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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Ex Parte No. 711 (Sub-No. 1)**

**RECIPROCAL SWITCHING**

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**OPENING COMMENTS**

**OF**

**M&G POLYMERS USA, LLC**

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Jeffrey O. Moreno  
David E. Benz  
THOMPSON HINE LLP  
1919 M Street, N.W., Suite 700  
Washington, DC 20036  
(202) 331-8800

*Counsel for M&G Polymers USA, LLC*

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M&G Polymers USA, LLC (“M&G”) hereby submits these Opening Comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued by the Surface Transportation Board (“Board” or “STB”) in this docket on July 27, 2016.<sup>1</sup> In the NPRM, the Board invited comment on proposed rules that would apply when the Board exercises its authority under 49 U.S.C. § 11102(c) to order reciprocal switching.

M&G generally supports the rules proposed by the Board in the NPRM, but also believes that at least one change should be made. Specifically, as originally proposed, the rules would permit reciprocal switching to be ordered only to allow competing service by a Class I railroad. See NPRM at 20-21. M&G believes this limitation is unwarranted. Shortline railroads should have the option of being the beneficiary of a reciprocal switching order, meaning having the opportunity to directly serve a new shipper through reciprocal switching ordered by the Board. M&G urges the Board to revise the proposed rules so that the new, competing railroad can be

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<sup>1</sup> The Board modified the due dates for comments in a decision served September 1, 2016.

any railroad, whether Class I, II, or III. M&G also makes other comments about the role of shortline railroads in reciprocal switching and related issues, as described below.

#### **I. Identity and Interest of M&G.**

M&G is a corporation organized under the laws of the State of Delaware, with its principal place of business in Apple Grove, West Virginia. M&G is part of M&G Group, which is the world's third largest producer of polyethylene terephthalate ("PET") for packaging applications and a technological leader in the polyester market. M&G produces PET in North America at Apple Grove, West Virginia and Altamira, Mexico. M&G is a major user of rail service to transport its products to customers throughout the continental United States, Canada, and Mexico. M&G also receives, via rail, certain raw materials used in PET production. M&G's Apple Grove facility is captive to CSX Transportation, Inc. ("CSXT"). M&G's corporate affiliate, M&G Resins USA, LLC, will soon open a new manufacturing facility in Corpus Christi, Texas for the production of both PET and purified terephthalic acid ("PTA"), one of the two main components of PET.

PET is a plastic pellet substance that is widely used by M&G's customers in many consumer and industrial applications such as plastic bottles, food packaging, and carpet fiber. The PET business in the United States is highly competitive, with domestic and international producers all vying for the same customers, and it is not at all unusual for a customer to switch its primary supplier every few years. Product quality and cost are the two most important competitive factors.

## **II. Comments of M&G.**

### **A. Shortline Railroads Should Be Able to Be the New, Competing Railroads in a Reciprocal Switching Situation.**

In the NPRM, the Board proposed that the new regulations would only apply to situations involving Class I railroads as both the incumbent railroad and the new, competing railroad. See NPRM at 20-21. However, the Board also requested comment on whether smaller railroads should be covered by the proposed regulations. NPRM at 21. For two main reasons, M&G strongly believes that the proposed regulations should allow any railroad to be the new, competing railroad.

#### **1. Shortline Railroads Should Be Given the Opportunities Afforded by the Proposed Regulations.**

Shortline railroads should be permitted to gain the benefits of additional traffic and revenue that would result from being the new, competing railroad in a reciprocal switching situation. The reciprocal switching proposal could result in significant benefits for shortline railroads – giving them the ability to compete for traffic that otherwise remains beyond their reach on a nearby Class I railroad. The proliferation of shortline railroads over the past thirty-five years has been due largely to Class I railroads selling or leasing their lighter-density branch lines to shortline railroads. Obviously, Class I railroads have generally retained rail lines with large-volume shippers. The reciprocal switching proposal, if revised as suggested by M&G, would enable shortline railroads to compete for some of these larger-volume shippers retained by Class I railroads, thereby providing more revenue to the shortline railroad “bottom line” without requiring the shortline to expend tens of millions of dollars in capital to construct a competing rail line to reach those same large-volume shippers.

The Board decided to omit shortline railroads from the proposed regulations “due to the lack of specific information on this matter and the concerns raised by ASLRRRA.” NPRM at 20-21. In these Opening Comments, M&G provides “specific information” regarding why shortline railroads should be permitted to be the new, competing railroads in reciprocal switching situations. As for the concerns raised by ASLRRRA, they were almost exclusively focused on shortline railroads being the *incumbent* railroad and, therefore, subject to *losing* traffic pursuant to reciprocal switching. See, e.g., ASLRRRA Reply Comments in Ex Parte No. 711 (filed May 30, 2013) at page 2 (expressing concern over situations where a new, competing Class I railroad would be “grant[ed] access over the small railroad route”) and page 3 (“[t]he NITL petition must be clarified as described above to ensure that a shipper served by a small railroad, in any capacity, is not subject to mandated competitive switching”). In other words, the Board’s stated rationale (deference to ASLRRRA’s concerns) is inapplicable to a situation where the shortline is the new, competing railroad. Hence, the Board should adopt M&G’s proposed change to the regulations.

ASLRRRA also raised general opposition to the entire concept of reciprocal switching for all railroads. Even if shortlines are exempted from the rules, ASLRRRA expresses concern about the rules’ possible effect on incumbent shortline railroads from reciprocal switching at nearby, Class I-served locations, contending that shippers will relocate their shortline-served facilities to locations served by a Class I railroad where reciprocal switching is available. See, e.g., ASLRRRA Reply Comments at 4 (“shippers and others looking to reduce their costs of shipping will question the fairness of having to pay more for small railroad service....they will slowly begin to shift their business from perceived high-cost switching carriers to locations where a cheaper government-mandated access fee prevails, to the detriment of the small railroad

industry”). The assertion that shortline railroads incur greater costs than Class I railroads is curious at best.<sup>2</sup> Congress, the Board, the ASLRRRA itself, and virtually all participants in the rail industry know that shortline railroads’ lower cost structure is what has enabled them to thrive when operating lighter-density branch lines sold by the larger railroads.<sup>3</sup> M&G urges the Board to critically evaluate the assertion that shortline railroads’ costs are higher than the switching fees that would be ordered by the Board for Class I railroads. Obviously, if these concerns are given credence by the Board, then the entire reciprocal switching proposal could be rejected.

**2. The Revision Suggested Herein is Necessary to Ensure that Reciprocal Switching is Not Prevented by Strategic Use of Rail Line Transactions.**

Shortline railroads must be permitted to be the new, competing railroad in order to prevent strategic use of rail line leases (and, potentially, sales) to defeat the possibility of reciprocal switching. M&G’s concerns on this point are highlighted by a brief description of facts surrounding rail service in the vicinity of M&G’s Apple Grove facility. As mentioned above, M&G’s Apple Grove facility is sole-served by CSXT. Approximately 14 miles from the Apple Grove facility, the CSXT rail line that serves Apple Grove intersects with a rail line owned by Norfolk Southern Railway Company (“NS”) at Point Pleasant, West Virginia. Just a

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<sup>2</sup> ASLRRRA also ignores the prohibitively expensive cost that a shipper would incur to move its facility from a shortline-served location to a Class I-served location.

<sup>3</sup> See, e.g., Review of Rail Access and Competition Issues, STB Ex Parte No. 575, ASLRRRA Opening Comments at 4 (“Many class II and class III railroad companies are viable solely because of their lower cost structures.”) (filed Mar. 7, 2006). See also Review of Rail Access and Competition Issues, STB Ex Parte No. 575, slip op. at 3 (served Oct. 30, 2007) (“Many short lines can operate their lines at lower costs than could the larger carriers from which they acquired or leased their lines. Reduced labor costs, which reflect a more flexible workforce and lower crewing requirements, contribute to the lower operating costs.”); Staff Memorandum, U.S. House Subcommittee on Railroads, Pipelines, and Hazardous Materials (May 8, 2015) regarding Hearing on “The 35th Anniversary of the Staggers Rail Act: Railroad Deregulation Past, Present, and Future” at p. 5-6 (“Furthermore, the network has been right-sized through the elimination of inefficient lines or service, many of which are now operated by lower-cost short line railroads, which has also been made possible via decreased regulatory barriers.”).

few months ago, this NS rail line was leased to a newly-created Class III shortline railroad, the Kanawha River Railroad, L.L.C. (“KNWA”). See Kanawha River Railroad, L.L.C. – Lease Exemption Containing Interchange Commitment – Norfolk Southern Railway Company, STB Docket No. 36028 (served July 15, 2016). This lease includes an interchange commitment whereby (1) KNWA receives “a credit for each car interchanged with NS,” and (2) NS has a “right of first refusal to handle traffic originating or terminating on the subject lines.”<sup>4</sup>

With this new lease by NS to KNWA, it appears that M&G’s Apple Grove facility might be unable to make use of the reciprocal switching described in the NPRM solely because of the lease, which makes KNWA the competing carrier rather than NS. Yet, in this scenario, NS still owns the subject rail line and has a “right of first refusal” to handle traffic originating or terminating on the subject line. This poses a question as to whether a rail line owned by a Class I railroad, but leased to a shortline, is considered a “Class I” rail line for purposes of the reciprocal switching rules. As described below, the circumstances facing M&G at Apple Grove also illuminate a problem with the proposal as described in the NPRM, thus requiring that the Board modify the proposed rules so that the new, competing railroad can be any railroad, including a shortline.

The nation’s Class I railroads have made no secret of their dislike of the reciprocal switching proposal.<sup>5</sup> If shortline railroads are not permitted to be the new, competing railroads in reciprocal switching situations, Class I railroads could prevent use of reciprocal switching through strategic use of interchange commitments and rail line leases and sales. When a rail origin/destination location is on a Class I railroad (“Railroad X”) within a reasonable distance of

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<sup>4</sup> See Notice of Exemption at p. 5 (filed July 1, 2016) by KNWA in STB Docket No. 36028.

<sup>5</sup> See, e.g., Opening and Reply Comments filed on March 1, 2013 and May 30, 2013 in STB Ex Parte No. 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules.

an interchange with a second Class I railroad (“Railroad Y”), either Class I railroad could completely bar use of reciprocal switching, yet maintain the financial benefits of rail line ownership and operation, by leasing or selling a portion of its rail line to a shortline railroad. This portion would include the interchange between Railroad X and Railroad Y. In this manner, the selling/leasing Class I railroad could (1) preclude use of reciprocal switching; (2) retain the revenue derived from and control over its long-haul transportation movements; (3) avoid the operating costs for rail operations provided by the shortline railroad; (4) retain ultimate control over the rail line at issue through the terms of its lease (or sale) agreement with the shortline railroad and any interchange commitment; and (5) draft terms of an interchange commitment to bar or hinder use of reciprocal switching at the relevant interchanges.

To counteract the strategic use of rail line sales and leases to prevent reciprocal switching, the Board should revise the proposed rules so that the new, competing railroad can be *any* railroad, whether Class I, II, or III. Without such a change, M&G’s Apple Grove facility, and other similarly-situated facilities across the country, could be barred from use of reciprocal switching. The Board should also remain open to consideration of reciprocal switching when the incumbent railroad is a shortline due to the afore-mentioned possible strategic use of rail line spinoffs.

As the description in the previous several paragraphs makes clear, there are numerous other issues that the Board may want to consider in this rulemaking, including:

- When a rail line is leased from a Class I to a shortline and an interchange commitment applies, the Board may want to say that the rail line should be considered operated by a Class I for purposes of the reciprocal switching rules.

- When a shipper facility is on a rail line near an interchange to a second rail line operated by a shortline pursuant to a lease from a Class I (and an interchange commitment applies), the Board may want to state that the Class I railroad owning the second line can be the new, competing railroad in a reciprocal switching situation for that shipper.
- The Board may want to say that reciprocal switching will be available if the incumbent rail line is owned by a Class I railroad, but leased to a shortline.
- The Board may want to include a provision in the new regulations that requires evaluation of the terms of all interchange commitments and other contractual terms that may affect an incumbent rail movement or proposed new rail movement in a reciprocal switching case.
- The Board may want to state that it has the authority to overturn any lease, sale, or interchange commitment terms that would purport to bar or hinder reciprocal switching ordered by the Board.

**B. The Board Should Permit a Case-By-Case Evaluation of Whether Reciprocal Switching Can Be Ordered When a Shortline Railroad is Involved in the Incumbent Movement.**

As mentioned above, the Board proposed that any involvement by a shortline railroad, whether in the incumbent movement or the proposed new movement, would preclude use of reciprocal switching. This blanket prohibition is far too over-inclusive. As mentioned above in Section II.A, a shortline railroad should be permitted to be the new, competing railroad. Moreover, the Board should also remain open to ordering reciprocal switching when the incumbent rail movement involves a shortline. Depending on the circumstances of the rail movements at issue, it is possible that a reciprocal switching order would not adversely impact

an incumbent shortline railroad. For example, many shortline railroads operate in port or terminal areas as local switching carriers. A shipper in such a port or terminal area is served by the shortline for the initial part of all outbound movements and the delivery of all inbound movements. If this shipper seeks a reciprocal switching order from the Board, it is possible that the port/terminal shortline railroad would *still* be the originating/terminating railroad for the new, competing rail movement. In such a scenario as this, where the shipper is located in a port or terminal area served by a shortline, the Board should consider the destination to be the port or terminal area itself, such that the line-haul movement to the port or terminal is the true incumbent movement that is replaced by a new, competing carrier. Hence, the shortline railroad would be involved in both the incumbent movement and the new, competing movement.

Similarly, if an incumbent rail line movement originates on a shortline railroad at Location X before being interchanged to a Class I railroad for delivery to Shipper Y, the Board should remain open to a reciprocal switching situation where Shipper Y seeks reciprocal switching. The new, competing movement may still originate from Location X on the same shortline, but simply be transported by a new railroad to an interchange location, where the incumbent Class I would provide the switching movement to Shipper Y. Again, in this scenario, the shortline would be involved in both the incumbent movement and the new, competing movement.

Numerous other similar scenarios exist where a shortline railroad could be involved in the incumbent rail movement yet not be adversely affected by reciprocal switching. M&G requests that the Board revise the proposed regulation so that a case-by-case evaluation is used to determine if reciprocal switching can be ordered when the incumbent movement involves a shortline.

### III. Conclusion.

For the foregoing reasons, M&G respectfully requests that the Board revise the proposed reciprocal switching regulations so that any railroad, whether Class I, II, or III, is able to be the new, competing railroad in a reciprocal switching situation. The Board should also remain open to ordering reciprocal switching even where a shortline is involved in the incumbent rail movement.

Respectfully submitted,



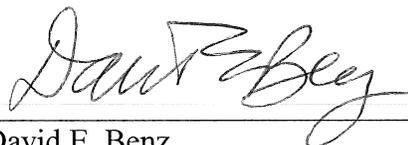
Jeffrey O. Moreno  
David E. Benz  
THOMPSON HINE LLP  
1919 M St. N.W., Suite 700  
Washington, DC 20036  
phone: (202) 331-8800  
fax: (202) 331-8330

*Counsel for M&G Polymers USA, LLC*

October 26, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 26th day of October 2016, I served a copy of the foregoing upon all parties of record in this proceeding by U.S. first-class mail, postage prepaid.

A handwritten signature in cursive script that reads "David E. Benz". The signature is written in black ink and is positioned above a horizontal line.

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David E. Benz