

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 711

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

REPLY COMMENTS

of

THE AMERICAN CHEMISTRY COUNCIL

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The American Chemistry Council (“ACC”) hereby submits these Reply Comments in the above-captioned proceeding pursuant to the decision (“Decision”) served by the Surface Transportation Board (“Board” or “STB”) on July 25, 2012.¹ The Decision sought comments and empirical information in response to a Petition for Rulemaking of the National Industrial Transportation League (“NITL Petition”) which requested that the Board initiate a rulemaking to adopt new regulations for competitive switching under 49 USC § 11102(c).

I. BACKGROUND AND SUMMARY OF ACC’S REPLY COMMENTS.

In Opening Comments filed on March 1, 2013, ACC expressed strong support for the need to revise the Board’s regulations in order to allow competitive switching to be used in accordance with the statutory mandate of 49 USC § 11102(c)(1). ACC showed that railroad market power has increasingly harmed the domestic chemical industry, with resulting negative

¹ The Board modified the procedural schedule of this proceeding in a decision issued on October 25, 2012.

effects felt throughout the U.S. economy. ACC also explained that railroads would not be materially harmed by the competitive switching regulations proposed by NITL (“CSP”), yet significant benefits would be felt in the chemical industry and the broader economy.

Evaluation of the Opening Comments filed by other parties in this proceeding has reinforced the views previously expressed by ACC. In these Reply Comments, ACC responds to the legal and policy arguments made by several of the railroad parties in the following areas:

1. The Board has legal authority to adopt CSP.
2. The Board should proceed expeditiously to issue a Notice of Proposed Rulemaking.
3. The Board should clarify that CSP is a supplement to, not a replacement for, rate regulation.
4. Railroad parties have overstated both the amount of traffic that would be eligible for CSP and the amount that actually would use CSP.
5. The Canadian example shows that competitive switching can be successful.
6. The estimated effects of CSP on the chemical industry are significant.

ACC appreciates the Board’s willingness to carefully consider the issues raised by the CSP. As described in ACC’s Opening Comments and below, ACC believes the Board should issue a Notice of Proposed Rulemaking and adopt the CSP.

II. THE BOARD HAS LEGAL AUTHORITY TO ADOPT THE CSP.

Many of the railroad parties have asserted that the Board does not have the legal authority to adopt the CSP. For example, the Association of American Railroads (“AAR”) contends that “the ICC and the courts have already concluded that Congress did not give the Board...authority” to adopt regulations such as the CSP. AAR Opening Comments at 6 (filed March 1, 2013) (“AAR Opening”). The main problem with the CSP, according to the AAR, is that anticompetitive railroad behavior must be proven by a petitioner before the Board is permitted to order carriers to enter a competitive switching agreement. See, e.g. AAR Opening at 22-23. See also Opening Comments of Norfolk Southern Railway Company at 23 (filed March 1, 2013) (“NS Opening”).

The railroad parties' assertions have no basis in the governing statute. The plain language of 49 USC § 11102(c) shows that Congress only restricted competitive switching to the Board's evaluation of the public interest and practicability, on the one hand, or whether competitive rail service would be fostered, on the other. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485 (1917). To interpret the statute in a way that ignores the plain meaning would be unreasonable. Shays v. FEC, 337 F.Supp.2d 28, 51 (D.C. Cir. 2004).

A. Competitive Switching Does Not Require Anticompetitive Railroad Behavior.

AAR contends that the CSP is improper because Congress allegedly "intended for the agency to use its authority to regulate competitive access to address specific instances of railroad misconduct." AAR Opening at 22. See also NS Opening at 28. The contentions of AAR and NS on this point are directly contrary to the statutory language. The plain language of 49 USC § 11102(c) does not mention railroad misconduct, service problems, or any similar concepts. Barnhart v. Sigmon Coal Company, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

The railroad parties' claim that Congress "intended" to require railroad misconduct must be rejected. If Congress had "intended" such a meaning, Congress would have included it in the statutory language. The Board should apply the statute as written. "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. We have stated time and again

that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” Connecticut National Bank v. Germain, 503 U.S. 249, 253-254 (1992). As Congress clearly stated, the Board has the discretion to order carriers to enter a competitive switching agreement solely in order to foster competition. Resort to strained attempts to divine Congress’ alleged unexpressed “intent” is unnecessary because the statutory language is abundantly clear. “When the words of a statute are unambiguous, then... ‘judicial inquiry is complete.’” Id., at 254 (internal citation omitted).

Several of the railroad parties repeatedly mention that the current standards for competitive switching, found within the Board’s competitive access rules, require a showing of anti-competitive railroad conduct. See, e.g., AAR Opening at 25-27; NS Opening at 23-28. However, the current rules are not the only permissible interpretation of § 11102(c). Indeed, the statutory language plainly requires use of the Board’s discretion in addressing the possibility of competitive switching; Congress used the term “may” and broad concepts such as competition and public interest in 49 USC § 11102(c). As such, the Board has wide latitude in implementing the statute. Cf. Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 90 (1943) (where a statute gave the SEC the authority to determine if an action was detrimental to the public interest, it “confer[red] upon the Commission broad powers for the protection of the public”).

The fact that the CSP differs from the current regulations in implementation of the statute does not bar the Board from adopting it. “An agency’s view of what is in the public interest may change, either with or without a change of circumstances” as long as a “reasoned analysis” is given. Greater Boston Television Corporation v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (citations omitted); Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile

Insurance Company, 463 U.S. 29, 51-52 (1983) (stating that NHTSA may revoke an existing vehicle safety standard “if supported by the record and reasonably explained”).

Indeed, if an agency could never modify or change its implementation of a statute, then the pro-competition, pre-1985 interpretation of the competitive switching statute would still be in force. Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Competitive switching Agreement, 367 ICC 718 (1983).

B. Congress Has Not Ratified The Current Competitive Access Rules.

NS and CSXT claim that the Board cannot adopt the CSP because Congress allegedly “ratified” the 1985 competitive access rules with the passage of the Interstate Commerce Commission Termination Act (“ICCTA”) in 1995. NS Opening at 23-28; CSXT Opening at 11-21. This claim is incorrect. Adoption of one interpretation of the broad authority given in § 11102(c) does not preclude later, different interpretations. Hinson v. NTSB, 57 F.3d 1144, 1149-1150 (D.C. Cir. 1995) (an agency is not “irrevocably bound to its own precedents, so long as it gives a reasoned explanation for its departure”) (internal citation omitted); Grace Petroleum Corporation v. FERC, 815 F.2d 589, 591 (10th Cir. 1987) (recognizing that an agency may “chang[e] its course” if it supplies “a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored”).

Congress’s failure to change § 11102(c) in the ICCTA indicates, at most, nothing more than Congress’s view that the 1985 competitive access rules were within the realm of permissible uses of ICC competitive switching discretion. There is nothing in either the Staggers Act or the ICCTA to indicate that the competitive access rules are the only possible use of that discretion. If there was only one possible use of the agency’s discretion under § 11102(c), the language of

the statute would have required a finding of anticompetitive railroad conduct – but Congress did not take that step.

NS and CSXT cite to numerous court decisions in support of their ratification theory (NS Opening at 23-27; CSXT Opening at 11-21), but none of them stand for the proposition that discretion given to an agency in a statute can be eliminated or narrowed in a later re-enactment of the same statutory language. Most of the decisions address agency interpretation of a specific statutory term or phrase; they do not address a situation where Congress used the word “may” and gave the agency discretion to act within a broad range of possible outcomes based on various factors, nor do these decisions concern the boundaries of a broad permissive grant of authority to an agency. A few of the ratification decisions involve agencies acting within a grant of discretion, but in all such decisions, the agency action was upheld as within its discretion. For example, in one decision, the relevant statute stated that the Secretary of State “may” grant passports under rules established by the President, and the court found that the authority was “surely broad enough” to enable the Secretary to create area restrictions that prohibit passports from being used for Cuba travel. Zemel v. Rusk, 381 U.S. 1, 8 (1965).

C. Existing Board Regulations Do Not Prohibit Adoption Of The CSP.

AAR contends that “Congress did not intend for the agency to promote a new regime of open-routing through aggressive switching regulation.” AAR Opening at 22. AAR also asserts that the Board cannot adopt the CSP due to judicially-affirmed agency decisions regarding through route prescription, bottleneck situations, and the competitive access rules. AAR Opening at 24-29. See also Opening Comments of Kansas City Southern Railway (filed Mar. 1, 2013) at 33 (“KCS Opening”) (“NITL’s Petition also seeks a short-cut around the through route provisions of Section 10705”). The AAR position rests upon a faulty and distorted view of what

NITL has proposed. The CSP does not “mandate switching” (AAR Opening at 13) or include blanket “open routing” in violation of 49 USC § 10705. Similarly, it does not give routing control to shippers, nor does it require bottleneck contracts for all possible route segments.

Open routing will not result. Under the CSP, a petitioner seeking competitive switching will have to make four separate showings in order to be entitled to access to a competing rail carrier: (1) service only by one Class I railroad; (2) no effective intermodal or intramodal competition; (3) there is an interchange within a reasonable distance; and (4) such interchange is “working.” See NITL Petition at 8. Moreover, the incumbent railroad would be able to defeat competitive switching if it shows only one of the following, that the proposed switching (1) is not feasible; (2) is unsafe; or (3) would unduly hamper existing rail operations. See NITL Petition at 8. If all these various requirements are met, the Board would be more than justified in ordering carriers to enter into a competitive switching agreement under the criteria set forth in § 11102(c). See Allied Local and Regional Manufacturers Caucus v. U.S. EPA, 215 F.3d 61, 72-73 (D.C. Cir. 2000) (“we must be particularly deferential in a case like this, where Congress – by instructing EPA to set priorities using multiple, nondeterminative criteria – has necessarily indicated an intention to delegate substantial discretion to the agency”) (citation omitted). Moreover, to the extent there are competing policies enunciated in the various statutes passed by Congress, the Board has been given discretionary authority to balance them. MidAmerican Energy Company v. Surface Transportation Board, 169 F.3d 1099, 1109 (8th Cir. 1999) (recognizing that the Board must reconcile “competing policies”); Association of American Railroads v. Surface Transportation Board, 306 F.3d 1008, 1111 (D.C. Cir. 2002) (“it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Act”).

The Bottleneck doctrine also does not prevent the Board from implementing the CSP. See AAR Opening at 27-29 and KCS Opening at 33-34 (both citing to Bottleneck). The Bottleneck cases found that shippers were not entitled to separate local rates where the incumbent railroad could provide full origin-to-destination service on its own or where the serving carriers decided to use a joint rate. See, e.g., Central Power & Light Company v. Southern Pacific Transportation Company, 2 STB 235, 236-238 (1997). As such, the Bottleneck rule is clearly distinct from the CSP, under which the Board would merely order carriers to enter into a competitive switching agreement in certain limited situations if a shipper could meet the multi-factor test described at page 8 of the NITL Petition. According to the AAR, the Board, in establishing the Bottleneck rule, “clearly recognized that granting shippers the ability to force open bottlenecks would be a species of open access.” AAR Opening at 28. As described above, however, it is wholly incorrect to claim that the CSP will result in open routing.

Several railroad parties also emphasize that the CSP is different from the existing competitive access rules which were adopted by the ICC in Intramodal Rail Competition, 1 ICC2d 822 (1985). AAR Opening at 25-27; NS Opening at 23-28; and Opening Comments of Union Pacific Railroad Company at 7 (filed March 1, 2013) (“UP Opening”). ACC has previously responded to this argument by showing that the Board may revise its implementation of 49 USC § 11102(c). See Sections II.A and II.B above.

III. THE BOARD SHOULD EXPEDITIOUSLY ISSUE A NOTICE OF PROPOSED RULEMAKING.

The Board should move forward with a rulemaking proceeding as requested by the NITL. There is no need for the Board to first issue an Advance Notice of Proposed Rulemaking (“ANPRM”); the Board can issue a Notice of Proposed Rulemaking (“NPRM”) to solicit comments on revised competitive switching regulations. Use of an ANPRM is not required

under the Administrative Procedure Act. See 5 USC §§ 553(b) and (c). There are occasionally specific statutes that require an agency to use an ANPRM², but there is no such requirement attached to 49 USC § 11102(c). Without such a statutory requirement, the Board need not issue an ANPRM. Cf. Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process, 56 Admin. L. Rev. 353, 358-359 (n. 21) (2004) (“In some cases, agencies issue an Advance Notice of Proposed Rulemaking, providing more detailed information than in the regulatory agenda and encouraging the public to provide early comment prior to the issuance of the proposed rules.”). See also Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059, 1065 (1985) (agencies sometimes issue an ANPRM because of “fear of negative OMB reaction” to the NPRM).

The purposes that would be served by an ANPRM have already been fulfilled in this proceeding. In inviting comments upon the NITL Petition, the Board has already informed the public of a possible change in the competitive switching rules, and encouraged parties to comment upon the proposal. The Board itself has undertaken major rulemaking proceedings without using an ANPRM. See, e.g., STB Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases (served Feb. 27, 2006); STB Ex Parte No. 669, Interpretation of the Term “Contract” in 49 U.S.C. 10709 (served Mar. 29, 2007).

The record in this proceeding shows that the Board should move forward and propose new rules to govern competitive switching. The Board has obtained ample data and industry feedback on the CSP as a result of the Board’s request for public comments in the Decision. Moreover, the two rounds of comments following the Decision have enabled parties to respond

² See, e.g., Consumer Federation of America v. Consumer Products Safety Commission, 883 F.2d 1073, 1076-1077 (D.C. Cir. 1989); Center For Biological Diversity v. Abraham, 218 F.Supp.2d 1143, 1150 (N.D. Cal. 2002).

to other parties' comments. In short, the Board has already received voluminous industry feedback and comment upon the CSP – which is exactly the purpose for which an ANPRM would be used; to issue an ANPRM would simply be redundant. The feedback, data, and comments provided to the Board warrant moving forward with an NPRM. A wide variety of parties agree that competition is lacking in the rail industry, and that the Board should do more to facilitate competition through, at a minimum, revising the competitive switching rules.

IV. THE BOARD SHOULD CLARIFY THAT THE CSP IS A SUPPLEMENT TO, NOT A REPLACEMENT FOR, RATE REGULATION.

Several of the railroad parties have asserted that the CSP is an impermissible “replace[ment]” for rate reasonableness cases. Opening Comments of CSX Transportation, Inc. at 8 (filed March 1, 2013) (“CSXT Opening”). See also AAR Opening at 29-30; NS Opening at 31-32. In the Decision, the Board also remarked upon a perceived link between the CSP and the rate case process, stating that if a competitive switching agreement were ordered under the CSP, then the incumbent railroad might not have market dominance for rate reasonableness purposes. Decision at 6. ACC is concerned that these statements by the railroads and the Board suggest that adoption of the CSP would preclude application of the Board’s rate reasonableness process.

The Board should clarify that the availability of competitive switching does not necessarily preclude a shipper from seeking rate relief under 49 USC §§ 10701 and 10704. This clarification should be two-fold. First, the Board should not require a shipper who may be eligible for competitive switching to actually invoke the CSP process in order to establish market dominance under 49 USC § 10707. Second, the Board should not presume the existence of “effective competition” under the same statute even when a shipper has been granted access to competitive switching.

These clarifications are necessary because simple eligibility for the CSP does not mean that a shipper would pass the multi-factor test required. See NITL Petition at 8. Moreover, even if the Board orders a railroad to enter into a competitive switching agreement, such a circumstance does not guarantee that the railroads will actually compete for the shipper's business. In a 2012 survey of chemical shippers commissioned by ACC, over one-quarter of the responding companies reported that, at some point in the past five years, one railroad effectively chose not to compete for the company's business. See ACC Opening, Attachment B at 1. Indeed, shippers of all kinds throughout the United States have experienced widespread and growing lack of competition between railroads over the past several years – even where two railroads serve a single shipper location – as the record in Ex Parte 705 shows.³

Hence, even where a competitive switching agreement exists, it only creates opportunities for railroads to compete; it does not guarantee that they will compete. “Effective competition” that would defeat market dominance under 49 USC § 10707 and, consequently, preclude a rate reasonableness case is entirely different from obtaining the “opportunity for competition” through CSP. If a competitive switching agreement exists, effective competition still might not occur for many reasons. The switching fee or service terms agreed by the railroads could make it impossible for the new railroad to effectively compete. Alternatively, the new railroad (or the incumbent railroad, for that matter) simply may not seek the traffic, ensuring that the shipper does not have a true, effective competitive option.

³ See, e.g., Comments filed in STB Ex Parte No. 705, Competition in the Railroad Industry, by Ameren Corporation at p. 3-5 (filed April 12, 2011); Alliance for Rail Competition, American Chemistry Council, American Forest and Paper Association, et al. at p. 9-16 (filed April 12, 2011); Concerned Captive Coal Shippers at p. 70 and 95-96 (filed April 12, 2011); Consumers United for Rail Equity at p. 15 (filed April 12, 2011); The Fertilizer Institute at p. 4 (filed April 12, 2011); Roseburg Forest Products at p. 4 (filed April 4, 2011); and TOTAL Petrochemicals USA, Inc. (written testimony) at p. 5 (filed April 12, 2011).

The Board's implicit assumption that competitive switching will guarantee reasonable rates is not necessarily accurate. The geographic duopolies that pass for rail competition today do not always produce actual competition because of the substantial opportunity for tacit collusion and the fear that one railroad's competing for another railroad's customers will lead to competitive retaliation by the second railroad against the first at another location. Although it is ACC's hope that the CSP will open enough additional traffic to competition to overcome these hurdles, that very much remains to be seen. Therefore, given that there is no assurance that railroads will actually compete under the CSP, when a shipper chooses to pursue competitive switching, the STB should not automatically assume a lack of market dominance if the shipper later files a rate case. Moreover, in those situations where CSP produces genuine competition, a shipper would not have any incentive to pursue a rate case.

Furthermore, the Board also should state that shippers who are eligible for CSP are not required to pursue competitive switching as a prerequisite to establishing market dominance in a rate case. As the NITL explained in its Opening Comments, it did not intend to limit or foreclose captive shippers' options to address railroad market power. NITL Opening at 14-16. More broadly, although the Board's rate reasonableness authority addresses unlawful railroad pricing, CSP simply provides opportunities for competition. The statutory scheme confirms that Congress did not make competitive switching and rate reasonableness mutually exclusive.

V. RAILROAD PARTIES HAVE OVERSTATED BOTH THE AMOUNT OF TRAFFIC THAT WOULD BE ELIGIBLE FOR THE CSP AND THE AMOUNT OF ELIGIBLE TRAFFIC THAT WOULD USE THE CSP.

The railroad commenting parties have dramatically overstated the likely impact of the CSP. At one point in its Opening Comments, the AAR alleged that "the NITL proposal could affect movements that originate or terminate at approximately 40 percent of the Nation's rail-

served stations.” AAR Opening at 4. Later, the AAR asserted that 7.5 million carloads may be subject to “mandated switching.” AAR Opening at 21. See also AAR Opening at 13 (“the NITL proposal could potentially mandate switching for more than 1/3 of the non-intermodal carloads transported by Class I railroads”). Evidence in the record reveals that AAR’s assertions are wildly exaggerated. As an initial matter, actual competitive switching will not necessarily be sought by, much less granted to, all shippers who are eligible to petition the Board under CSP. Even when a competitive switching agreement is ordered by the Board, there is no guarantee that the shipper will actually use the rail service provided by the new railroad; the shipper may continue to use the incumbent railroad’s service for any variety of reasons, such as superior single line service and/or a more competitive rate.

The Canadian experience is instructive on this point. Canada has utilized a form of competitive switching called “interswitching” for many years. The Canada Transportation Agency (“CTA”) has the authority to order interswitching to a facility within 30 kilometers of an interchange. Indeed, interswitching is virtually automatic in Canada within 30 kilometers without requiring any of the other tests contained in the CSP. As recounted in the Opening Comments of Highroad Consulting (“Highroad”), the number of rail cars that are interswitched in Canada has fluctuated between 2.5% and 4.1% of total traffic. See Highroad Opening at 18. Moreover, Highroad showed that nearly 40% of rail tonnage in Canada had the ability to seek interswitching at both origin and destination, and the figure was over 90% for traffic with an interswitching option at either origin or destination.⁴ Although the units in these figures differ (the first one is in carloads, while the latter two measure tonnage), it is undoubted that Canadian shippers make use of interswitching for only a small fraction of eligible traffic.

⁴ See Neil Thurson, Assessing Canada’s Regulated Interswitching Impact on Rail Operations and Service to Customers (unpublished, Feb. 17, 2013) at p. 22, attached to Highroad Opening.

Expert evidence submitted by the NITL on this point confirms that the AAR has dramatically overstated the likely impact of the CSP. NITL's expert witness has estimated that 1.24 million carloads of traffic from BNSF, CSXT, NS, and UP would potentially qualify under CSP. NITL Opening at 43. This figure is approximately 4% of the total carload count for these same four railroads. Id. Of course, when a petition for competitive switching is actually filed in any particular situation, the incumbent railroad would always have the ability to show that an agreement should not be ordered because it is not feasible or unsafe, or that it would unduly hamper existing service. See NITL Petition at 8. Therefore, the 1.24 million figure is likely a conservative overstatement.

VI. THE CANADIAN EXAMPLE SHOWS THAT COMPETITIVE SWITCHING CAN BE SUCCESSFUL.

The railroad parties almost universally allege that the CSP will create inefficiencies, reduce rail service quality, and generally harm the U.S. rail system. For example, AAR asserts that the CSP "would turn back the clock on these improvements [since the Staggers Act] that have benefitted all users of the rail network." AAR Opening at 4. AAR also claims that "the NITL proposal would have a negative impact on rail service across the rail network." AAR Opening at 4. Similarly, UP contends that the "negative impacts of NITL's proposal on rail network efficiency and service...would be substantial." UP Opening at 22. NS claims that the NITL proposal "is harmful to the public interest" because it would decrease rail network efficiency, and that "NITL's proposal is contrary to the best interests of the rail system and most shippers." NS Opening at 8 and 61.

The railroads' critique makes two fatal errors. First, as noted in the preceding section, the railroads assume an unrealistically high amount of traffic would be eligible for CSP. Second, they assume that an excessive amount (e.g., 25%) of the eligible universe actually would be

diverted to the competing railroad. This is obviously not the case. See Sections II.C and V above. Because the CSP does not prescribe or mandate any particular transportation rate, competitive switching will likely occur only in those instances where the new railroad has lower costs and/or can provide better, less expensive, and/or more efficient rail service. If, as the railroad parties assert, inefficiencies increase costs, then an inefficient competitive switching option will rarely, if ever, displace more efficient service by the incumbent railroad. In other words, competitive switching could facilitate greater efficiency, not hamper it.

The Canadian experience confirms that a switching proposal like the CSP would not harm efficiency. One of the NITL's expert witnesses in the Opening Comments quoted a 2002 statement from CP that "[t]he current structure of interswitching rates has worked to the general benefit of all parties concerned." NITL Opening at 62. The witness also cited to figures showing that Canadian railroads are among the most productive in the world and, critically, have become more productive in the period since interswitching was expanded from 4 miles to 30 kilometers. NITL Opening at 62-63.

The Highroad Opening Comments included a report which provided an evaluation of the recent Canadian experience with interswitching. See Neil Thurson, Assessing Canada's Regulated Interswitching Impact on Rail Operations and Service to Customers (unpublished, Feb. 17, 2013). Contrary to the exaggerated prognostications of AAR and others, Canada, after several decades of experience with interswitching, saw fit to expand its geographic extent from 4 miles to 30 kilometers in 1987. See Thurston Report at 9-10. Despite the growth of interswitching, the traffic, freight revenue, and net income have significantly increased for Canadian National and Canadian Pacific between 1996 and 2012. See Thurston Report at 25.

During this same time period, most railroad efficiency indicators have shown that CN and CP are becoming more efficient. See Thurston Report at 28.

VII. THE ESTIMATED EFFECTS OF THE CSP ON THE CHEMICAL INDUSTRY ARE SIGNIFICANT.

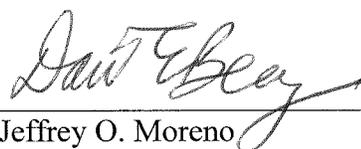
In its Opening Comments, ACC showed that lack of rail competition has negatively impacted the ability of U.S. chemical producers to meet customer demand and has also deterred some companies from making investments in the U.S. See, e.g., ACC Opening at 4. The Norfolk Southern Railway (“NS”) has implicitly disputed this showing, pointing to an ACC press release and opinion article previously highlighted by NS in Ex Parte 705. See NS Opening at 14-15. NS claims that those ACC statements have somehow “undermined ACC’s prior arguments that rail was driving chemical companies off-shore.” See NS Opening at 14. Natural gas is the chemical industry’s primary feedstock, and with U.S. natural gas prices as low as they currently are, America’s chemistry industry is indeed in a strong competitive position for the first time in years. However, while natural gas has provided a tailwind for the chemical industry and the U.S. economy, high freight rates and the lack of competition in the rail industry have become a stiff headwind. In ACC’s survey of chemical shippers, 27% of companies reported that “captivity and associated rail rates and service problems hindered their company from making domestic investments.” See ACC Opening, Attachment B at 2.

It is for reasons such as this that ACC supports the CSP. The lack of rail competition harms not just the American chemical industry, but the domestic economy as a whole. CSP will create the possibility of competitive rail service for an increased percentage of chemical product shipments, as evidence provided by other parties shows. For example, the U.S. Department of Transportation (“DOT”) engaged in an evaluation of the traffic that is eligible for competitive switching. See DOT Opening at 9-11 (filed March 1, 2013). The DOT determined that the

chemical and allied products group provided just over 50% of the carloads and 71% of the revenue of CSP-eligible traffic. DOT Opening at 11. Of the three major commodity groups studied by DOT, the chemical group was far and away the most affected by the CSP.

VIII. CONCLUSION.

ACC thanks the Board for the opportunity to provide these Reply Comments, and ACC respectfully requests that the Board issue a Notice of Proposed Rulemaking as described in the NITL Petition.



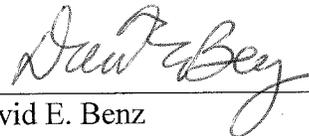
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May 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May 2013, I served a copy of the foregoing Reply Comments of ACC upon all parties of record via first-class mail, postage prepaid.



David E. Benz