, *Competition in the R.R. Indus*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹⁴ Comments of PPG Indus., Inc. at 8, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹⁵ *Id.* at 10.

⁹⁶ Comments of The Dow Chemical Co. at 1, *Competition in the R.R. Indus*, STB Docket No. EP 705 (Apr. 12, 2011).

⁹⁷ Lauritis R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition* (rev. 2009), <http://www.lrc.com/projects/railroadstudy/> [hereinafter *Christensen Competition Report*].

⁹⁸ 3 Christensen Competition Report, *supra* note 97, at 22-12.

competitive access proposals, including reciprocal switching.⁹⁹ The Christensen Competition

Report noted:

Of the various open-access policies proposed in recent legislation, those policies that propose incremental changes – e.g., *reciprocal switching and terminal agreements* – will be the least costly in terms of loss of economic efficiency and, in our opinion, the most likely to produce competitive responses by railroads. The losses of economies of density and vertical integration, and the likely negative impact on incumbent investment incentives, are among the economic efficiency costs that must be weighed against any potential gains. Of course, to the extent that competitive responses result and traffic increases, static efficiency losses may be overcome – e.g., there would be a likely gain in economies of density if volumes increase.

....
*[I]ncremental policies such as reciprocal switching . . . are most likely to produce an outcome of increased railroad competition as length-of-haul economies are least affected by end-point open access.*¹⁰⁰

Table 22-1 summarized the Christensen Competition Report’s conclusions by indicating that reciprocal switching would likely result in “potential gains” with respect to economies of density; would produce only “small losses” or “small effects” with respect to length of haul economies, investment incentives, railroad profitability, and coordination costs; would “most likely” result in competitive responses by carriers; and would “most likely” produce shipper gains. The Report’s overall conclusions on reciprocal switching strongly support an initiative by the Board to reform and broaden its reciprocal switching rules: “[w]e believe that incremental policies such as reciprocal switching and terminal agreements *have a lower potential of leading to adverse changes to industry structure, costs, and operations, and additionally have greater likelihoods of resolving shipper concerns via competitive market responses.*”¹⁰¹

⁹⁹ See *Id.* at 22-13.

¹⁰⁰ *Id.* [emphasis added].

¹⁰¹ *Id.* at 22-14 [emphasis added].

2. The Board's Own Railroad-Shipper Transportation Advisory Council Urged The Adoption Of A Broadened Approach To Competitive Switching

The Railroad-Shipper Transportation Advisory Council ("R-STAC"), established pursuant to the ICC Termination Act of 1995, consists of 15 appointed members and is comprised of senior officials representing large and small shippers, and large and small railroads. Thus, significantly, R-STAC's membership is composed of both shippers and carriers. In addition, the Secretary of the U.S. Department of Transportation and the three Board Members serve as *ex officio* members. The R-STAC provides advice on regulatory, policy and legislative matters, as appropriate, to the STB Chairman, the Secretary of Transportation, the Senate Committee on Commerce, Science and Transportation, and the House Transportation and Infrastructure Committee.

In a *White Paper on New Regulatory Changes in the Railroad Industry*, dated October 16, 2009,¹⁰² the R-STAC recommended that the implementation of certain changes would "achieve a *balanced, moderate approach* for the mutual benefit of the shippers and railroads."¹⁰³ The very first of these recommendations was that railroads should be required to open up shippers closed to reciprocal switching "as long as they are within an acceptable mileage distance (suggest 30 miles) from an interchange with another railroad in a terminal area."¹⁰⁴

The R-STAC's recommendation of a broadened competitive switching regime provides further assurance to the Board that a reasonable revision to the Board's current rules on reciprocal switching would be of benefit to shippers without harming the railroad industry.

¹⁰² See R.R.-Shipper Transp. Advisory Council, *White Paper on New Regulatory Changes for the Railroad Industry* (2009), <http://www.stb.dot.gov/stb/docs/RSTAC/White%20Paper%2010-16-2009.pdf>.

¹⁰³ *Id.* at 2. [emphasis added].

¹⁰⁴ *Id.* [emphasis added].

E. Canadian “Interswitching” Shows That The Development Of Rules On Competitive Switching Would Provide For Broad Public Benefits Without Harm To The Rail Industry

As the Board knows, under Part III of the Canada Transportation Act (“CTA”), Section 127, the Canadian Transportation Agency is authorized to publish and has published regulations dealing with “interswitching.” Under the CTA, the agency may order a railway company to provide reasonable facilities for the interchange of traffic, as long as a point of origin or destination is within 30 kilometers (about 18 miles) of an interchange, or a “prescribed greater distance” if the origin or destination is “reasonably close” to the interchange. The agency may also prescribe the rate to be charged for the switching.¹⁰⁵ The regulations published by the Canadian Transportation Agency set forth the rates to be charged for the interswitching service.¹⁰⁶

In 2001, in a full review of the CTA in order to assess the act and recommend amendments, an independent Panel reported that shippers had indicated that interswitching is generally effective in promoting competition and fostering efficiency.¹⁰⁷ Interestingly, the Panel reported that the Canadian railways indicated only that the prescribed interswitching rates were too low; the railroads apparently did not question the interswitching arrangements on the grounds that they were inefficient or operationally infeasible.¹⁰⁸

Additionally, in a research paper commissioned as part of the review, the consultant retained by the Panel noted that interswitching has been a commonplace feature of the Canadian

¹⁰⁵ See Canada Transportation Act, R.S.C., §§127(3), 127(4), 128 (Can.).

¹⁰⁶ See *Review of the Railway Interswitching Regulations*, Canadian Transp. Agency Decision No. LET-R-66-2010, (Apr. 21, 2011) (Can.), <http://www.otc-cta.gc.ca/doc.php?did=2319&lang=eng>.

¹⁰⁷ See Can. Transp. Act Review Panel, *Canada Transportation Act Review* 32 (2001), <http://www.reviewcta-examenlct.gc.ca/english/pages/final/ch4e.htm#6>.

¹⁰⁸ *Id.*

railway environment since the beginning of the Twentieth Century.¹⁰⁹ Although interswitching was originally introduced as a measure to avoid congestive overbuilding of railway lines, the Consultant's Report indicated that the scope of the provision has been significantly extended well beyond its original purpose to serve as one of several competitive access provisions contained in the CTA.¹¹⁰ The Consultant's Report noted that interswitching within the 30 kilometer limit was "ubiquitous" within Canada.¹¹¹ In response, the Panel recommended no change to the structure of interswitching, but simply indicated that the interswitching rates set by the agency should be prescribed as maximum rates, so that railroads and shippers could negotiate lower rates if they so desired.¹¹²

Canadian interswitching has clearly been successful. In the Ex Parte No. 705 proceeding, the Board heard from several shippers with actual experience with Canadian interswitching, who reported their success with the regime.¹¹³ The League would note that the Canadian interswitching model, in providing for competitive switching in all instances (not just those involving shippers without inter- and intramodal competition) and in actually prescribing interswitching rates "up front," goes well beyond the proposal advanced by the League in this Petition. Nevertheless, the Board can take confidence in the fact that the Canadian model has proved itself to be operationally feasible and successful in promoting rail-to-rail competition, but without harming Canadian carriers.

¹⁰⁹ D.W. Flicker, *Canada-United States Railway Economic Regulation Comparison 17* (2000) [hereinafter "Consultant's Report"].

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² <http://www.reviewcta-examenlrc.gc.ca/english/pages/ctar-recommendations.htm>

¹¹³ See, Comments of E.I. du Pont de Nemours & Co. at 12, *Competition in the R.R. Indus*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of PPG Indus., Inc. at 10, *Competition in the R.R. Indus*, STB Docket No. EP 705 (Apr. 12, 2011); Comments of Total Petrochemicals USA, Inc. at 5, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

F. Conclusion To Part IV: The Board Should Initiate A Proceeding To Revise Its Current Reciprocal Switching Rules, And Should Adopt New Rules On Competitive Switching

In short, the Board is fully justified both by the terms of the statute and relevant precedent, by the record before it in the Ex Parte No. 705 proceeding, by its own consultants and advisory committee, and by the example in Canada, to initiate a rulemaking on reciprocal switching. It is the content of that rulemaking to which we now turn.

V. THE BOARD SHOULD INITIATE A RULEMAKING TO SEEK COMMENTS ON THE LEAGUE'S PROPOSAL ON COMPETITIVE SWITCHING, AND SHOULD ADOPT THE LEAGUE'S PROPOSAL

On page 8 of this Petition and Appendix A, the League presents a one-page summary of its proposed rules implementing a new regime of competitive switching, and in Appendix B to this Petition, the League sets forth the language that it believes the agency should include in a Notice of Proposed Rulemaking under 5 U.S.C. §553. Once having received comments, the League urges the STB to adopt these rules as proposed.

In this Part V, the League sets forth each of the elements of the proposed rules included in Appendix B. It also provides an explanation of the proposed rules, and the reasons why the agency should propose this language in an NPRM and adopt this language as final rules under section 49 of the Code of Federal Regulations.

The League's proposed language set forth in Appendix B is in three main parts.

In the first part of Appendix B, the League's proposal would simply delete reciprocal switching from the terms of existing 49 C.F.R. Part 1144. Part 1144 of 49 C.F.R. would remain the same with respect to the cancellation of through routes and joint rates. This deletion would permit the Board to adopt new rules, as the League seeks in this Petition, for competitive switching under Section 11102(c) of the statute.

In the second part of Appendix B, the League's proposal would have the STB, in a decision implementing new rules for competitive switching, announce that the precedent in *Midtec*, *Vista Chemical*, *Shenango*, and *Golden Cat* would no longer be followed with respect to reciprocal switching under 49 U.S.C. §11102(c). This would clear the regulatory landscape for the Board to develop new precedent under the new rules, without consideration of prior precedent under the current rules.

Finally, and most importantly, in the third part of Appendix B, the League sets forth the text of new competitive switching rules that the League would urge the Board to propose in a rulemaking (a proposed new Part 1145 of the Code of Federal Regulations) and to adopt at the conclusion of that rulemaking.

The title of the proposed new Part 1145 of the Code of Federal Regulations is "Competitive Switching Under 49 U.S.C. §11102(c)." The title refers to "competitive switching," rather than "reciprocal switching," since, as the Board knows, the "reciprocal" nomenclature used in 49 U.S.C. §11102(c) does not accurately describe the action authorized by the section. At its most general and fundamental level, the League's proposal would clarify the Board's discretion and require the agency to order competitive switching under 49 U.S.C. §11102(c) by establishing an affirmative "if-then" proposition: if the Board finds that four conditions are fulfilled (which are listed in the subsequent wording of proposed Section 1145), then the agency "shall find" that the statutory tests of "practicable and in the public interest" and "necessary to provide competitive rail service" are met. The four conditions are:

1. Service by a Single, Class I Carrier: Under the first of these four conditions, the new rules would operate only when the party seeking competitive switching shows that an origin or destination facility (or group of facilities)¹¹⁴ is served by rail only by a single, Class I rail carrier.

2. Lack of Inter- or Intramodal Competition, With Two Conclusive Presumptions.

Second, under the new rules, a party would be required to show that there is no effective inter- or intramodal competition for each of the movements for which reciprocal switching is sought, but with two conclusive presumptions to simplify and expedite that showing in certain cases.

Specifically, where the party shows: either (a) that a movement for which reciprocal switching is sought has a revenue-to-variable cost ratio of 240% or more; or (b) that the Class I carrier solely serving the shipper's facilities has handled 75% or more of the volume transported in the past twelve months for a movement for which competitive switching is sought, then there would be a conclusive presumption for those movements that there is a lack of inter- or intramodal competition. If one or more of the movements for which competitive switching is sought could not qualify for either of those conclusive presumptions, the shipper would have to litigate the question of effective inter- or intra-modal competition for those movements, and the issue would have to be decided by the Board.

3. "Working Interchange" Within a "Reasonable Distance," With Two Conclusive Presumptions. Third, under the new rules, a party seeking competitive switching would be required to show that there "is or can be" a "working interchange" within a "reasonable distance" of the shipper's facility, but with two conclusive presumptions to simplify and expedite the showing in certain cases. Specifically, where the party seeking competitive switching could show: either (a) that the shipper's facilities and the lines of another carrier were within the

¹¹⁴ As discussed herein, the League's proposed new rules apply to both a shipper and a receiver, as well as to a group of shippers or receivers. To facilitate the text of this Petition, the term "shipper" in this Petition shall be used to denote both a shipper and a receiver, and shall refer to both the singular and the plural.

boundaries of a “terminal” of the Class I rail carrier that currently exists as of the date of this Petition for Rulemaking or that the Class I carrier establishes in the future, in which cars are “regularly switched;” or, (b) that the shipper’s facilities are within a radius of 30 miles of an interchange between the Class I rail carrier and another carrier, at which cars are “regularly switched,” then there would be a conclusive presumption that there is a “working interchange” within a “reasonable distance” of the shipper’s facilities. If the petitioner could not qualify for either one of those conclusive presumptions, the issue would have to be litigated and decided by the Board.

4. Switching is Safe and Feasible, With No Undue Adverse Effect on Existing Service.

The fourth requirement is a negative condition, to insure that the new competitive switching regime would not compromise safety or operational feasibility, or would not undermine service to existing shippers. Under this condition, a request for competitive switching would be defeated if either rail carrier between which competitive switching is to be established under the first three conditions shows that the proposed switching is not feasible or is unsafe, or that the presence of this switching would unduly hamper the ability of either carrier to serve its shippers.

The League’s proposal on a new competitive switching regime does not go nearly as far as the statute would allow, since it would effectively limit the new competitive switching regime to situations where there is railroad market power – a limitation that is not required by Section 11102(c) of the statute, which significantly does not contain a “market dominance” requirement that is present when the agency directly regulates a carrier’s rates under 49 U.S.C. §10701. However, this limitation to situations where there is railroad market power is intended to create a middle-ground position consistent with the Railroad Transportation Policy of 49 U.S.C. §10101a and the “public interest” and “necessary to provide competitive rail service” standards in 49

U.S.C. §11102(c). As will be discussed further below, the League's proposal, which does not allow for competitive switching where the shipper already has competitive options, is reasonable, and indeed is much more restrictive than the *D&H* precedent.

Yet, by providing for certain conclusive presumptions as to the existence of effective inter- and intramodal competition, the League's proposal avoids long, drawn-out, expensive litigation on "market dominance" in every instance, in cases where railroad market power is highly likely. In that respect, the League's proposal is consistent with the needs of the competitive market, where certainty, predictability, and efficiency are required.

The League's proposal also requires the shipper to show that there "is or can be" a working interchange between the Class I rail carrier currently serving the shipper and another carrier, but again with conclusive presumptions to expedite and simplify this showing. This condition is consistent with the statutory requirement of "practicable" and "necessary" to provide competitive rail service terms of the statute.

Finally, the League's proposal allows for rail carriers to show that competitive switching would be infeasible or unsafe, or would compromise service to current shippers. It is thus consistent with the Rail Transportation Policy and the "public interest" terms of Section 11102(c) in that respect as well.

A. Introductory Language To Proposed Part 1145 -- The Board "Shall Find" That The Statutory Requirements Are Fulfilled And "Shall Require" A Rail Carrier To Enter Into A Switching Agreement Under The Statute When Four Tests Are Met

Under the League's proposal, the introductory language to proposed new Part 1145 states: "[t]he Board shall find that a switching agreement under 49 U.S.C. §11102(c) is practicable and in the public interest and that such an agreement is necessary to provide competitive rail service; and shall require a rail carrier to enter into a switching agreement with

another rail carrier to serve a shipper (or group of shippers) and/or a receiver (or group of receivers)” when four conditions are met, which are set forth in the remainder of the Part. See Appendix B, proposed Section 1145, introductory language.

Adoption of this language by the Board would be a “substantive rule[] of general applicability adopted as authorized by law” as defined by 5 U.S.C. §552(a)(1)(D), and would therefore clarify the Board’s current discretion under the statute. Under this proposal, if the Board finds that the conditions set forth in the remainder of the section were met, then the Board would in all cases require the carrier at issue to enter into a switching arrangement under 49 U.S.C. §11102(c). There is no doubt that the Board can limit its discretion under the statute, and indeed the Board has done so in its current rules set forth in Part 1144, as the reviewing court recognized.¹¹⁵ Although it would be possible for the Board to simply eliminate reciprocal switching from Part 1144, such a course of action would require the industry and the Board to fully litigate every case to determine if the statutory standards are met. The League believes that the industry, and the competitive market, would be far better served with a set of clear standards and procedures so that both shippers and carriers know the “rules of the game,” and can avoid lengthy and expensive litigation through negotiations if possible. This is especially true in the area of competitive switching, where the needs of the competitive market require clarity, certainty, and efficiency.

Under the introductory language to the League’s proposal, the new rules would apply to both a shipper and a group of shippers, and/or a receiver and a group of receivers. Thus, under the proposed rule, at Location A, there might be only a single shipper who desires competitive

¹¹⁵ *Midtec Paper Co. v. United States*, 857 F.2d 1487, 1500 (D.C. Cir. 1988) (stating that the Ex Parte 445 Rules “narrow the agency’s discretion under section 11103 . . . We could not say in *Baltimore Gas*, and we cannot say now, that the Commission’s narrowing of its own discretion is manifestly inconsistent with the terms or the purposes of section 11103, or with the broader purposes of the Staggers Act . . .”).

switching; or, there might be several shippers, only one of which seeks competitive switching. That single party could qualify for such competitive switching, as long as the four conditions were fulfilled. However, at Location A, there could also be several shippers who desire competitive switching, as well as receivers of goods. The League's proposal envisions that the group of shippers and/or receivers could jointly file a petition seeking competitive switching at a particular location. As long as all of the shippers and receivers qualified under the four standards, competitive switching could be established for all of them.

Finally, as discussed further below, the four standards apply to a "party" seeking competitive switching. Thus, it would be possible for another rail carrier to file a request for competitive switching at a particular location. That potentially competitive rail carrier would, of course, have to show that each of the shippers/receivers which it sought to serve would meet the standards of the proposed rule.

B. Condition 1: Petitioner Shows That Shipper/Receiver's Facilities For Which Competitive Switching Are Sought Are Served By Rail Only By A Single, Class I Rail Carrier

The first condition that would have to be met for the grant of an order for competitive switching would require the party seeking such switching to show that "the facilities of the shipper (or group of shippers) and/or receiver (or group of receivers) for whom such switching is sought are served by rail only by a single, Class I rail carrier (or a controlled affiliate)." There are several aspects and implications to this requirement.

First, this requirement would defeat a request for competitive switching where the facility of the shipper is already served by more than one rail carrier. This condition would carefully prevent an order mandating competitive switching where the facility in question is already served by two rail carriers (which could be, for example, two Class I carriers, or a Class I and a Class II or III carrier, or several Class II or III carriers). Such service could be via actual

physical tracks, or via trackage rights, or the like. In such a case, the shipper presumably already has rail-to-rail competition, and therefore would not qualify for third-carrier service.

Second, this condition, by requiring the party seeking competitive switching to show that the facility of the shipper is actually served by rail only by a single, Class I rail carrier, would prevent the imposition of competitive switching in a situation where the shipper is only served by a Class II or III rail carrier.¹¹⁶ According to the Association of American Railroads (“AAR”), Class I railroads represented 67 percent of U.S. freight rail mileage but fully 93 percent of freight railroad revenue in 2009.¹¹⁷ The League believes that, due to their size and reach, in general Class I railroads have market power; while the much smaller Class II and III railroads generally do not. The Board is not required to regulate Class II and III railroads in the same way as Class I carriers, and the Board has frequently distinguished between the classes of carriers in a variety of settings.¹¹⁸ The League believes that it is appropriate at this time and in this setting for the Board to distinguish between Class I versus Class II and III carriers with respect to competitive switching. However, the League also believes that, if the Board agrees at this time, the Board can and should monitor this condition over time, and adjust it if necessary.

Of course, the requirement that a party seeking competitive switching shows that the facility of the shipper is served by rail only by a single, Class I carrier could mean that a Class II or III carrier could, if otherwise legally free to do so, seek to obtain the right to serve the facility of a shipper that is currently served by only one Class I carrier, and thus provide competitive rail service to the facility of that shipper. That Class II or III carrier would, of course, have to meet the remainder of the tests in the proposed new Part 1145 competitive switching regime. On the

¹¹⁶ If a Class I rail carrier had a controlled affiliate, the rule would extend to that affiliate as well.

¹¹⁷ Ass'n of Am. R.Rs., *Railroad Facts* 8 (2010).

¹¹⁸ See, e.g., *Simplified Standards for Rail Rate Cases*, STB Docket No. Ex Parte 646, slip op. at 101 (served Sept. 7, 2007).

other hand, because of the proposed requirement that the facility of a shipper be served by “only a single, Class I rail carrier,” a Class I carrier would not be able, under the proposed rule, to seek competitive switching against a Class II or III carrier who solely serves a shipper; or a Class II or Class III carrier would not be able to seek competitive switching against another Class II or Class III carrier.

Finally, the burden of proof for this condition would lie with the party seeking an order for competitive switching. It is envisioned that the factual inquiry for this condition would in the very large majority of cases be simple, since it would only be necessary for a petitioner to show that the facility of the shipper for which competitive switching is sought is actually served by rail only by a single, Class I carrier.¹¹⁹

C. Condition 2: Petitioner Shows That There Is No Effective Inter- Or Intramodal Competition, With Two Conclusive Presumptions

Under the League’s proposal, the second condition necessary for obtaining an order for competitive switching under new Part 1145 is that:

the party seeking such switching shows that intermodal and/or intramodal competition is not effective with respect to the movements of the shipper (or group of shippers) and/or receiver (or group of receivers) for whom competitive switching is sought. In making such a determination, the Board shall not consider the existence of product or geographic competition.

At the outset, it should be noted that, unlike the provisions of Section 10701 and 10707 of the Act with respect to the reasonableness of rates, Section 11102(c) of the statute does not have any market dominance requirement. Indeed, even in its Ex Parte 445 Rules decision, although the agency was at that time considering both product and geographic competition in determining market dominance in rate cases, the agency recognized that the reciprocal switching provision of the statute did not require a showing of market dominance, and it chose to eliminate the

¹¹⁹ Intramodal competition via potential build-outs is dealt with under the second condition, discussed immediately below.

consideration of product competition in competitive access cases.¹²⁰ It would be entirely lawful if *no* “captivity” requirement would be imposed in the reciprocal switching context at all.

However, the proposed League rules do not go that far, in order to attempt to accommodate the interests of carriers. Under the League’s proposal, competitive switching would be imposed only where there is no effective inter- or intra-modal competition. Thus, the focus is on situations where there is railroad market power. Such a limitation would substantially strengthen the agency’s legal right to impose competitive switching. Clearly, in such a case, competition would be in the “public interest,” and clearly in such a case, competition would be “necessary to provide competitive rail service” -- the two tests set forth in Section 11102(c). Such a test would clearly be consistent with Section 10101(1) of the Act, which provides that the agency should “allow, to the maximum extent possible, competition . . . to establish reasonable rates for transportation by rail.”¹²¹ It would also be consistent with 49 U.S.C. §10101(4), “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public . . . ”

A limitation for competitive switching to shippers lacking inter- or intra-modal competition would also be supported by 49 U.S.C. §10101(5), which requires the agency to “ensure effective competition . . . between rail carriers . . .” Finally, this proposed condition would be consistent with 49 U.S.C. §10101(6) and (12), which respectively require the Board to “ensure effective competition and coordination between rail carriers” and to “avoid undue

¹²⁰ See *Intramodal Rail Competition*, STB Docket No. Ex Parte 445, 1 I.C.C.2d 822, 829 (noting that the agency’s “market dominance determination is *jurisdictional*” and therefore the agency is “statutorily barred from finding a rate unreasonably high or prescribing a maximum reasonable rate unless there is market dominance.” However, “[b]y contrast, our jurisdiction in the competitive access context is not limited in such a manner. Indeed, our discretion . . . is very broad. . .”).

¹²¹ 49 U.S.C. §10101(1).

concentrations of market power.” Indeed, as the agency noted in the *D&H* decision, “[u]nder the Staggers Act, competition is normally presumed to be in the public interest, and the proponent [of competition] bears a light burden on this issue.”¹²² It should be noted that, under the League’s proposed rules, the burden of proof on this issue would be on the petitioner.

Under the League’s proposal, the inquiry on market power would be limited to inter- or intramodal competition. Because Condition No. 1 already requires the party requesting the imposition of competitive switching to show that the shipper is served by only one Class I rail carrier, unless there is a realistic build-out possibility to another carrier, normally the inquiry into intramodal competition would be simple.

There would be no inquiry into product or geographic competition. This, the League believes, is completely appropriate. Even under the current competitive access rules, the agency does not consider product competition.¹²³ Under its 1998 decision in *Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937 (1998), *aff’d Ass’n of American Railroads v. STB.*, 306 F.3d 1108 (D.C. Cir. 2002), the Board determined to exclude product and geographic competition in most circumstances from its determination of market dominance in rate cases. Surely, access to the competitive market under Section 11102(c) should not be more demanding than access to the Board’s procedures directly regulating the price that a rail carrier can charge, particularly when the Congress has required the Board to determine “market dominance” in rate cases, and has left the Board free to ignore such considerations altogether under Section 11102(c).

Under the League’s proposal, the inter- and intramodal competition inquiry would operate on a movement-by-movement basis, as in rate cases. For each movement, the party

¹²² *Del. & Hudson Ry v. Consol. Rail Corp. – Reciprocal Switching Agreement*, 367 I.C.C. 718, 723 (1981).

¹²³ See 49 C.F.R. §1144.2(b).

seeking competitive switching would need to show that there is no effective inter- or intramodal competition. However, the League's proposal also contains two crucial presumptions – conclusive in nature – that would simplify and expedite the inquiry into the effectiveness of inter- and intramodal competition in cases where railroad market power is clear.

1. The Board Should Establish Conclusive Presumptions To Simplify, Expedite And Make More Efficient The Determination Of Effective Inter- And Intramodal Competition Where Railroad Market Power Is Substantial

As noted above, the statute does not require a showing of market dominance for applications under Section 11102(c). The Board, therefore, is even more free than it is under Sections 10701 and 10707 to fashion any competitive inquiry under Section 11102(c) in the way that best serves the policies of the statute. The policies of the statute require the Board to “provide for the *expeditious handling and resolution of all proceedings* required or permitted to be brought under this part,” 49 U.S.C. §10101(15); to render “fair *and expeditious* regulatory decisions, 49 U.S.C. §10101(2); and to “reduce regulatory barriers” to entry in the industry, 49 U.S.C. §10101(7) [emphasis added]. Indeed, under the ICC Termination Act of 1995, the Board was instructed to become even more sensitive to regulatory inefficiencies and delays.¹²⁴

However, the fact is that the Board's market dominance inquiry, even when limited to inter- and intramodal competition, has become very complex, expensive and lengthy, especially in recent cases. Indeed, the Board is almost “back where it started from” in terms of the length of time that it takes to determine an initial jurisdictional question, one that was supposed to be a “practical determination without administrative delay,” in which “protracted antitrust-type” litigation was not envisioned, and was simply supposed to be a “threshold test.”¹²⁵

¹²⁴ See *Market Dominance Determinations – Product and Geographic Competition*, STB Docket No. Ex Parte 627, 3 S.T.B. 937, 942-943 (1998).

¹²⁵ See 49 U.S.C. §1(5)(d) (1976); S. Rep. No. 94-499 at 47 (1976) as reprinted in 1976 U.S.C.C.A.N. 61; *Market Dominance Determinations – Product and Geographic Competition*, 3 S.T.B. 937, 938 (1998).

For example, in two recent cases, there have been significant delays in determining market dominance. In STB Docket No. 42121, *Total Petrochemicals USA, Inc. v. CSX Transportation Inc.*, the complainant filed a complaint on May 3, 2010. Discovery was initiated, including discovery into the issue of market dominance. In a decision served on April 4, 2011, the Board decided to bifurcate the proceeding and resolve the issue of market dominance first; in that decision, the Board set a procedural schedule that would have completed the submission of evidence on July 5, 2011, fifteen months after the filing of the complaint. However, in a subsequent decision served June 3, 2011, the Board suspended the procedural schedule for market dominance, pending further order from the Board. Thus, more than one year after the filing of the complaint, the Board is still many months from deciding the issue of market dominance.

In a second case, STB Docket No. 42123, *M&G Polymers USA, LLC v CSX Transportation, Inc.*, the complaint was filed on June 18, 2010. In a decision served May 6, 2011, the Board also bifurcated the proceeding to decide the market dominance issue and issued a procedural schedule that would complete the submission of evidence by August 2011, fourteen months after the complaint was filed, with several more months clearly necessary for the Board to issue a decision. In both of these cases, it is entirely likely that it will take the Board at least eighteen months just to decide the issue of market dominance.

These cases involved carload traffic. The Board seems to believe that a determination of the issue of market dominance is more complex for this type of traffic than for heavy-loaded unit trains of coal. But carload traffic is precisely the type of traffic that is likely to seek and benefit from competitive switching – traffic from manufacturing facilities located in urban areas where large-scale switching is already performed. The use of sensible presumptions will assist the

Board in the use of its resources and will permit the Board to fulfill the National Transportation Policy, which as noted above requires the “expeditious handling and resolution” of proceedings by the Board.

Perhaps most importantly, delays are inconsistent with the competitive market. Competitive opportunities that may exist for the shipper and the alternative competitive carrier might evaporate if a decision on the application for competitive switching takes years or even many months.

Thus, the League strongly believes that the use of conclusive presumptions regarding the effectiveness of inter- and intramodal competition is appropriate, and indeed necessary, in cases where the incumbent rail carrier clearly possesses market power. Of course, if the party seeking competitive switching cannot meet the conclusive presumption as to the effectiveness of inter- and intramodal competition, it would still be open to the applicant to litigate the matter. In that case, however, the applicant would have to bear the cost and delay inherent in the litigation – a result that would be procedurally and substantively fair, and would avoid the appearance of arbitrariness.¹²⁶

2. **Conclusive Presumption #1: The Rate For The Movement For Which Competitive Switching Is Sought Has An R/VC Ratio Of 240 Percent Or More**

Under proposed Section 1145, the League proposes that the first conclusive presumption to determine the lack of effective inter- and intra-modal competition is that “the rate for the movement for which such switching is sought has a revenue to variable cost ratio of 240 percent

¹²⁶ As discussed immediately below, the League proposes that a conclusive presumption as to the lack of effective inter- and intramodal competition should exist if the applicant for competitive switching can show that the revenue to variable cost ratio for the movement for which competitive switching is sought is 240% or more, or that the rail market share of the transportation for that movement is 75% or more. A shipper whose movement has a revenue to variable cost ratio of 230% and a 70% market share would not be precluded from seeking an order for competitive switching, but would have to bear the burden of the risk, cost and delay of proving the issue of “lack of effective inter- and intramodal competition” through evidence submitted to the Board, and a Board decision on the question.

or more.”¹²⁷ Clearly, the ability to charge monopoly profits is a strong indication of the presence of market power and the lack of effective competition.¹²⁸ Indeed, the Board itself has noted that the ability of a carrier to charge rates “substantially above cost” is a factor that it “typically consider[s]” in determining whether effective competition exists.”¹²⁹ Revenue-to-variable-cost ratios have long been used by the Board and its predecessor to analyze railroad rates, and are in fact embedded not only in the Board’s jurisdiction under 49 U.S.C. §10707, but also in the Board’s analysis of “unreasonable” rates under both its simplified and full rate standards. The Board’s procedures to develop R/VC ratios – URCS Phase III – are well known, well understood, can be developed quickly and easily, generally with little controversy, either with or without the use of consultants.

The R/VC ratio chosen by the League to trigger the first conclusive presumption of the lack of inter- and intramodal competition—240 percent or more—is at a level of profitability that clearly represents a very high likelihood of the presence of railroad market power. The level is well above railroad fully allocated cost and the Board’s jurisdictional threshold. Much more importantly, in its decision in Ex Parte No. 689 (Sub-No. 1), *Simplified Standards for Rail Rate Cases – 2008 RSAM and R/VC>180 Calculations*, served July 27, 2010, the Board published its most recent figures for analyzing the reasonableness of rail rates under the Board’s decision in Ex Parte No. 646 (Sub-No. 1), *Simplified Standards for Rail Rate Cases*, served Sept. 5, 2007. One of these standards, the R/VC>180, measures the “average markup actually applied by the defendant railroad on its potentially captive traffic,” and is calculated “as the total revenue

¹²⁷ See App. A, proposed §1145(b)(i)

¹²⁸ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (“a firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear.”) (citations omitted)

¹²⁹ *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42101, slip op. at 6 (served June 30, 2008) [hereinafter *DuPont Nitrobenzene Decision*].

earned by the carrier on potentially captive traffic divided by the total variable costs of the railroad to handle that traffic.”¹³⁰ In other words, the R/VC>180 standard calculates the average R/VC ratio on the very highest-rated traffic on the railroad, i.e., “potentially captive traffic,” that is, traffic with an R/VC ratio of 180 percent or more.

Analysis of the Board’s July 27, 2010 decision reveals that, for all seven Class I railroads, the average R/VC>180 is 242 percent.¹³¹ In other words, a conclusive presumption of lack of effective inter-and intramodal competition set at 240 percent would encompass only the very highest rates within the group of the very highest rated traffic in the entire railroad system in the United States. The Board can be confident that the ability of a carrier to charge rates at this level indicates rates that are not just “potentially captive,” i.e., the universe of traffic used to calculate the R/VC>180, but, by charging greater than the average of the rates on all “potentially captive” traffic, clearly indicates a high likelihood that such traffic is actually captive.

Analysis of the Board’s R/VC>180 figures over time and among carriers also reveals several other useful characteristics. The R/VC>180 percentages are quite consistent over time: the individual yearly data that make up the four-year average indicates little variation: the average R/VC>180 percentage ranges from just 239% on the low end (2005) to 246% on the high end (2006), with the figures for 2007 and 2008 falling in that small range. Thus, selection of a 240 percent figure for a conclusive presumption would be fully consistent with that small variation over time. Similarly, the R/VC>180 does not vary much between the four major Class I carriers: UP and BNSF have an R/VC>180 of 231% and 232% respectively, CSXT’s figure is

¹³⁰ *Simplified Standards for Rail Rate Cases—2008 RSAM and R/VC>180 Calculations*, STB Docket No. EP 689, slip op. at 2 (served July 27, 2010).

¹³¹ Using the four-year average figures. Thus, 232% (BNSF) + 243% (CSXT) + 256% (GTC) + 249% (KCS) + 257% (NS) + 229% (Soo) + 231% (UP) divided by 7 = 242.4

243%, and NS's is 257%. Again, a conclusive presumption of 240% for showing a lack of effective inter- and intramodal competition would fall directly within this small range.

Moreover, a conclusive presumption of lack of inter- and intramodal competition at an R/VC of 240 percent or more for purposes of competitive switching is also consistent with the Board's precedent on unreasonable rates. For example, in *Western Fuels, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company*, STB Docket No. 42088, decision served June 5, 2009, the Board prescribed a maximum reasonable rate under its Stand-Alone Cost methodology (the most accurate of the ratemaking methodologies that it uses),¹³² of 241 percent as the initial rate prescription; the average maximum reasonable rate R/VC ratio over the first ten years of the rate prescription in the case was 243 percent.¹³³ If rates have been found to be unreasonable above an R/VC ratio of 240 percent – a conclusion that requires a finding that there has been an actual exercise of monopoly power -- a conclusive presumption of a lack of effective inter- and intramodal competition at an R/VC ratio of 240 percent or more is plainly justified.

Finally, it should be noted that this conclusive presumption would operate against the "rate for the movement for which such switching is sought." If the rate from the shipper's facility is an origin-to-destination rate (either a single line rate or a joint through rate), the R/VC ratio would be calculated against that total rate. If the rate from the shipper's facility was a Rule 11 rate to an interchange, the R/VC ratio would be calculated against that Rule 11 rate. It is intended that the presumption operate against the rate that the shipper is paying, whether it be a contract rate or a common carrier rate.

¹³² *Simplified Standards*, slip op. at 13.

¹³³ *Id.* at 4. The Board has prescribed maximum reasonable rates well below this level. See *W. Tex. Utils v. Burlington N. R.R.*, 1 S.T.B. 638, 677 (1996) (finding that the SAC rate was below the 180 percent jurisdictional threshold level). Similarly, in *Kansas City Power & Light Company v. Union Pacific Railroad Company*, STB Docket No. 42095 (served May 19, 2008), the parties stipulated that the rate should be set at the jurisdictional threshold; in effect, the railroad defendant conceded that a SAC determination would result in a rate at or below the jurisdictional threshold.

In view of the above, the League believes that there is a strong justification for the use of a 240% R/V/C ratio as a conclusive presumption to satisfy the “lack of inter- and intramodal competition” prong of the proposed competitive switching test.

3. **Conclusive Presumption #2: Rail Market Share Of 75% Or More**

Under proposed Section 1145, the League proposes that the second conclusive presumption to determine the lack of effective inter- and intra-modal competition is that “the Class I rail carrier serving the shipper’s (or group of shippers’) and/or receiver’s (or group of receivers’) facilities for which switching is sought (or a controlled affiliate) has handled 75 percent or more of the transported volume of the movement(s) for which such switching is sought for the twelve month period prior to the petition seeking such switching.”¹³⁴

Market share has long been used by the courts and administrative agencies to indicate market power. The Supreme Court of the United States has affirmed for many years that market share is an important factor in determining monopoly power.¹³⁵ Similarly, the Department of Justice and the Federal Trade Commission explicitly use market share and market concentration in evaluating mergers among competitors.¹³⁶

Indeed, the STB and its predecessor have frequently consulted market shares in determining the lack of effective competition. In *Product and Geographic Competition*, 2 ICC.2d 1, 21 (1985), the ICC noted that the existence of effective competition requires consideration of “the amount of the product in question that is transported by [alternative modes]

¹³⁴ See App. A, proposed §1145(b)(ii).

¹³⁵ *Eastman Kodak v Image Technical Servs.*, 504 U.S. 451, 481 (1992); *United States v Grinnell Corp.*, 384 U.S. 563, 571 (1966) (“existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market”); *United States v. E.I. du Pont de Nemours & Co*, 351 U.S. 377, 379, 391 (1956) (holding that control of 75 percent of a relevant market constitutes monopoly power); *Int’l Boxing Club v United States*, 358 U.S. 242, 249 (1959).

¹³⁶ See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* §5 (2010) (“The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects. . . . Market shares can directly influence firms’ competitive incentives.”) [hereinafter *DOJ/FTC Merger Guidelines*].

where rail alternatives are available.” The ICC and the Board have duly applied that factor in market dominance determinations ever since. For example, in the *DuPont Nitrobenzene Decision*, slip op. at 6, the Board indicated that the amount of a commodity transported via a mode other than rail was one of the “typical” factors it consults in making a determination of market dominance.¹³⁷

The ICC also regularly consulted market share in determining whether there was market power in exemption cases; indeed, the AAR itself used market share in presenting evidence on that factor.¹³⁸

A market share of 75% or more clearly represents substantial market power and strongly indicates a lack of effective competition. Under the *DOJ/FTC Merger Guidelines*, the antitrust agencies indicate that they often use the Herfindahl / Herschman Index (HHI) of market concentration, which is calculated by summing the squares of the individual firms’ market shares. The antitrust agencies consider an HHI of more than 2500 to be a “Highly Concentrated Market.”¹³⁹ A 75% share of the market held by a single railroad results in an HHI of at least 5625 – a very highly concentrated market, even if the rest of the market is spread among many different competitors.¹⁴⁰

Even more importantly, courts have often held that a market share in excess of 70% establishes a *prima facie* case of market power. *Spirit Airlines v. Northwest Airlines*, 431 F.3d

¹³⁷ See also, *FMC Wyo. Corp. v Union Pac. R R.*, STB Docket No. 42022, slip op. at 18-19 (served May 12, 2000) (using market share to determine effective competition).

¹³⁸ See, e.g., *Rail Gen. Exemption – Petition of AAR to Exempt Rail Transp of Selected Commodity Groups*, 9 I.C.C.2d 969, 973-982 (1993) (consulting rail market shares of various commodities); *Rail General Exemption Authority Miscellaneous Manufactured Commodities*, 6 I.C.C.2d 186, 192-194 (1989) (consulting rail market share to determine market power); *Rail General Exemption Authority – Exemption for Hydraulic Cement*. STB Docket No. EP 346, slip op. at 3 (served Dec 17, 1996) (examining market shares in determining presence of effective competition).

¹³⁹ *DOJ/FTC Merger Guidelines*, *supra* note 136, at §5.3.

¹⁴⁰ In contrast the European Commission considers market shares in the range of only 40 to 45% to be dominant. Comm’n of European Communities, *Tenth Report on Competition Policy* para. 150 at 103, CB-31-80-126-EN-C (1981).

917, 935-936 (6th Cir. 2005) (holding that a reasonable finder of fact could find monopoly power based on market shares of 70% to 89%); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 783 n. 2 (6th Cir. 2002) (market share of 74% to 77% shows monopoly power); *Image Technical Services v. Eastman Kodak Company*, 125 F.3d 1195, 1206 (9th Cir. 1997) (“Courts generally require a 65% market share to establish a *prima facie* case of market power.”); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 n. 3 (8th Cir. 1994) (finding 80% market share sufficient); *Weiss v. York Hospital*, 745 F.2d 786, 827 (3d Cir. 1984) (finding a market share in excess of 80% sufficient); *In re Educational Testing Service*, 429 F. Supp. 2d 752, 756 (E.D. I.a. 2005) (“The case law supports the conclusion that a market share of more than 70 percent is generally sufficient to support an inference of market power.”); *R.J. Reynolds Tobacco Company*, 199 F. Supp. 2d 362, 394 (M.D.N.C. 2002) (citing the “generally-accepted 70% to 75% minimum share necessary to support a finding of monopoly power.”). Indeed, some courts have found that even a market share smaller than 70% was sufficient. *See, e.g., Confederated Tribes of Siletz Indians v. Weyerhaeuser*, 411 F.3d 1030, 1044-45 (9th Cir. 2005) (affirming a jury finding of a § 2 violation where monopsony share was approximately 65%).

In view of the above, the League believes that there is a strong justification for the use of a 75% market share as a conclusive presumption to satisfy the “lack of inter- and intramodal competition” prong of the proposed competitive switching test.

D. Condition 3: Petitioner Shows That There “Is Or Can Be” A “Working Interchange” Within A “Reasonable Distance” Of The Shipper’s Facilities, With Two Conclusive Presumptions

Under the League’s proposal, a petitioner must show, as the third condition for obtaining a grant of competitive switching under proposed Part 1145 of the Code of Federal Regulations, that:

there is or can be a working interchange between the Class I rail carrier serving the shipper (or group of shippers) and/or receiver (or group of receivers) for whom such switching is sought and another rail carrier within a reasonable distance of such shipper or receiver or group of shippers or receivers.¹⁴¹

Under the fundamental requirement in this section, the petitioner seeking an order for competitive switching has the burden of proving that there “is or can be” a working interchange between the Class I railroad serving the shipper and “another rail carrier” within a “reasonable distance” of the shipper’s facilities. It should be noted that the fundamental requirement under this third condition is not limited to existing interchanges, but the petitioner could prove on the basis of facts and circumstances that a working interchange could reasonably be constructed. However, the simple existence of a physical switch between two carriers -- the proverbial “switch in the middle of a cornfield,” unused and unable to be used -- would not be sufficient to meet this condition: the petitioner would have to show that the interchange is (or could be made to be) a “working” interchange. That determination, subject to the conclusive presumptions set forth below, would be made by the Board on the basis of evidence presented to the agency.

This proposal envisions that this “working interchange” would be between the lines of the Class I carrier serving the shipper and “another carrier.” For this “other carrier,” the proposed rule does not distinguish between Class I and Class II or III carriers. Thus, assuming that a Class II or Class III carrier is legally free to do so, such a carrier could seek to obtain the right to serve a shipper served by only one Class I rail carrier through an order for competitive switching.

In addition to the requirement that there “is or can be a working interchange” between the two carriers, the petitioner would also need to show that there is a “reasonable distance” between the facilities of the shipper for whom competitive switching would be established and the

¹⁴¹ App. A., proposed §1145(c).

“working interchange.” Again, on this question the petitioner would have the burden of proof, on the basis of facts and circumstances shown, except where the petitioner shows that either of two conclusive presumptions, discussed immediately below, apply. The Board, again subject to the conclusive presumptions discussed immediately below, would have the authority to determine what distance would be “reasonable.”

1. The Board Should Establish Conclusive Presumptions To Simplify, Expedite And Make More Efficient The Determination Of The Existence Of A “Working Interchange” Within A “Reasonable Distance” Of The Shipper’s Facilities

For many of the same reasons as in the determination of “lack of effective inter- and intramodal competition,” the Board should establish certain conclusive presumptions regarding the determination of the existence of a “working interchange” within a “reasonable distance” of the facilities of the shipper for whom competitive switching is sought.

It would be possible in theory for the Board to make this determination on a case-by-case basis. However, such an approach would lead to lengthy and complex litigation, and it would take years, if ever, for shippers and carriers to obtain an understanding of the rules under which competitive switching would be granted. The lack of certainty and predictability would itself discourage the development of such arrangements, or even rational negotiations between a shipper and the carrier that serves it. Such a case-by-case, fact-intensive approach would certainly strain the Board’s own resources.

Moreover, such an approach is clearly not necessary under the statute. Indeed, the Board’s current rules already provide for certain broad principles to limit the Board’s discretion and to govern applications for reciprocal switching, such as the current requirement to show anticompetitive conduct and the agency’s decision not to consider product competition. The “practicable/public interest” and “necessary to provide competitive rail service” standards are

clearly broad enough to encompass the development of rules to guide and govern relevant inquiries that the Board might determine to make under the statute.

As discussed in more detail immediately below, under the League's proposal, the Board should establish two conclusive presumptions as to the existence of a "working interchange" within a "reasonable distance:" (a) where the carrier has already declared that a certain area is a "terminal" in which cars are "regularly switched;" and, (b) where there is an interchange at which cars are "regularly switched" within a radius of thirty (30) miles of the shipper's facilities. As in the conclusive presumptions on the lack of effective inter- and intramodal competition, if an applicant could not meet either one of these conclusive presumptions, the applicant for competitive switching would have to prove, on the basis of evidence submitted, that there is or could be a working interchange within a reasonable distance of the shipper's facilities.

Thus, for example, if the facilities of a shipper were not in a "terminal" established by the carrier and were 35 miles from an interchange at which cars are regularly switched, that shipper would have to prove in litigation before the Board that there is or could be a "working interchange" and that the 35-mile distance between the shipper's facilities and that interchange was "reasonable." on the basis of facts presented.

2. **Conclusive Presumption #1: A "Working Interchange" Within A "Reasonable Distance" Exists If The Shipper's Facilities Are Within The Boundaries Of An Existing Or Future "Terminal"**

The first conclusive presumption regarding the existence of a "working interchange" within a "reasonable distance" of the shipper's facilities that is proposed by the League is when the facilities of the shipper and the lines of another carrier at which cars are "regularly switched," are within the geographic boundaries of a "terminal" established by the Class I rail carrier serving the shipper. The definition of a "terminal" is in two parts: (a) "terminals" that exist as of

July 7, 2011, the date of this Petition for Rulemaking (see proposed Part 1145(c)(i)); and, (b) “terminals” that are established in the future.

The League believes that it is entirely appropriate for the Board to establish a conclusive presumption on this third condition when the carrier has in fact established the geographic boundaries of a “terminal” at which cars are “regularly switched.” This conclusive presumption would therefore restrict a carrier from establishing a terminal, choosing to permit reciprocal switching for some shippers, and forbidding reciprocal switching for others. The proposed conclusive presumption specifies that, where there is a “terminal,” competitive switching could be established “regardless of whether reciprocal switching exists” in the terminal or “regardless or whether [the shipper] [is] excluded from reciprocal switching service.”

The proposed conclusive presumption would operate in the case of terminals established as of the date of this Petition for Rulemaking, in order to prevent “backsliding” by the carrier (*i.e.*, elimination of the designation of a “terminal” in an area in order to prevent the operation of the proposed rule), as well as “terminals” established by a carrier in the future.

Under this proposed conclusive presumption, not only would there need to be a “terminal” established by the incumbent carrier, but the applicant would also need to show that cars are “regularly switched” between the incumbent carrier and the carrier in whose favor competitive switching is sought, within the boundaries of the terminal. Thus, this conclusive presumption would not operate in cases where cars might be, but in fact are not, regularly switched between the two involved carriers. In such a case, competitive switching might be ordered, but only after a full determination by the Board, without the use of the conclusive presumption.

The determination of when the carrier has in fact “established” a “terminal” is left undefined. In some cases, carriers have already defined “terminals” in their tariffs. However, the proposed rule leaves open the possibility that a carrier might have defined an area as a “terminal” in some other document or through its operations, or the existence of a “terminal” can be implied from the use of an area; if that is the case, such a situation could be used under proposed Section 1145(c)(i) and (ii).

3. **Conclusive Presumption #2: Cars “Regularly Switched” Within A 30-Mile Radius Of The Shipper’s Facilities**

The League proposes a second conclusive presumption for the requirement of a “working interchange” within a “reasonable distance” of the shipper’s facilities, namely, that “the facilities of such shipper . . . are within a radius of 30 miles of an interchange between the Class I rail carrier serving such shipper . . . and another rail carrier, at which interchange cars are regularly switched between such carriers.” There are two major aspects to this proposed conclusive presumption: (a) the distance requirement of 30 miles; and, (b) the requirement that cars be “regularly switched” between the two carriers.

The League believes that the distance requirement of 30 miles to an actual, working interchange with another carrier is reasonable and fully supportable. As discussed below, the Board’s own advisory council, the Department of Agriculture, Board precedent, and the railroads’ own practices confirm the reasonableness of such a figure.

As noted above, the R-STAC’s *White Paper on New Regulatory Changes in the Railroad Industry*, dated October 16, 2009, recommended that railroads should be required to open up shippers closed to reciprocal switching “as long as they are within an *acceptable mileage distance (suggest 30 miles)* from an interchange with another railroad in a terminal area.” *Id.*

[emphasis added] Thus, the Board's own Advisory Council believed that a 30-mile distance for competitive switching was reasonable.

The 30-mile distance here proposed by the League was also advocated by the USDA in its Comments dated April 12, 2011 in Ex Parte No. 705. USDA stated that it: "urges the Board to use mandatory reciprocal switching agreements as one means to increase rail-to-rail competition. [footnote omitted] These mandatory reciprocal switching agreements should be for a distance up to about 30 miles . . ." ¹⁴² USDA noted that such a regime would "increase rail-to-rail competition in some areas, while enhancing the marketing opportunities for some agricultural shippers and would not substantially affect overall rail profitability and investment." ¹⁴³ Again, USDA's choice of a 30-mile limit indicates the reasonableness of the League's proposal.

The agency's own precedent is not to the contrary. In the *D&H* decision, the ICC imposed reciprocal switching within the entire city of Philadelphia. In Finance Docket No. 29908, *Delaware and Hudson Railway Company and New York Department of Transportation – Exemption for Use of Terminal Facilities* (not printed), served November 10, 1982, a rail carrier was granted terminal trackage rights – a much more intrusive remedy – over 13.4 miles of branch lines to reach shippers on other branch lines near Buffalo, NY.

Carriers in the past have agreed to and/or have been required to conduct geographically extensive joint operations. For example, in STB Finance Docket No. 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation*, 3 S.T.B. 196, 228 (1998), NS and CSXT agreed to establish three extensive

¹⁴² Comments of U.S. Dep't of Agric. at 6, *Competition in the R.R. Indus.*, STB Docket No. EP 705 (Apr. 12, 2011).

¹⁴³ *Id.* at 7.

“Shared Assets Areas” (“SAAs”), to be operated by Conrail for the benefit of both carriers. The North Jersey SAA encompassed all Conrail northern New Jersey trackage and other trackage extending south to Trenton, a total of about 470 miles of track,¹⁴⁴ extending over about a 40-mile area. The South Jersey/Philadelphia SAA encompassed all stations within the city limits of Philadelphia as well as points south, about 372 miles of track,¹⁴⁵ extending over about a 30-mile area. The Detroit SAA encompassed all Conrail trackage from Michigan Line Milepost 7.4 south to and including Detroit Line Milepost 20, or about 359 miles of track,¹⁴⁶ extending over about a 25-mile area. Thus, joint switching operations over this distance are certainly feasible. And, as discussed above, Canadian “interswitching” requires competitive switching for a distance of 30 kilometers, or about 18 miles, but also provides that the distance may be extended by the Canadian Transportation Agency if it finds that the origin or destination is “reasonably close” to an interchange.¹⁴⁷

Finally, the second element to this proposed conclusive presumption, that cars be “regularly switched” between the two carriers, would insure that, under the presumption, switching operations are actually taking place between the two carriers on some kind of regular basis. How “regular” such switching must be would be left to the Board’s determination.

For the above reasons, the League believes that the Board should establish the two conclusive presumptions regarding a “working interchange” within a “reasonable distance” for competitive switching under the proposed rule.

¹⁴⁴ Conrail Operations, <http://www.conrail.com/freight.htm> (last visited July 5, 2011).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See infra* p. 30

E. Condition #4: An Application For Competitive Switching Is Defeated If Either Rail Carrier Shows That The Proposed Switching Is Not Feasible Or Unsafe, Or Will Unduly Hamper The Ability Of Either Carrier To Serve Its Shippers

The last condition suggested by the League for reciprocal switching is a “negative” one, *i.e.*, that competitive switching would not be ordered, even if the first three conditions are met, if the fourth condition is met by the carrier(s). Under Section 1145(d) of the proposed rule, “[n]otwithstanding the provisions of 49 C.F.R. §1145(a)-(c), competitive switching shall not be established . . . if either rail carrier . . . shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.”

This condition would enable the Board to reasonably implement the requirements of Section 11102(c) of the statute, namely, that the proposed switching be “practicable” and “in the public interest.” This condition is also consistent with the agency’s precedent in *D&H*.¹⁴⁸ This is the only condition in which the burden of proof would be on the carrier(s), to show by persuasive facts and circumstances that the proposed switching is unsafe, infeasible, or would hamper their ability to serve their current shippers.

The League believes that, in the very large majority of cases, competitive switching will be safe, feasible and in fact efficient. As noted above, in Canada there has been “interswitching” – a much broader form of competitive switching than the League has proposed in this Petition – for many years, with no apparent ill effects on either CN or CP, two of the most efficiently-run railroads on the continent. Also as noted above, the NS and CSX have established large joint operations in “Shared Asset Areas,” with no ill-effects.

¹⁴⁸ See *Del. & Hudson Ry. v. Consol. Rail Corp – Reciprocal Switching Agreement*, 367 I.C.C. 718, 720-21 (1981); see also, *Jamestown, N.Y. Chamber of Commerce v Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933).

Indeed, reciprocal switching takes place now, over wide swaths of the United States. For example, UP publishes a “UP Reciprocal Switching Circular,” in which it lists approximately 100 geographic locations at which it performs reciprocal switching, and another 34 locations at which reciprocal switching is performed by other carriers, usually small Class III carriers.¹⁴⁹ These locations range in size from such major cities as Chicago, Denver, Dallas, Houston and Los Angeles, to such small locations as Sheldon, IA, Temple, TX, and Hope, AK.¹⁵⁰ UP’s Reciprocal Switching Circular lists well over 1500 customers for which reciprocal switching is provided on its system.¹⁵¹ UP even has a “Serving Carrier and Reciprocal Switch Application” on its website, for the convenience of its customers.¹⁵²

NS’ reciprocal switching tariff is similar.¹⁵³ Section 4 and Section 5 to NS’ tariff 8001-A lists over 100 separate cities at which reciprocal switching is performed, for several hundred industries.¹⁵⁴

Clearly, when carriers want to, reciprocal switching is carried on widely and seemingly without difficulty.

Nevertheless, there could be locations at which reciprocal switching is not feasible or is unsafe. The League is sensitive to those situations, and particularly desires to avoid any adverse

¹⁴⁹ See Union Pac. R.R., UP Reciprocal Switching Circular (Apr. 11, 2011), available at http://www.uprr.com/customers/shortline/attachments/prior_uprsc.pdf.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² UP: Serving Carrier & Reciprocal Switching Information, <http://www.uprr.com/customers/shortline/recipswitch.shtml> (last visited July 5, 2011) (follow “Serving Carrier & Reciprocal Switch Application” hyperlink).

¹⁵³ See Norfolk S. Ry., *Switching and Absorption Tariff*, NS 8001-A, Item 4000 (March 1, 2011), <http://www.nscorp.com/nscorphtml/publications/NS8001-A.pdf>; Norfolk S. Ry., *Rules and Charges on Accessorial Services at Stations on Norfolk Southern Railway Company*, NS 8002-A (May 1, 2011), <http://www.nscorp.com/nscorphtml/publications/NS8002-A.pdf>.

¹⁵⁴ CSXT and BNSF’s tariffs are similar. *E.g.*, CSX Transportation, *Tariff CSXT 8100* at §III-C (March 25, 2011), http://www.csx.com/share/wwwcsx_mura/assets/File/Customers/Price_Lists_Tariffs_Fuel_Surcharge/8100%20Prior/Reciprocal_Switching_-_Section_III-C_as_of_MARCH_24_2011.pdf Under that tariff, CSX performs reciprocal switching at over 75 locations on its system. See also, BNSF Ry Co., *BNSF Switching Book 8005-C* (Jan. 1, 2011), <http://domino.bnsf.com/website/prices.nsf/PublicationsLookup/4AFF011D07B5CBC786257801005E4ADD?Open>. BNSF offers reciprocal switching in over 100 cities, to hundreds of customers on its system. *Id.* §1.

impact on safety. The League's proposed fourth condition would permit a carrier to make its case before the Board, with a decision by the Board based on the specific facts and circumstances.

VI. THE BOARD SHOULD TAKE COMMENTS IN A RULEMAKING ON THE ISSUE OF COMPENSATION FOR COMPETITIVE SWITCHING

The League's proposed rule set forth in Appendix A does not include a specific proposal governing compensation for competitive switching. In this respect, it is consistent with the Board's current rules, which also do not have any provision on compensation. Nevertheless, the issue of compensation is important.

Concerning compensation, Section 11102(c) of the statute states: "[t]he rail carriers entering into [a reciprocal switching] agreement shall establish the conditions and compensation applicable to such agreement, but, if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation." Thus, the statute appears to contemplate that carriers must first attempt to agree on compensation, and if they cannot, the Board can set compensation.

Based on the statute, the League believes that it would be within the authority of the Board to set, via rulemaking, the methodology for compensation that it would use if the carriers cannot agree. Based on the testimony from various shippers at the Ex Parte No. 705 hearing which raised questions about the willingness of the Class I railroads to compete for traffic, the League believes that the Board should take comments on the issue of compensation in the rulemaking requested by the League.

VII. CONCLUSION

The Board should initiate a Notice of Proposed Rulemaking under 5 U.S.C. §553 asking for comment on the League's proposal set forth in this Petition. The League's proposal is a balanced regime fully within the parameters of the statute. Under the proposal, the Board shall

order competitive switching where a shipper's facilities are served by a single, Class I rail carrier, a provision that both protects Class II and Class III carriers and provides that shippers who are served by more than one carrier are not eligible for competitive switching under proposed Part 1145. Under the proposal, the Board shall order competitive switching where there is a lack of intra- and intermodal competition, but with two conclusive presumptions where carrier market power is clear, so as to meet both Congressional policy, the needs of both shippers and carriers for clarity and certainty in at least some cases, and to facilitate the Board's own administrative procedures and burdens. Under the proposal, the Board shall order competitive switching where there is or can be a working interchange within a reasonable distance of the shipper's facilities, again with two fully-supported conclusive presumptions. Finally, under the proposal, the Board shall not order competitive switching if such switching would compromise safety, be otherwise infeasible, or would work to the detriment of service to existing shippers.

Thirteen years ago, in *Ex Parte 575, Review of Rail Access and Competition Issues*, 3 S.T.B. 92, 95 (1998), the Board stated that "[i]t is thus clear that we are at a regulatory crossroads. Neither continuation of the status quo nor the immediate adoption of the more drastic measures suggested by some shippers . . . seems appropriate at this juncture. Therefore, we must take a careful, measured approach." However, thirteen years ago, the Board by default took the path of "continuation of the status quo," in part, the League believes, because the Board thought that it did not have a "careful, measured approach" as an alternative to the "more drastic measures" that it was examining at the time.

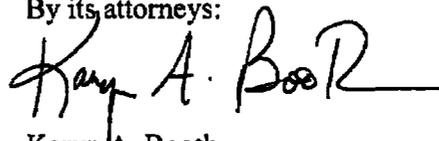
It is time for the Board to take a different path, and this proposal by the League shows the Board the way.

The Board should initiate a Notice of Proposed Rulemaking, and adopt the League's proposed rules for a new regime of competitive switching.

Respectfully submitted,

The National Industrial Transportation League
1700 North Moore Street
Arlington, VA 22209

By its attorneys:

A handwritten signature in black ink, appearing to read "Karyn A. Booth". The signature is fluid and cursive, with a long horizontal stroke at the end.

Karyn A. Booth
Jeffrey O. Moreno
Nicholas J. DiMichael
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 263-4108

Dated: July 7, 2011

APPENDIX A

SUMMARY OF THE LEAGUE'S COMPETITIVE SWITCHING PROPOSAL

A. Elimination Of Current Rules And Current Precedent On Reciprocal Switching

The Board should eliminate the agency's current competitive access rules in Ex Parte 445 (Sub-No. 1), *Intramodal Rail Competition* (49 C.F.R. Part 1144) insofar as such rules apply to reciprocal switching. The Board should also vacate the agency's existing precedent insofar as such precedent applies to reciprocal switching under the agency's existing rules.

B. Establishment Of New Rules On Competitive Switching

The Board should adopt new rules for reciprocal switching, under which the Board "shall require" a Class I rail carrier to enter into a competitive switching agreement if the following four conditions are met for a shipper (or group of shippers) and/or a receiver (or group of receivers):

1. The petitioner shows that the shipper's/receiver's facility(ies) for which competitive switching is/are sought are served by rail only by a single, Class I rail carrier (the "Landlord Class I Carrier").
2. The petitioner shows that there is no effective inter- or intramodal competition for the movements for which competitive switching is sought. There would be no consideration of product or geographic competition. There would be a conclusive presumption that there is no such effective competition where either: (a) a movement for which competitive switching is sought has an R/VC ratio of 240% or more; or (b) the Landlord Class I carrier has handled 75% or more of the freight volume transported for a movement for which competitive switching is sought in the twelve months prior to the petition seeking switching.
3. The petitioner shows that there "is or can be" a "working interchange" between the Landlord Class I Carrier and another carrier within a "reasonable distance" of such facility(ies). There would be a conclusive presumption that there is a "working interchange" within a "reasonable distance" if either one of two circumstances exist:
 - (a) the shipper's/receiver's facility(ies) for which competitive switching is/are sought are within the boundaries of a "terminal" of the Landlord Class I Carrier existing on July 7, 2011, the date of this Petition for Rulemaking; or are within the boundaries of any new "terminal" established by the Landlord Class I Carrier; or
 - (b) such facility(ies) are within a radius of 30 miles of an interchange between the Landlord Class I Carrier and another carrier, at which cars are "regularly switched."
4. Competitive switching shall not be imposed if either rail carrier between which competitive switching is to be established shows that the proposed switching is not feasible or is unsafe; or that the presence of reciprocal switching will unduly hamper the ability of that carrier to serve its own shippers.

APPENDIX B

PROPOSED NEW REGULATIONS FOR COMPETITIVE SWITCHING

I. The Board shall revise current 49 C.F.R. Part 1144 to eliminate reciprocal switching from the Board's Ex Parte 445 (Sub-No. 1) competitive access rules as follows:

- Delete the comma after "through route;" insert the word "or" between "through route" and "joint rate;" and delete the phrase "or reciprocal switching," from 49 C.F.R. §1144.1(a);
- Delete "or a switching arrangement shall be established under 49 U.S.C. 11102," from 49 C.F.R. §1144.2(a);
- Delete "or establishment" from 49 C.F.R. §1144.2(a)(1);
- Delete "or compensation" and "or establishment" from 49 C.F.R. §1144.2(a)(1)(iii);
- Delete "or establishment" from 49 C.F.R. §1144.2(a)(1)(iv);
- Delete the comma after "through route;" insert the word "or" between "through route" and "joint rate;" and delete the phrase, "or reciprocal switching" from 49 C.F.R. §1144.2(a)(2)(i);
- Delete the comma after "through route;" insert the word "or" between "through route" and "joint rate;" and delete the phrase "or reciprocal switching" from 49 C.F.R. §1144.2(a)(2)(ii);
- Delete the comma after "through route;" insert the word "or" between "through route" and "joint rate;" and delete the phrase, "or reciprocal switching" from 49 C.F.R. §1144.2(b)(3).

II. The Board shall declare, in the decision implementing the rules set forth in Section III below, that the STB shall not follow its precedent in *Midtec Paper Corp. v. Chicago and North Western Transportation Company*, 3 I.C.C.2d 171 (1986), *aff'd Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988); *Vista Chemical Company v. Atchison, Topeka and Santa Fe Ry.*, 5 I.C.C.2d 331 (1989); *Shenango, Inc. v. Pittsburgh, C & Y Ry.*, 5 I.C.C.2d 995 (1989), *aff'd sub nom. Shenango, Inc. v. ICC*, 904 F.2d 696 (3d Cir. 1990); and, ICC Docket No. 41550, *Golden Cut Division of Ralston Purina Company v. St. Louis Southwestern Railway Company*,

served April 25, 1996 with respect to the establishments of reciprocal switching under 49 U.S.C. §11102(c).

III. The Board shall establish a new 49 C.F.R. §1145 as follows:

Section 1145 Competitive Switching Under 49 U.S.C. §11102(c)

The Board shall find that a switching agreement under 49 U.S.C. §11102(c) is practicable and in the public interest and that such an agreement is necessary to provide competitive rail service; and shall require a rail carrier to enter into a switching agreement with another rail carrier to serve a shipper (or group of shippers) and/or a receiver (or group of receivers) under this Section when:

- a. The party seeking such switching shows that the facilities of the shipper (or group of shippers) and/or receiver (or group of receivers) for whom such switching is sought under this Section are served by rail only by a single, Class I rail carrier (or a controlled affiliate).
- b. The party seeking such switching under this Section shows that intermodal and/or intramodal competition is not effective with respect to the movements of the shipper (or group of shippers) and/or receiver (or group of receivers) for whom competitive switching is sought. In making such a determination, the Board shall not consider the existence of product or geographic competition. The Board shall conclusively presume that such intermodal and/or intramodal competition is not effective under this Section where, in the case of any movement for which such switching is sought, either: (i) the rate for the movement for which such switching is sought has a revenue to variable cost ratio of 240 percent or more; or, (ii) the Class I rail carrier serving the shipper's (or group of shippers') and/or receiver's (or group of receivers') facilities for which switching is sought (or a controlled affiliate) has handled 75 percent or more of the freight volume transported of the movement(s) for which such switching is sought for the twelve month period prior to the petition seeking such switching.
- c. The party seeking such switching under this Section shows that there is or can be a working interchange between the Class I rail carrier serving the shipper (or group of shippers) and/or receiver (or group of receivers) for whom such switching is sought and another rail carrier within a reasonable distance of the facilities of such shipper or receiver or group of shippers or receivers. The Board shall conclusively presume that there is a working interchange within a reasonable distance of the facilities of such shipper (or group of shippers) and/or receiver (or group of receivers) under this Section where: (i) the facilities of such shipper (or

group of shippers) and/ or receiver (or group of receivers) and the lines of another carrier are within the geographic boundaries of a terminal established by such Class I rail carrier as of July 7, 2011 at which cars are regularly switched, regardless of whether reciprocal switching exists in such terminal or regardless of whether such shipper (or group of shippers) and/or receiver (or group of receivers) are excluded from reciprocal switching service; (ii) the facilities of such shipper (or group of shippers) and/or receiver (or group of receivers) are within the geographic boundaries of a terminal established by such Class I rail carrier after July 7, 2011, at which cars are regularly switched, regardless of whether reciprocal switching exists in such terminal or regardless or whether such shipper (or group of shippers) and/or receiver (or group of receivers) are excluded from reciprocal switching service; or (iii) the facilities of such shipper (or group of shippers) and/or receiver (or group of receivers) are within a radius of 30 miles of an interchange between the Class I rail carrier serving such shipper (or group of shippers) and/or receiver (or group of receivers) and another rail carrier, at which interchange cars are regularly switched between such carriers.

- d. Notwithstanding the provisions of 49 C.F.R. §1145(a)-(c), competitive switching shall not be established under this Section if either rail carrier between which such switching is to be established shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its own shippers.