

SERVICE DATE – LATE RELEASE JULY 25, 2012

SURFACE TRANSPORTATION BOARD

NOTICE

Docket No. EP 711

PETITION FOR RULEMAKING TO ADOPT REVISED  
COMPETITIVE SWITCHING RULES

Digest:<sup>1</sup> This decision begins a proceeding to consider a proposal submitted by The National Industrial Transportation League (NITL) to increase rail-to-rail competition. Under its proposal, certain shippers located in terminal areas that lack effective competitive transportation alternatives would be granted access to a competing railroad, if there is a working interchange within a reasonable distance (30 miles under NITL’s proposal). The Surface Transportation Board (the Board) is seeking empirical information about the impact of the proposal, if it were to be adopted. Specifically, the Board is seeking public input on the proposal’s impact on rail shippers’ rates and service, including shippers that would not benefit under NITL’s proposal; the proposal’s impact on the rail industry, including its financial condition and network efficiencies; and methodologies for the access price that would be used in conjunction with competitive switching.

Decided: July 25, 2012

In 2011, the Surface Transportation Board (the Board) held a hearing to consider the state of competition in the railroad industry and what steps, if any, we should take to increase rail-to-rail competition. See Competition in the Railroad Industry, Docket No. EP 705. Among wide-ranging testimony, various commenters focused on the Board’s authority to direct switching, urging modifications to the Board’s mandatory reciprocal switching standards. Under 49 U.S.C. § 11102(c), the Board may compel a railroad to enter into a switching agreement “where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service.” 49 U.S.C. § 11102(c).

After last year’s hearing, The National Industrial Transportation League (NITL) came forward with a proposal to modify the Board’s standards for mandatory competitive switching. NITL suggests that we mandate switching where a captive shipper (located in a terminal area) is within 30 miles of a working interchange and the transportation rate charged by the Class I carrier from origin to destination exceeds 240% of its variable costs of providing service.<sup>2</sup> This

---

<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The specific details and limitations behind NITL’s proposal are summarized later in  
(continued . . . )

proposal has the potential to promote more rail-to-rail competition and reduce the agency's role in regulating the reasonableness of transportation rates. It could permit the agency to rely on competitive market forces to discipline railroad pricing from origin to destination, and regulate only the access price for the first (or last) 30 miles.

While NITL's proposal is thoughtful and responsive to the Competition in the Railroad Industry, Docket No. EP 705 proceeding, we cannot fully gauge its potential impact. For example, we do not know how many shippers would be able to take advantage of mandatory competitive switching, nor has NITL provided such data in its submission. We must also consider an appropriate methodology for access pricing that would be used in conjunction with competitive switching. The access price would be a significant factor in determining the impact of such a broad competitive switching requirement, but that critical element also was not included in NITL's petition. Therefore, additional information is needed before we can determine how to proceed.

We begin this proceeding to receive empirical evidence on the impact of the proposal on shippers and the railroad industry. Specifically, interested parties are invited to submit information on the following: (1) the impact on rates and service for shippers that would qualify under the competitive switching proposal; (2) the impact on rates and service for captive shippers that would not qualify under this proposal (because they are not located in a terminal area or within 30 miles of a working interchange); (3) the impact on the railroad industry, including its financial condition, and network efficiencies or inefficiencies (including the potential for increased traffic); and (4) an access pricing proposal.

We will make our most recent confidential Waybill Sample available, under customary protective orders (see 49 C.F.R. § 1244.9 (f)), as well as allow reasonably tailored discovery, as needed, for commenters to conduct the empirical analyses requested. We also encourage the commenters to submit evidence to show what would happen if we modified NITL's proposal, such as: by changing the 30-mile distance limitation, and/or by changing the revenue to variable costs ratio that would be used for the conclusive presumption in favor of competitive access relief, or using some other method, such as a carrier's 4-year average Revenue Shortfall Allocation Methodology (RSAM) benchmark. It may be appropriate to consider an R/VC threshold that is related to the revenue needs of the carrier and the amount of demand-based differential pricing that the carrier needs to earn a reasonable return on its investments.

## BACKGROUND

### **Statutory Framework**

Competitive access generally refers to the ability of a shipper or a competitor railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided

---

( . . . continued)

this decision and are described in more detail by NITL in its petition.

by the competitor railroad. The Interstate Commerce Act makes three competitive access remedies available to shippers and carriers: through routes, terminal trackage rights and reciprocal switching. Under 49 U.S.C. § 10705(a), the Board may require a carrier to interchange traffic with another railroad and provide a through route and a through rate for that traffic. Under 49 U.S.C. § 11102(a), the Board may require an incumbent carrier to grant physical access over its lines so that the trains and crews of a competing carrier can serve shippers located in the incumbent carrier's terminal facilities. Under 49 U.S.C. § 11102(c)—the provision that NITL's proposal would engage—the Board may require an incumbent carrier to transport the cars of a competing carrier and to switch those cars between the two lines for a fee. Reciprocal switching, or as it is more generally termed “competitive switching” because it is not always a reciprocal arrangement between carriers, thus enables the competing railroad to offer its own single-line rate, even though it cannot physically serve the shipper's facility, to compete with the incumbent's single-line rate. The Board's current policy is that all of the competitive access remedies require a showing that the “the prescription or establishment is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive, and otherwise satisfies, the criteria of either 49 U.S.C. 10705 or 11102.”<sup>3</sup>

### **Hearing on Competition in the Railroad Industry (Docket No. EP 705)**

On January 11, 2011, the Board issued a notice seeking comments and announcing a public hearing to explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate. Competition in the R.R. Indus., EP 705 (STB served Jan. 11, 2011). In the notice, the Board urged commenters to focus on, among other things, competitive switching, inviting commenters to discuss “how to construe [49 U.S.C. § 11102(c)] in light of current transportation market conditions.” Id. at 6.

On April 12, 2011, NITL filed individual and joint comments in Docket No. EP 705. In its filings, NITL urged the Board to implement changes to its rules on competitive switching. On June 22 and 23, 2011, after receiving numerous other written comments, the Board held a public hearing in that proceeding.

### **NITL's Proposal**

On July 7, 2011, NITL filed a petition requesting that we institute a rulemaking under 5 U.S.C. § 553 to replace the Board's existing competitive access rules with new rules, proposed by NITL, for competitive switching under 49 U.S.C. § 11102(c). In a decision served November

---

<sup>3</sup> The Board's existing competitive access rules are codified at 49 C.F.R. § 1144. They were originally adopted by the Interstate Commerce Commission (ICC), the Board's predecessor agency, in the mid-1980s. Intramodal Rail Competition, 1 I.C.C. 2d 822 (1985), aff'd sub nom. Balt. Gas & Elec. v. United States, 817 F.2d 108 (D.C. Cir. 1987), applied in Midtec Paper Corp. v. Chi. & Nw. Transp. Co., 3 I.C.C. 2d 171 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988); Cent. Power & Light v. S. Pac., et al., 1 S.T.B. 1059 (1996) (Bottleneck I), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

4, 2011, we deferred a decision on whether to begin a rulemaking pending review of the issues and arguments presented in Docket No. EP 705. Pet. for Rulemaking to Adopt Revised Competitive Switching Rules, EP 711 (STB served Nov. 4, 2011).

The Board's existing rules make competitive switching available as a remedy for the abuse of market power by railroads. Under NITL's proposal, the Board would move away from a competitive-abuse standard toward a market-power standard by promulgating a new Part 1145 to Title 49 of the Code of Federal Regulations, captioned "Competitive Switching Under 49 U.S.C. § 11102(c)." Competitive switching by a Class I rail carrier would be mandatory if four conditions were met: (1) the shipper (or group of shippers) is served by a single Class I rail carrier; (2) there is no effective intermodal or intramodal competition for the movements for which competitive switching is sought; (3) there is or can be "a working interchange" within a "reasonable distance" of the shipper's facility; and (4) switching is safe and feasible, with no adverse effect on existing service. Central to NITL's proposed rules is the establishment of conclusive presumptions with respect to whether a shipper lacks effective intermodal or intramodal competition for the movements at issue, and whether there is a working interchange within a reasonable distance of the shipper's facilities.

Pointing to the experience of shippers in litigating the issue of market dominance in rate reasonableness cases, NITL argues that conclusive presumptions regarding whether effective competition exists for the transportation of a shipper's goods are necessary because, without such presumptions, the complexity, costs, and time-consuming nature of litigating competitive switching would deter shippers from bringing meritorious cases. Therefore, NITL proposes, first, that we find conclusively that a shipper lacks effective intermodal or intramodal competition where the rate for the movement for which switching is sought has a revenue-to-variable cost ratio of 240% or more ( $R/VC_{\geq 240}$ ). NITL argues that  $R/VC_{\geq 240}$  is a level of profitability that represents a very high likelihood that the carrier is exercising market power over the shipment. NITL states that  $R/VC_{\geq 240}$  is well above the railroads' fully allocated costs and the Board's jurisdictional threshold of revenue-to-variable cost greater than 180% ( $R/VC_{>180}$ ). Moreover, NITL argues that  $R/VC_{\geq 240}$  represents the average markup above variable costs earned by Class I rail carriers on their "very-highest-rated traffic"—that is, the railroads' "potentially captive traffic" with an  $R/VC$  ratio greater than 180%.<sup>4</sup>

Second, NITL proposes that a shipper would be conclusively presumed to lack effective intermodal and intramodal competition where the Class I carrier serving the shipper's facilities for which switching is sought has handled 75% or more of the transported volumes of the movements at issue for the twelve-month period prior to the petition requesting that the Board order switching. NITL relies on judicial and administrative precedent in antitrust cases that equates a 75% market share with substantial market power and a lack of effective competition.<sup>5</sup>

---

<sup>4</sup> NITL also notes that the Board has prescribed maximum reasonable rates at or below  $R/VC_{\geq 240}$ . NITL Pet. 49.

<sup>5</sup> NITL Pet. 50-52.

NITL would also have the Board establish two conclusive presumptions to determine whether a workable interchange exists within a reasonable distance of a shipper's facility. First, NITL would have the Board conclusively presume that a workable interchange exists where a shipper's facilities are within the geographic boundaries of a terminal established by a Class I rail carrier (incumbent carrier) serving the shipper, and cars are regularly switched between the incumbent carrier and the carrier for which competitive switching is sought.<sup>6</sup> NITL argues that it is appropriate to establish a conclusive presumption that a workable interchange exists when the incumbent carrier has itself established the geographic boundaries of a terminal at which cars are regularly switched.

NITL's second conclusive presumption regarding workable interchanges addresses what is a reasonable distance between a shipper's facilities and the interchange at issue. Specifically, NITL proposes that the Board conclusively presume that 30 miles is a reasonable distance, provided that the interchange is one where cars are regularly switched between the incumbent carrier and the carrier for which switching is sought. To support its use of a 30-mile distance, NITL primarily relies on recommendations from the U.S. Department of Agriculture in Docket No. EP 705, a 2009 policy paper by the Railroad-Shipper Transportation Advisory Council (RSTAC),<sup>7</sup> and the geographic scope of various existing interchange arrangements between carriers.

### **Response of AAR and Class I Railroads**

The Association of American Railroads (AAR), which represents the Class I railroads, opposes NITL's proposal and argues that the record in Docket No. EP 705 has not demonstrated that changes to the Board's competitive access regulations are needed or justified. Its response on behalf of the railroad industry argues that NITL's proposal is neither limited nor a middle ground, but amounts instead to a scheme of access on demand for many shippers served by a single railroad.<sup>8</sup> AAR claims that NITL's proposal would replace the existing conduct-based standards for competitive access with a scheme based on conclusive presumptions of market power that, in fact, have nothing to do with market power and are readily subject to manipulation. AAR also argues that NITL's proposal is incomplete because it does not include a proposal on access pricing, and likewise fails to address the impact on investment in the rail network from loss of revenue caused by mandatory access.

---

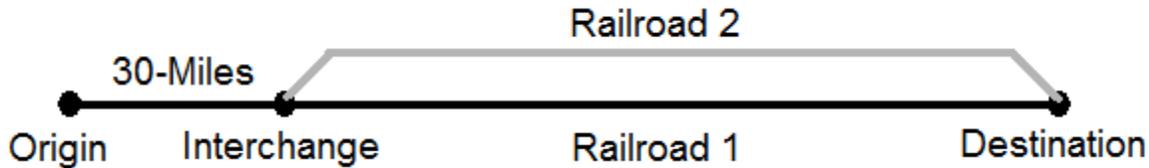
<sup>6</sup> NITL Pet. 55-56. The presumption would apply to terminals in existence on the date of NITL's petition (July 7, 2011) and to terminals established by Class I railroads in the future.

<sup>7</sup> R.R.-Shipper Transp. Advisory Council, White Paper on New Regulatory Changes for the Railroad Industry (Oct. 16, 2009). Congress created RSTAC for the purpose of advising Congress, the U.S. Department of Transportation, and the Board on rail transportation policy, with particular emphasis on rail issues affecting small shippers and small railroads. The representatives of Class I railroads are not voting members of RSTAC. See 49 U.S.C. § 726.

<sup>8</sup> Additionally, Norfolk Southern Railway Company and CSX Transportation, Inc. filed brief responses that adopted AAR's response and incorporated by reference their prior comments and testimony from Docket No. EP 705.

DISCUSSION AND CONCLUSIONS

NITL’s proposal, if adopted, could change the competitive rail service landscape by making mandatory competitive switching more widely available to a subset of currently captive shippers. The following schematic illustrates the basic objective of NITL’s proposal.



As illustrated, a captive shipper transports its goods from “Origin” to “Destination” using the services provided by “Railroad 1,” the only railroad that serves Origin. Currently, if Railroad 1 charges rates that the shipper believes are too high, the shipper’s only choices are to construct 30 miles of new track to reach “Railroad 2” (a competitor railroad), to truck the product to Railroad 2 for transloading, or to pursue rate relief before this agency if the transload option does not provide effective competition.

Under NITL’s proposal, Railroad 1 would be required to give Railroad 2 access to the origin by “switching” the traffic for Railroad 2 if either: (1) the rate charged by Railroad 1 from Origin to Destination were greater than or equal to 240% of the variable cost of providing that service; or (2) Railroad 1 carried 75% or more of the shipper’s traffic between Origin and Destination. Under this proposal, because both Railroad 1 and Railroad 2 could quote rates from Origin to Destination, there may be no market dominance, and hence the Board may not regulate the reasonableness of those rates. Rather, its role would be limited to regulating the “access price” (i.e., the price Railroad 1 may charge to provide the shipper with access to the competitor service provided by Railroad 2). Under the assumption that competition between Railroad 1 and Railroad 2 would ensure reasonable rates and service between Origin and Destination, we could focus our resources only on the access price for the first 30 miles of the movement under NITL’s proposal.

NITL’s proposal is premised on the potential benefits to shippers of creating rail-to-rail competition between Railroad 1 and Railroad 2 for transportation between Origin and Destination: more choices, better service, and lower rates. An additional benefit of NITL’s proposal is that it would reduce governmental intervention by limiting regulation to the access price and relying on demand and the marketplace to set rates and judge the service provided by the railroads.

The policies governing railroad regulation require the Board to balance a variety of factors reflecting the tension between the desire for competitive rates for shippers, on the one hand, and adequate revenues for railroads, on the other. See 49 U.S.C. §§ 10101(1)-(6); 49 U.S.C. § 10704(a).

NITL's proposal does not provide enough information for the Board to determine fully its effect on qualifying shippers, as we do not yet have an estimate of how many shippers would be able to take advantage of mandatory competitive switching. NITL has indicated that it has sought to minimize the potential negative effects of its proposal on the financial health of the railroad industry by designating limitations on the traffic for which competitive access relief would be mandatory.<sup>9</sup> NITL's petition itself, however, does not include detailed evidence or analysis of the likely benefits to shippers that could obtain mandatory switching that would result from its proposal, nor does it address how remaining shippers might be affected. And, it does not include a methodology for access pricing, which we believe would be a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry.

In addition to the benefit-to-shippers analysis, this Board must consider the impact of the proposal on the financial health of the railroad industry. To remain financially sound, carriers must be allowed to engage in "demand-based differential pricing"—that is, in order to recover the substantial joint and common costs of its network, a railroad must be able and permitted to charge different customers different prices based on their different levels of demand for transportation services. If a railroad is unable to recover these joint and common costs, it will not be able to earn adequate revenues. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 526 (1985), aff'd sub nom. Consol. Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). Much of the traffic that moves by rail has competitive alternatives. If a carrier were required to charge all of its shippers the same markup over cost, the competitive traffic with lower-cost alternatives would be diverted to those other modes of transportation. This, in turn, could require the carrier to charge the remaining traffic even higher rates to recover joint and common costs.

Because we cannot project the extent of any net revenue loss to railroads that would result from NITL's proposal, we also cannot predict whether, or by how much, the remaining captive traffic would likely be charged to make up for any revenues that would otherwise be lost to the carriers. AAR argued that broadly curtailing the ability of carriers to engage in demand-based differential pricing through competitive access would produce real-world consequences that "could be dramatic and would adversely affect all shippers and the Nation's economy as a whole."<sup>10</sup> That concern merits careful consideration, as we want to ensure the rail industry is able to continue to invest adequately in rail network infrastructure improvements. On the other hand, as noted above, the effect on revenues from lower prices might be offset, at least in part, from increased demand. But we cannot overlook the possibility that, to make up for lost revenues, a carrier might charge its remaining captive shippers considerably more.<sup>11</sup> Therefore,

---

<sup>9</sup> The most significant limitations in NITL's proposal are the distance limitation (the conclusive presumption in favor of mandated competitive switching does not apply to movements that are over 30 miles to a working interchange) and the R/VC limitation (movements with a R/VC below 240% are generally ineligible for competitive switching absent a showing of market dominance).

<sup>10</sup> AAR Open. Comment 45, Competition in the Railroad Industry, EP 705 (filed April 12, 2011).

<sup>11</sup> Under our stand-alone cost (SAC) rate analysis, a carrier may be able to justify higher  
(continued . . . )

the extent to which a program of broad competitive access could affect other captive shippers who may not participate in the program must also be examined.<sup>12</sup>

Finally, we need more precise information about whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations. AAR and Class I railroads submitted considerable testimony in Docket No. EP 705 from internal operating personnel stating a concern that inefficiencies would result, which, in their view could offset the benefits to qualifying shippers while also impeding the fluidity of the rail network as a whole. The Board and interested stakeholders would benefit from more empirical evidence to quantify the impact on network efficiency if the Board's competitive access rules were modified to make mandated competitive switching more widely available.

The discussion concerning the overall benefits to shippers of competitive access and its impact on railroads has been ongoing since the 1980s. Yet the Board still does not have the empirical evidence it needs to determine the merits of either NITL's or AAR's claims of the potential impact of NITL's proposal. In Docket No. EP 705, we asked commenters to submit empirical evidence of the anticipated impact of any proposal on the railroad industry. NITL states that its proposal will not harm the rail industry, but it has not yet provided detailed evidence to support its claim.<sup>13</sup> By the same token, the railroads have offered little in the way of quantitative evidence to support their claims that mandated competitive switching on the scale contemplated by NITL's proposal would have severe adverse effects on the financial health of

---

( . . . continued)

rates to remaining captive shippers if other formerly captive shippers obtain rate reductions. The SAC test determines the maximum amount of differential pricing a carrier needs to earn a reasonable return on the facilities used to serve the captive shipper. This becomes the limit on what the railroad can charge that shipper. But the maximum amount of differential pricing the SAC test will permit depends in part on the revenues the railroad earns from other traffic that shares those facilities. Holding everything else constant, if the carrier earns more revenue, the amount of differential pricing needed falls, and vice versa. Therefore, under the SAC test, a captive shipper could be responsible for paying *even more* of the joint and common costs of the facilities used to serve that shipper if the railroad can no longer recover as much revenue from formerly captive traffic that obtains rate reductions under NITL's proposal.

<sup>12</sup> This concern is not just hypothetical. For example, it appears unlikely that NITL's proposal would help agricultural shippers in the states of Montana and North Dakota, as virtually none of those shippers is located within 30 miles of a competitor railroad, nor would it benefit the many utility companies that similarly are not located within 30 miles of a competitor railroad.

<sup>13</sup> NITL relies on language in the Board-commissioned Christensen Report for the proposition that competitive switching is unlikely to harm the industry. NITL Pet. 28-29 (citing Laurits R. Christensen Assoc., Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition 22-12 to -14 (rev. 2009)). The Christensen Report, however, did not analyze rigorously specific proposals and did not provide evidentiary support for its conclusions regarding industry effects.

the industry. And no party has addressed the potential effect on other captive shippers that would not be covered under NITL's proposal.

Therefore, we will seek further study and comment about these issues. To provide commenters with sufficient time to produce hard facts and rigorous empirical analyses, we will adopt an extended procedural schedule. The extended period also should allow the participants to seek Board resolution of any discovery issues that may arise during that time. If, however, parties need more time, they should petition for an extension. We will make the 2010 Waybill Sample available to participants, under customary protective orders (see 49 C.F.R. § 1244.9), and we will entertain requests that participants' pleadings be filed under seal so that confidential information is protected. If participants are permitted to file their pleadings under seal, they will be required also to file a public version with confidential information redacted.

To narrow the scope of the undertaking, any railroad or shipper interest may choose to focus on the impact of this proposal on one of the 4 largest U.S. Class I railroads (Union Pacific Railroad, BNSF Railway Company, CSX Transportation, Inc., or Norfolk Southern Railway Company) as illustrative of the impact on the industry, instead of performing a study of the impact on the entire industry.<sup>14</sup> Commenters should fully address and quantify, to the extent practicable, the following issues concerning the rail carrier (or carriers) included in the study:

1. Identify the existing terminals and shippers located within the boundaries of those terminals. Explain whether the shippers can currently obtain competitive switching and any restrictions or limitations on the shippers' competitive switching rights.
2. Identify how many additional shippers and what amount of revenues earned by the incumbent Class I rail carrier from those shippers would be subject to competitive switching under NITL's proposal.
3. Based on the commenter's assumed access pricing methodology, by how much would NITL's proposal lower rates for the shippers identified in the study that would qualify for competitive access? How much revenue would the incumbent Class I rail carrier lose as a result of NITL's proposal? How much of this revenue loss could be offset through traffic increases or other gains?
4. What would be the economic and regulatory impacts of NITL's proposal on the captive shippers served by the incumbent Class I rail carrier or carriers included in the study that would not be covered by NITL's proposal and, therefore, would continue to be served only by the incumbent carrier? Would their rates increase, and, if so, by how much, to offset the reduced rates to others?
5. How would rail network efficiency be affected by NITL's proposal?

---

<sup>14</sup> We believe that the broad mix of traffic (both geographically and type of traffic) handled by any of the 4 largest U.S. Class I railroads is sufficiently representative of the railroad industry as a whole that one could draw reasonable inferences from a study of one of those carriers on the industry-wide impact.

Commenters should study the impact of NITL's proposal under whatever access pricing proposal they believe the Board should adopt. Commenters may also provide the analysis needed to assess the impact of this proposal if the 30-mile "reasonable distance" were changed. And they may provide the analysis needed to assess the impact of this proposal if the  $R/VC_{\geq 240}$  or the 75% market-share eligibility requirements were changed. As noted, NITL's proposal creates a conclusive presumption in favor of competitive access relief to those shippers where the R/VC ratio of the through movements is equal to or greater than 240%, or where the incumbent railroad has handled 75% of the origin-to-destination traffic for which switching is sought over the most recent 12 months. While  $R/VC_{\geq 240}$  is a core limitation to NITL's proposal, one might conclude that the R/VC threshold should be related to the revenue needs of the carrier and the amount of demand-based differential pricing that the carrier needs to earn a reasonable return on its investments. Thus, an alternative approach might be to limit any competitive access relief to shippers for which their R/VC ratio exceeds the 4-year average RSAM benchmark published annually by the Board for the carrier in question, or some other reasonable R/VC threshold. We encourage commenters to submit evidence to show what would happen if we adopted this alternative approach, or any other alternative approach.

### CONCLUSION

Since the hearing in Competition in the Railroad Industry, Docket No. EP 705, we have been considering the wide range of ideas and options that were discussed to determine how best to promote a competitive and economically viable rail network. NITL submitted the proposal at issue here, which is a part of the competition and service issues brought to the Board in the EP 705 proceeding. Today, we have also proposed rules to reform our rate regulation process, as reflected in the notice of proposed rulemaking in Docket No. EP 715. In addition, we continue to evaluate other competitive issues, including what actions to take in connection with commodity exemptions which were the subject of a separate hearing in Docket No. EP 704, and how to improve our rules in transactions involving interchange commitments.

As part of this ongoing effort, we have conducted preliminary analysis of NITL's proposal, which has led to our conclusion that it would be in the public interest to solicit further information here before we move forward with any formal rulemaking. The empirical information we are now requesting would be used to augment the Board's ongoing analysis of NITL's proposal, as well as to evaluate issues raised in the Competition in the Railroad Industry hearing. We also believe that soliciting empirical studies from stakeholders at this stage will enable the Board to balance efficiently its responsibilities in this docket with those in other ongoing proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A proceeding is instituted to consider NITL's competitive access proposal.
2. We invite interested commenters to perform a study of the competitive access proposal submitted by NITL and to submit reports of their studies' findings or other appropriate information and recommendations.
3. Opening submissions are due by November 23, 2012. Responses are due February 21, 2013. Pleadings containing confidential information must be filed under seal, along with public versions with confidential information redacted.
4. Notice of this decision will be published in the Federal Register on July 30, 2012.
5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.