

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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COMPETITION IN THE RAILROAD	)	
INDUSTRY	)	Ex Parte No. 705
	)	

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**COMMENTS OF  
CONCERNED CAPTIVE COAL SHIPPERS**

By: C. Michael Loftus  
Andrew B. Kolesar III  
Slover & Loftus LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 347-7170

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*Attorneys for the Concerned Captive  
Coal Shippers*

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The Concerned Captive Coal Shippers (“Concerned Coal Shippers”) hereby provide these Comments in response to the Board’s Notice of Public Hearing served January 11, 2011 (“Notice”), as modified by Decision served February 4, 2011. In its Notice, the Board expresses its intention to examine issues related to the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate. The Board suggests that the proceeding is intended as a “public forum to discuss access and competition in the rail industry, and with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies . . . .” Notice at 5.

The Concerned Coal Shippers commend the Board for its interest in re-examining the competitive access rules. In multiple proceedings over the past fifteen years, the Board has recognized that sufficient authority exists under Title 49 – and in particular, under 49 U.S.C. § 10705 – to protect shippers in specific instances of need. The existing competitive access rules (49 C.F.R. § 1144), however, prevent shippers from obtaining (or even seeking) the benefits contemplated under the statute and have served

to neutralize a key component of the overall competitive balance envisioned by Congress. The practical effect of those regulations has been to eliminate Section 10705 from any meaningful role in STB jurisprudence and to leave the Board without a vehicle for bridging the gap between carriers and shippers on issues such as bottleneck rate relief. Through these comments, the Concerned Coal Shippers advocate replacing the current competitive access rules as a means of fulfilling the pro-competitive statutory goals reflected in Section 10705.

Following the substantial consolidation of the railroad industry, competition between carriers has greatly diminished. It is critical that in revising its competitive access rules, the Board avoid any formulation that is premised upon the willingness of carriers to protect the interests of shippers. When placed in that situation, duopoly carriers have shown a propensity to allow each carrier to retain its own traffic rather than working aggressively to take advantage of opportunities to secure new traffic. Accordingly, the Board should develop a means of affording relief – in narrowly defined situations – where the availability of an alternative through route is based upon the Board’s assessment of the relevant competitive circumstances, not upon the consent of the carriers. The Concerned Coal Shippers respectfully submit that their proposal would provide such a solution.

## RELIEF REQUESTED

As explained in greater detail herein, the Concerned Coal Shippers seek the following relief:

(1) The Concerned Coal Shippers request that the Board replace its competitive access rules at 49 C.F.R. § 1144 with rules that would provide objective and readily ascertainable standards for determining whether the prescription of a through route (including a through route that would short-haul a rail carrier) is desirable in the public interest and is needed to provide adequate, and more efficient or economic, transportation. Specifically, the Concerned Coal Shippers request that the Board establish a bright-line standard of the nature of the Board's class exemptions that would be based upon the revenue-to-variable cost ("R/VC") level – calculated using the STB's URCS Phase III costing program – for service from the subject origin to the subject destination under the existing routing. If the current carrier offers a rate for the existing route that exceeds the carrier's most recent single-year Revenue Shortfall Allocation Methodology ("RSAM") level,<sup>1</sup> that fact should trigger an automatic right to the prescription of an alternative through route under the standards of 49 U.S.C. § 10705(a)(1) and 49 U.S.C. § 10705(a)(2)(C).

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<sup>1</sup> "RSAM measures the average markup that the railroad would need to charge all of its 'potentially captive' traffic in order for the railroad to earn adequate revenues as measured by the Board under 49 U.S.C. § 10704(a)(2)." *Simplified Standards for Rail Rate Cases – 2008 RSAM and R/VC<sub>>180</sub> Calculations*, STB Ex Parte No. 689 (Sub-No. 1) at 1 (STB served July 27, 2010); *id.* ("Potentially captive traffic is defined as all traffic priced at or above the 180% R/VC level –which is the statutory floor for regulatory rail rate intervention.").

(2) The Concerned Coal Shippers request that the Board establish a second bright-line standard to allow a shipper to obtain the prescription of an alternative through route where: (i) the alternative through route would be shorter than the current routing; (ii) the alternative through route constitutes a practicable means of handling the traffic; and (iii) the R/VC ratio for the existing route exceeds the existing carrier's most recent single-year "revenue-to-variable cost percentage above 180" or "R/VC<sub>>180</sub> percentage."<sup>2</sup> See 49 U.S.C. § 10705(a)(2)(B).

(3) In either of the two foregoing situations, if the shipper first secures a rail transportation contract with the non-bottleneck carrier (for service from an origin already served by the bottleneck carrier), the Concerned Coal Shippers propose that the Board likewise apply these two trigger standards, albeit in a slightly modified manner. Specifically, the Board first should calculate an imputed bottleneck rate by subtracting: (i) the non-bottleneck carrier's contract rate, from (ii) the bottleneck carrier's rate for single-line service. If the R/VC ratio associated with that imputed bottleneck rate exceeds the bottleneck carrier's most recent single-year RSAM value, then the shipper will be entitled to the prescription of an alternative through route using the contract service over the non-bottleneck segment. Moreover, where the origin-to-destination routing via the non-bottleneck carrier is shorter than the current single-line routing, then

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<sup>2</sup> The R/VC<sub>>180</sub> benchmark "measures the average markup actually applied by the defendant railroad on its potentially captive traffic." *Simplified Standards*, STB Ex Parte No. 689 (Sub-No. 1) at 2.

the trigger value for prescribing an alternative through route will be the bottleneck carrier's most recent single-year  $R/VC_{>180}$  value.

(4) Next, the Concerned Coal Shippers request that the Board adopt a rule permitting shippers to petition the Board for the prescription of an alternative through route in situations in which they believe that facts exist that would justify relief under 49 U.S.C. § 10705(a)(2)(A). Specifically, a shipper should be permitted to seek relief on an expedited basis where a carrier has subjected the shipper to unreasonable discrimination (49 U.S.C. § 10741), where a carrier has failed to provide “reasonable, proper, and equal” facilities for interchange (49 U.S.C. § 10742), or where the prescription of a through route is necessary to effectuate other forms of competitive access relief (49 U.S.C. § 11102). The Board should not require a showing of anticompetitive conduct as a pre-condition to relief under Section 10705(a)(2)(A).

(5) The Concerned Coal Shippers further request that the Board adopt a rule that – in the absence of agreed-upon divisions between the carriers providing a prescribed alternative through route (and in the absence of a contract between the non-bottleneck carrier on the alternative through route and the shipper) – divisions for the alternative through route shall be set on the basis of a straight mileage pro-rate.

(6) The Concerned Coal Shippers also request clarification that the existence of an alternative through route prescribed under Section 10705 should not operate as a bar to a finding of market dominance on the pre-existing routing. Likewise, the existence of the pre-existing routing should not operate as a bar to a finding of market

dominance on the prescribed alternative routing. Such a maximum rate case would proceed under the Board's current standards, and the through route prescription trigger levels (*i.e.*, the RSAM level for relief under Sections 10705(a)(1) and 10705(a)(2)(C) and the R/VC<sub>>180</sub> level for relief under Section 10705(a)(2)(B)) would not play any role in the determination of maximum rates.

Moreover, as confirmed in the *Bottleneck* decisions,<sup>3</sup> if the shipper obtains a contract with the non-bottleneck carrier for service on the alternative route, the shipper is entitled to challenge the rate on the bottleneck segment of the alternative routing.

(7) Finally, the Concerned Coal Shippers request that the Board ease the burden of proof under the competitive access regulations for shippers seeking terminal trackage rights or reciprocal switching, and clarify the scope and availability of such potential remedies as more fully addressed in these Comments.

These proposals, if implemented by the Board, would have the effect of affording a competitive access remedy in those situations in which monopoly carrier pricing has reached a point that demonstrably satisfies the public interest standard of Section 10705(a)(1) and the short-hauling criteria of Section 10705(a)(2). Moreover, these proposals have the added benefit of ensuring that non-bottleneck carriers would be sufficiently compensated if a through route were prescribed, and would allow the Board to act to restore competitive balance (albeit at rates that would be highly remunerative for

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<sup>3</sup> *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1074-75 (1996) ("*Bottleneck I*"), *clarified*, 2 S.T.B. 235, 245 & n.15 (1997) ("*Bottleneck II*"), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999).

the carriers) without depending upon the carriers' willingness to enter into contracts in advance of Board action.<sup>4</sup>

\* \* \*

The following comments include: (i) a description of the identity and interest of the Concerned Coal Shippers; (ii) an explanation of the long history of the through route statute; (iii) an analysis of the development and judicial review of the competitive access rules; (iv) a discussion of the instances in which the Board has suggested that through route prescription could provide an important form of relief; and (v) a proposal for modifying the Board's current competitive access rules to allow relief to be available to shippers in a meaningful fashion.

### **IDENTITY AND INTEREST**

The Concerned Coal Shippers include the following nine entities: (1) American Electric Power Service Corporation; (2) the City of Grand Island, Nebraska; (3) Duke Energy Corporation; (4) Dynege, Inc.; (5) Intermountain Power Project; (6) Progress Energy Carolinas, Inc. and Progress Energy Florida, Inc.; (7) Seminole Electric Cooperative, Inc.; (8) South Carolina Public Service Authority (Santee Cooper); and (9) South Mississippi Electric Power Association. Each entity consumes large volumes of coal to generate electricity and relies upon rail carriers to transport that coal.

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<sup>4</sup> Any issues associated with upgrading or rehabilitating the alternative route could be addressed in a transportation contract with the shipper, or otherwise would be reflected in the rate charged by the carriers for the alternative routing.

Collectively, the members of the Concerned Coal Shippers utilize rail transportation service for the movement of well in excess of 105 million tons of coal per year. Each member of the group, by virtue of its circumstances, has a strong interest in the subject matter of this proceeding.

(1) American Electric Power Service Corporation. AEP Service Corporation acts as agent for its American Electric Power (“AEP”) electric generating affiliates in securing coal transportation services by rail for more than 44 million tons of coal annually. AEP, with more than 5 million American customers, is one of the country’s largest investor-owned utilities, serving parts of 11 states. The service territory covers 197,500 square miles in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia. AEP owns and operates 80 generating stations in the United States, with a capacity of more than 38,000 megawatts. Coal fired plants account for 66 percent of AEP’s generating capacity.

(2) The City of Grand Island, Nebraska. Grand Island, Nebraska is the third largest stand-alone city in the State of Nebraska, and includes a population of more than 48,500. Grand Island owns and operates the 100 MW Platte Generating Station, which consumes approximately 300,000 tons of Powder River Basin coal per year.

Union Pacific (“UP”) is the only rail carrier that serves the Platte Station. UP currently provides service to Platte Station pursuant to a rail transportation contract.

(3) Duke Energy Corporation. Duke Energy is a diversified energy company with a portfolio of electric and natural gas businesses, both regulated and non-

regulated. Duke Energy supplies, delivers and processes energy for customers in North America and selected international markets. Duke Energy owns two regulated electric companies which use rail transportation: Duke Energy Carolinas, LLC (“Duke Carolinas”) and Duke Energy Indiana, Inc. (“Duke Indiana”).

Duke Carolinas operates eight coal-fired electric generating stations, including one station (Marshall 2,090 MW) that is served by both Norfolk Southern Railway Corporation (“NS”) and CSX Transportation, Inc. (“CSXT”), four stations that are served solely by NS (Allen - 1,140 MW, Belews Creek- 2,240 MW, Buck - 369 MW, and Dan River - 276 MW), and three stations that are served solely by CSXT (Cliffside - 760 MW, Lee - 370 MW, and Riverbend - 454 MW).

Duke Indiana operates three coal-fired electric generating stations which use rail transportation, including one served by NS (Gibson - 3,340 MW), one served by CSXT (Cayuga - 1,062 MW), and one served by Canadian Pacific Railway (Wabash River - 860 MW).

These eleven stations are capable of generating a total of 12,961 megawatts of energy. Duke Carolinas and Duke Indiana ship a combined total of approximately 30 million tons of coal per year via rail.

(4) Dynegy, Inc. Dynegy provides wholesale power, capacity and ancillary services to utilities, cooperatives, municipalities and other energy companies in six states in the Midwest, the Northeast and the West Coast. The company’s power generation portfolio consists of approximately 11,800 megawatts of baseload,

intermediate and peaking power plants fueled by a mix of coal, fuel oil and natural gas. Dynegy's geographic, dispatch and fuel diversity contribute to a portfolio that is well-positioned to capitalize on regional differences in power prices and weather-driven demand. Dynegy affiliates operate a number of existing coal-fired power plants that are served by rail.

(5) Intermountain Power Project. Intermountain Power Agency ("IPA"), a political subdivision of the State of Utah, is the owner of the Intermountain Power Project ("IPP"). IPP is located in the great basin of western Utah near Lynndyl, Millard County, Utah. The project generates more than 13 million megawatt hours of energy each year from its two coal-fired units and serves approximately 2 million customers. The units have a total capacity of 1,900 MW Gross and consume over 6 million tons of coal per year.

IPP's generation rights are held, respectively, by the Los Angeles Department of Water and Power (44.6%), five California cities (30%), twenty-three municipal Utah purchasers (14%), six cooperative Utah purchasers (7%), and one investor-owned Utah purchaser (4%).

IPP's generating station is served only by the Union Pacific Railroad Company.

(6) Progress Energy Carolinas, Inc. and Progress Energy Florida, Inc. Progress Energy, headquartered in Raleigh, N.C., is a Fortune 250 diversified energy company with more than 24,000 megawatts of generation capacity and \$9 billion in

annual revenues. The company's holdings include two electric utilities serving approximately 2.9 million customers in North Carolina, South Carolina and Florida.

Progress Energy's coal-fired plants include: (i) the two unit, 392 MW Asheville Steam Plant at Skyland, N.C.; (ii) the two-unit, 316 MW Cape Fear Plant near Moncure, N.C.; (iii) the four unit Crystal River steam complex, located near Crystal River, Fla., which includes two units built in the 1960s (Crystal River South, totaling 865 MW) and two units built in the 1980s (Crystal River North, totaling 1,437 MW); (iv) the three unit, 407 MW H.F. Lee Plant near Goldsboro, N.C.; (v) the single unit, 745 MW Mayo Plant near Roxboro, N.C.; (vi) the single unit, 174 MW H.B. Robinson Steam Plant near Hartsville, S.C.; (vii) the four unit, 2,462 MW Roxboro Steam Plant near Roxboro, N.C.; (viii) the three unit, 613 MW L.V. Sutton Steam Plant near Wilmington, N.C.; and (ix) the three unit, 176 MW W.H. Weatherspoon Steam Plant near Lumberton, N.C. All of Progress Energy's coal-fired plants are served by rail. Three are served solely by NS, four solely by CSXT, and two jointly by NS and CSXT.

Progress Energy Carolinas and Progress Energy Florida annually ship a combined total of approximately 14.5 million tons of coal by rail.

(7) Seminole Electric Cooperative, Inc. Headquartered in Tampa, Florida, Seminole Electric Cooperative, Inc. is one of the largest non-profit generation and transmission (G&T) cooperatives in the United States. As a G&T, Seminole generates, sells and transmits bulk supplies of wholesale electricity primarily to its 10 Member distribution cooperatives. The Members, in turn, provide retail electric

distribution services to their member residential, commercial and industrial consumers. Seminole and its Members serve nearly 900,000 metered residential and business consumers (as of the end of 2010) in 45 of Florida's 67 counties. In 2010, Seminole generated annual revenue of more than \$1.4 billion. Also in 2010, more than 98% of Seminole's total operating revenues were generated from sales to its Members, and approximately 70% of its Members' total retail sales were to residential consumers. Seminole sold more than 17 billion kilowatt hours (kWh) of energy in 2010, 97% of which was comprised of energy sales to its Members. Seminole's aggregate coincident peak demand for the summer of 2010 and the winter of 2010/2011 were 3,486 megawatts and 4,260 megawatts, respectively.

The primary energy resource serving Seminole's Member systems is the Seminole Generating Station (SGS). This 1,300 megawatt, coal-fueled facility is located in Northeast Florida in Putnam County, on the St. Johns River, about 50 miles south of Jacksonville. It consumes approximately four million tons of coal and/or petroleum coke per year. SGS is served exclusively by CSXT.

(8) South Carolina Public Service Authority (Santee Cooper). Santee Cooper is South Carolina's state-owned electric and water utility, and the state's largest power producer, supplying electricity to more than 163,000 retail customers in Berkeley, Georgetown, and Horry counties, as well as to 31 large industrial facilities, the cities of Bamberg and Georgetown, and the Charleston Air Force Base. Santee Cooper also generates the power distributed by the state's 20 electric cooperatives to more than

685,000 customers in all 46 counties. Approximately 2 million South Carolinians receive their power directly or indirectly from Santee Cooper. The utility also provides water to 137,000 consumers in Berkeley and Dorchester counties, and the town of Santee.

Santee Cooper owns and operates four large-scale, coal-fired generating stations in South Carolina: Jefferies Station in Moncks Corner, Cross Station in Cross, Winyah Station in Georgetown, and Grainger Station in Conway. All of these plants are served exclusively by CSXT, with the exception of Grainger which is served by a short line carrier from Mullins, SC to Conway. Collectively, these four stations consume approximately 9.3 million tons of coal per year with a capacity of approximately 3,951 MW.

(9) South Mississippi Electric Power Association (“SMEPA”). SMEPA is a rural electric power association formed for the purposes of generating and transmitting electric energy. SMEPA is headquartered in Hattiesburg, Mississippi, and provides wholesale electric energy to eleven member-owners. The member-owners, in turn, are each rural electric distribution cooperatives who sell power through more than 411,000 meters to homes, farms, and businesses in 56 of the 82 counties in Mississippi. SMEPA recovers its cost of providing electric energy through wholesale rates to its eleven members. Fuel costs, including the costs to transport fuel, are eventually passed on to the electric customers by the local cooperatives.

SMEPA owns and operates an electric generating facility at Richburg, Mississippi known as the Morrow Station. This 400 MW facility consists of two

coal-burning electric generating units. Historically, the Morrow Station has consumed an average of approximately one million (1,000,000) tons of coal per year, and operates on a nearly continuous basis. Rail transportation is the only economical means of delivering large volumes of coal to the Morrow Station, and rail access to the Morrow Station is exclusively over the lines of NS. As such, SMEPA is captive to NS, and SMEPA has no other current transportation option for delivering its coal purchases.

## COMMENTS

### I. Introduction and Summary

For over 100 years, the Interstate Commerce Act has required rail carriers to participate voluntarily in through routes (*see* 49 U.S.C. § 10703), and has given the agency the authority to prescribe through routes where appropriate. That route prescription authority currently resides in Section 10705 of Title 49, which provides that “[t]he Board may, *and shall when it considers it desirable in the public interest*, prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated, for a rail carrier providing transportation subject to the jurisdiction of the Board under this part.” 49 U.S.C. § 10705(a)(1) (emphasis added).

Although Section 10705(a)(2) generally prohibits the Board from prescribing a through route that would short-haul a carrier, there are three important statutory exceptions to that rule, as well as a stated preference for protecting the long-haul of originating carriers. Those three exceptions pertain to situations involving

unequal access to interchange facilities, unreasonably long routes, and inadequate, inefficient, or uneconomic transportation:

The Board may require a rail carrier to include in a through route substantially less than the entire length of its railroad and any intermediate railroad operated with it under common management or control if that intermediate railroad lies between the terminals of the through route only when—

(A) required under section 10741, 10742, or 11102 of this title;

(B) inclusion of those lines would make the through route unreasonably long when compared with a practicable alternative through route that could be established; or

(C) the Board decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation.

The Board shall give reasonable preference, subject to this subsection, to the rail carrier originating the traffic when prescribing through routes.

49 U.S.C. § 10705(a)(2).

Since 1985, however, Section 10705 has ceased, in practice, to be a meaningful tool in administrative practice before the agency. In fact, a review of STB case law confirms that through route prescription virtually has disappeared from STB jurisprudence. Nevertheless, it is equally evident that the STB regards Section 10705 as a significant statutory provision that can – and should – play an important role in striking the appropriate competitive balance between carriers and shippers. For example, the STB repeatedly has invited shippers to bring cases under Section 10705 (*see Bottleneck I* and

*Entergy 2009*<sup>5</sup>), but with rare exceptions, shippers have been unwilling to accept that invitation.

The Concerned Coal Shippers respectfully submit that the reason shippers have been unwilling to pursue relief under Section 10705 is the widespread recognition of the unreasonable burdens imposed by the Board's competitive access regulations at 49 C.F.R. § 1144. Those regulations place an extremely high burden on shippers seeking the prescription of a through route. As described in greater detail herein, while the 4R Act and the Staggers Act eliminated the complex open routing system that had developed as a result of the ICC's arcane rate equalization and merger conditioning practices, those two Acts left the agency's fundamental through route prescription authority intact. In practice, however, the ICC's 1985 competitive access regulations have gone far beyond what Congress intended and effectively have rendered the through route prescription statute a nullity.

The Concerned Coal Shippers applaud the STB for recognizing in past cases, and through the notice initiating the instant proceeding, that Section 10705 should play a role in the overall structure of the STB's oversight of the industry. The key to the revitalization of this provision is the elimination of the current competitive access regulations.

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<sup>5</sup> *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pac. R.R.*, STB Docket No. 42104, at 2 (STB served June 26, 2009) ("*Entergy 2009*").

These Comments first address the long history and development of Section 10705. Next, they explain the defects associated with the competitive access regulations. These Comments propose a model for the proper interpretation and application of the through route prescription statute, as well as an approach for setting divisions on through routes in a manner that will advance the STB's frequently stated goals of ease of use and transparency. Finally, these Comments also explain that the Board should ease the standards for obtaining reciprocal switching relief or terminal area trackage rights relief.

## **II. Through Route Prescription Authority has been a Significant Part of the Interstate Commerce Act for Over 100 Years**

In order to appreciate the full extent of the competitive access regulations' negative impact, it is beneficial to review the development of the through route prescription statute. The following analysis demonstrates that both Congress and the agency historically have understood through route prescription to be a significant tool available for serving the public interest.

To summarize this history briefly, Congress initially gave the agency authority to prescribe through routes where no reasonable or satisfactory through route already existed. When the Supreme Court found that initial route prescription authority to be more limited than the agency would have preferred, Congress modified the Interstate Commerce Act to grant broader authority, but included a short-haul restriction as a constraint on agency action. Subsequently, in response to various Supreme Court interpretations of the through route and short-haul provisions, Congress refined the

statute by creating exceptions to the short-haul provision to maintain a fair balance between the interests of shippers and carriers. Eventually, when the ICC's statutory interpretations and merger practices led to an overly complex and counterproductive situation in the 1970's, Congress acted to simplify and harmonize the through route statute. Significantly, however, Congress left the through route prescription authority in place in the 4R Act and Staggers Act and left the exceptions to the short-haul provision intact as well. Unfortunately, the Board's 1985 competitive access regulations upset the delicate balance Congress intended.

The following analysis will address each step of this development in detail. For ease of reference, Appendix A to these Comments includes a bullet-point summary of this history.

**A. The Interstate Commerce Act of 1887**

The Interstate Commerce Act of 1887 did not authorize the agency to prescribe through routes, but included a provision regarding the interchange of traffic that remains significant in the current statute. In particular, the 1887 Act created language that still exists as an exception to the short-haul provision of 49 U.S.C. § 10705(a)(2).

Specifically, Section 3 of the 1887 Act provided that “[e]very common carrier subject to the provisions of this act shall according to their respective powers, *afford all reasonable, proper, and equal facilities for the interchange of traffic* between their respective lines . . . .” (Emphasis added). This same language appears in the current statute at Section 10742. *See* 49 U.S.C. § 10742 (“A rail carrier providing transportation

subject to the jurisdiction of the Board under this part shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic . . . .”).

As described below, although Section 10705 of the current statute generally precludes route prescriptions that would short-haul a carrier, that section includes, *inter alia*, an exception that allows the Board to short-haul a rail carrier if a through route prescription is required under Section 10742. *See* 49 U.S.C. § 10705(a)(2)(A). Stated differently, the STB can short-haul a carrier if that carrier is not affording “reasonable, proper, and equal facilities” for interchange with another carrier. In such a situation, the statute dispenses with any consideration of the length of the proposed route, or the relative adequacy, efficiency, or economics of the proposed routing.

Accordingly, the current through route prescription statute still gives effect to this 1887 principle of mandating reasonable, proper and equal facilities for interchange.

**B. The Hepburn Act of 1906**

The Hepburn Act of 1906 made two significant changes to the law regarding rail carriers that are relevant to the present inquiry. First, unlike the 1887 Act, the Hepburn Act created a formal duty under Section 1(4) of the Interstate Commerce Act for carriers to participate in through routes. *See, e.g., Pacific Coast Lbr. Mfrs. Ass’n v. Northern Pac. Ry.*, 14 I.C.C. 51, 53 (1908) (noting that “the first section of the act, as amended June 29, 1096, provides that it shall be the duty of carriers subject to the act ‘to

establish through routes and just and reasonable rates applicable thereto” and that the refusal “upon the part of carriers to establish and maintain just and reasonable through routes is, to-day, of itself a violation of the act”); *Cardiff Coal Co. v. Chicago, M. & St. P. Ry.*, 13 I.C.C. 460, 466 (1908) (same). This duty for carriers to establish through routes has existed in the statute continuously for over 100 years. In fact, comparable language continues to appear in Section 10703 of the current version of the statute. *See* 49 U.S.C. § 10703 (“Rail carriers providing transportation subject to the jurisdiction of the Board under this part shall establish through routes . . . , shall establish rates and classifications applicable to those routes, and shall establish rules for their operation . . . .”).

Second, in an even more consequential development, Congress granted the Commission the affirmative authority in Section 15 of the Act to prescribe through routes, joint rates, and the divisions of joint rates where carriers failed to comply with their Section 1 obligations. *See, e.g., Cedar Hill Coal & Coke Co. v. Colorado & S. Ry.*, 17 I.C.C. 479, 480-81 (1910) (“While at the common law a common carrier may not have been compelled to accord traffic coming off the rails of other carriers and not originating on its own lines the necessary facilities for through movement, under the act to regulate commerce, as amended June 29, 1906, this is no longer the law with regard to interstate carriers.”); *see also* 1 *Interstate Commerce Acts Annotated*, at 79 (1930) (through the Hepburn Act, “[t]he commission was given authority to establish through routes and joint rates and to prescribe divisions of joint rates.”); *see also* 1 I.L. Sharfman, *The Interstate*

*Commerce Commission, A Study in Administrative Law and Procedure*, at 45 (The Commonwealth Fund 1931) (“*Sharfman*”) (“The basic import of the 1906 amendments lay in the explicit delegation of rate-making power to the Commission . . . . *This affirmative authority was also extended to the establishment of joint rates and to the division of such joint rates among the carriers concerned . . . .*”) (emphasis added).

Congress limited this initial version of the ICC’s through route prescription authority to situations in which no reasonable or satisfactory through route already existed. *See, e.g., Cedar Hill Coal & Coke Co.*, 17 I.C.C. at 481 (“The only limitation placed upon the exercise of the power of the Commission to establish a through route is where there is already a reasonable or satisfactory through route in existence, and the question as to whether or not an existing through route is ‘reasonable or satisfactory’ is one of fact for the determination of the Commission.”); *see also Sharfman* at 45 n.43 (“The Commission was also authorized to establish through routes, and to prescribe the terms and conditions under which such through routes shall be operated, *upon refusal or neglect of the carriers to do so on their own initiative.*”) (emphasis added).<sup>6</sup> Notably, Congress replaced this limited scope of route prescription authority within four years.

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<sup>6</sup> The Commission commented on the significance of this statutory change in a 1908 decision, explaining that Congress had intended to strike a balance between the interests of shippers and carriers in the Hepburn Act. *See Pacific Coast*, 14 I.C.C. at 53 (“Every attempt to require by law the establishment of through routes and joint rates has been met by the objection upon the part of railways that such arrangements were properly matters of contract, and that each railway should be left free to control its own traffic. It has been insisted that unless this were so railway operation would be unjustly hampered and railway development unduly checked. This contention upon the part of the railways has apparently been, to an extent, recognized by Congress in the enactment of this statute.

**C. The Mann-Elkins Act of 1910**

The Mann-Elkins Act of 1910 continued the development of the agency's through route prescription authority. Specifically, this Act eliminated the restriction on the agency's through route prescription authority that had appeared in Section 15 of the 1906 Act and that had prevented the Commission from prescribing a new through route where a "reasonable or satisfactory" through route already existed. *See 1 Interstate Commerce Acts Annotated*, 81 (1930) ("The principal changes [associated with the Mann-Elkins Act of 1910] consisted of: . . . (d) Modification of the commission's power to establish through routes and joint rates so as to eliminate the restriction thereon when a reasonable or satisfactory through route existed . . .").

Congress passed this portion of the Mann-Elkins Act in response, *inter alia*, to a decision of the Supreme Court that had vacated the Commission's effort to prescribe through routes under the terms of the Hepburn Act because of a dispute regarding the proper interpretation of the "reasonable or satisfactory" limitation. As described by Professor Sharfman, "the authority of the Commission to establish through routes was modified" in response to a Supreme Court decision that found then-existing law to be insufficient to authorize the Commission's efforts to provide pro-competitive relief to shippers:

The power conferred upon the Commission by the Hepburn Act [to prescribe through routes] could be exercised if the

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The Commission is only allowed to establish a through route and a joint rate when the carriers themselves have neglected to provide a reasonable and satisfactory one.").

carriers failed voluntarily to establish through routes, “provided no reasonable or satisfactory through route exists.” In the so-called *Portland Gateway* case, *In re Through Passenger Routes via Portland, Oreg.*, 16 I.C.C. 300 (1909), the Commission, finding that an existing through route was not, as to a large body of passengers, “reasonable and satisfactory,” ordered the carriers to establish a through route and joint rate for passengers and baggage from Seattle, Washington, to various destinations by way of Portland, Oregon. In *Interstate Commerce Commission v. Nor. Pac. Ry.*, 216 U.S. 538 (1910), the Supreme Court, on review, held the Commission’s order invalid. *It was found that a satisfactory through route already existed and that the Commission was therefore precluded from establishing another.* Less than four months later the Mann-Elkins Act sought to remove the defect thus disclosed in the law (see *Annual Report*, 1909, p. 7) by eliminating the proviso that the Commission could act only when “no reasonable or satisfactory through route exists.”

*Sharfman* at 53-54 n.53 (emphasis added).<sup>7</sup> By eliminating the restriction on through route prescription that the Supreme Court regarded as an impediment to the Commission’s action, Congress confirmed its intention that the existence of a “reasonable and satisfactory” through route should not preclude a finding that the establishment of a second through route is desirable in the public interest. The same issue is relevant at the present time to the extent that carriers seek to prevent shippers served by destination

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<sup>7</sup> In *Interstate Commerce Comm’n v. Northern Pac. Ry.*, 216 U.S. 538, 544 (1910), Justice Holmes had written for the Court that “the Commission had no power to make the order [prescribing a second through route] if a reasonable and satisfactory through route already existed.” The Court’s decision added that the Commission’s justifications “are reasons for desiring a second through route, but they are not reasons warranting the declaration that ‘no reasonable or satisfactory through route exists.’” *Id.* at 545; *id.* (“It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away.”).

monopolists from obtaining access to a competitive through route option. Congress' determination that the public interest can require more than one "reasonable and satisfactory" through route has stood unchanged for over 100 years.

In place of the "reasonable and satisfactory" limitation, the Mann-Elkins Act instead imposed a restriction on through route prescriptions that would short-haul a rail carrier (unless the existing routing was unreasonably long):

[I]n establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

*Mann-Elkins Act*, ch. 309, § 12, 36 Stat. 539, 552 (1910).

This same type of short-haul restriction on the agency's through route prescription authority appears in Section 10705(a)(2) of the current statute, and continues to include the "unreasonably long" exception. Much of the history of the statute in the ensuing decades relates to the proper interpretation of the short-haul provision and to the development of additional exceptions to that provision.

#### **D. The Transportation Act of 1920**

The Transportation Act of 1920 represented a fundamental change in the manner in which the Commission was to regulate the industry, and made several

significant changes to the Interstate Commerce Act that are relevant to the present inquiry regarding competition in the railroad industry.<sup>8</sup>

First, the 1920 Act modified the agency's through route authority by introducing an affirmative obligation on the agency to prescribe through routes that are in the public interest, rather than simply leaving the prescription of such through routes to the agency's discretion. Second, the 1920 Act gave the agency the authority, albeit on a permissive basis, to grant terminal trackage rights. Third, the 1920 Act created an additional exception to the short-haul provision that allowed the Commission to short-haul a carrier where the carrier had not met its obligations under Section 3 of the Act to provide "reasonable, proper, and equal" facilities for interchange.

**1. The "May/Shall" Distinction  
Regarding Through Route Prescription**

The pre-1920 version of Section 15(3) of the Act had included only the permissive construction indicating that the Commission "may . . . establish" through

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<sup>8</sup> Professor Sharfman remarks that the adoption of the Transportation Act of 1920 marked the "beginning of a new approach in railroad regulation. . . . The basic contribution [of this Act, as] evidenced by the character of many of its provisions, lay in the statutory recognition of a positive public responsibility, in the exercise of the Commission's regulating functions, toward the establishment and maintenance of an adequate transportation service." *Sharfman* at 177 (emphasis added); *id.* at 178 ("The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States") (quoting *R.R. Comm. of Wisc. v. C., B., & Q. R.R.*, 257 U.S. 563, 585 (1922) (Taft, C.J.)) (emphasis added); *id.* ("[The Transportation Act of 1920] introduced into the federal legislation a new railroad policy. . . . Theretofore, the effort of Congress had been directed mainly to the prevention of abuses . . . The 1920 Act sought to ensure, also, adequate transportation service.") (quoting *Akron, C. & Y. Ry. v. United States*, 261 U.S. 184, 189 (1923) (Brandeis, J.)).

routes. Congress added the mandatory “shall” language that appears in the current version of Section 10705<sup>9</sup> when it amended Section 15(3) in the Transportation Act of 1920, 41 Stat. 484. *See 3 Interstate Commerce Act Annotated*, p. 1905 (1930) (explaining that the 1906 version of the Act provided that “[t]he commission may also . . . establish through routes” but that the term “also” was replaced in the 1920 Act by “and it *shall* whenever deemed by it to be necessary or desirable in the public interest”) (emphasis added).

As described in greater detail below, Congress’ decision to change the language of Section 15(3) from “may” to “shall” is critical to a proper understanding of the defects in the Board’s current competitive access regulations and of the D.C. Circuit case law relating to those regulations. *See Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1499 (D.C. Cir. 1988). In *Midtec*, the D.C. Circuit relied upon the “may” language of the terminal trackage and reciprocal switching statutes as a basis for approving the agency’s decision to adopt the competitive access rules. *Id.* at 1499-1500, 1502. Congress’ use of the word “may” in those two statutes was critical to the D.C. Circuit’s decision, because those statutes do not obligate – but instead only permit – the agency to grant terminal trackage rights and reciprocal switching. The D.C. Circuit reasoned that since the statutes did not require the Commission to grant terminal trackage rights or

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<sup>9</sup> *See* 49 U.S.C. § 10705(a)(1) (“The Board may, *and shall* when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated . . .”) (emphasis added).

reciprocal switching, it was not unreasonable for the Commission to impose strict limits on the instances in which it would grant such relief. The Commission's "discretion-limiting" competitive access rules, however, also apply to requests for through route prescription. Significantly, in the case of requests for through route prescription, Congress had modified the "may" language that the D.C. Circuit relied upon more than sixty-five years earlier.

With specific regard to the subject of through route prescription, Sharfman notes that "[w]hile the right to establish through routes and authority to adjust divisions of joint rates had been conferred upon the Commission as early as 1906, the Transportation Act [of 1920] sought to mold the exercise of these powers more directly in the interest of the public." *Sharfman* at 217. According to Sharfman:

. . . the amended Sec. 15, par. (3), deals with the establishment of through routes and joint rates. [Pursuant to the 1920 modifications, the] Commission's powers in these directions may be exercised on its own initiative as well as upon complaint, and it may establish minimum as well as maximum charges. Moreover, "whenever deemed by it to be necessary or desirable in the public interest," *it is made the duty of the Commission to establish through routes, joint rates, and "the divisions of such rates."*

*Id.* at 217 n.83 (emphasis added). A review of the most recent twenty-five years of practice before the agency confirms that the "duty" that Congress imposed upon the agency has gone unfulfilled. As described below, the Concerned Coal Shippers contend that the competitive access rules are the cause of this failure, and that the modification of

those rules would permit the agency's through route prescription authority to achieve the objective that Congress intended.

## 2. Permissive Authority to Grant Terminal Trackage Rights

At the same time that Congress mandated the establishment of through routes found to be desirable in the public interest, Congress simultaneously added the permissive authority of Section 3(4) to the Interstate Commerce Act, which empowered the Commission to grant terminal trackage rights:

If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, *it shall have the power to require the use of any such terminal facilities*, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings.

2 *Interstate Commerce Act Annotated*, at 1254 (1930) (emphasis added). Section 11102(a) of the current statute similarly gives the Board the permissive authority to grant requests for terminal trackage rights. *See* 49 U.S.C. § 11102(a) (“The Board *may* require terminal facilities . . . to be used by another rail carrier . . . .”) (emphasis added).<sup>10</sup>

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<sup>10</sup> In 1978, Congress adjusted the permissive language of the 1920 version of the terminal trackage rights provision (*i.e.*, “shall have the power by order to require”) to the current and similarly permissive “may require” formulation. *See* Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1419.

It is evident that in making simultaneous modifications to the Interstate Commerce Act in these two respects – *i.e.*, introducing “obligatory” language to the agency’s pre-existing through route prescription discretion and creating a new, “permissive” authority to grant terminal trackage rights – Congress intended to draw a distinction between the scope of the Commission’s authority in administering these two provisions of the statute.<sup>11</sup>

**3. The Introduction of the Exception to the Short-Haul Provision Regarding “Reasonable, Proper, and Equal” Facilities for Interchange**

The 1920 Transportation Act also created an exception to the short-haul provision that gave the agency expanded route prescription power in situations in which a carrier had failed to provide “reasonable, proper, and equal” facilities for interchange in accordance with its obligations under Section 3 of the Act. *See* Section 15(4). While this duty to provide reasonable, proper, and equal facilities for interchange had existed in Section 3 of the Interstate Commerce Act since 1887, the 1920 Act constituted the first time in which Congress allowed the failure to abide by that obligation to justify the prescription of a through route that would short-haul the carrier refusing to interchange traffic.

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<sup>11</sup> It is noteworthy that despite the many subsequent instances in which it has revisited the Interstate Commerce Act throughout its history, Congress has consistently retained the obligatory “shall” language in Section 10705 (and its predecessor, Section 15(3)).

In the current version of the statute, this clause provides that the Board can short-haul a rail carrier “as required under section 10741, 10742, or 11102 of this title.” 49 U.S.C. § 10705(a)(2)(A). Section 10741 pertains to unreasonable discrimination by carriers, Section 10742 (as noted above) pertains to “reasonable, proper, and equal facilities for the interchange of traffic,” and Section 11102 pertains to terminal trackage rights and reciprocal switching. Consequently, the current version of Section 10705 gives the Board broad latitude to prescribe through routes that would short-haul a carrier based on the failure of the carrier to provide reasonable facilities for interchange or based on the need to facilitate terminal trackage rights or reciprocal switching.

Notably, the Commission itself recognized that the statutory insistence on the availability of reasonable, proper, and equal interchange should be regarded as having equal dignity as the short-haul provision of the through route prescription statute. *See, e.g., Restriction in Routing on Grain and Grain Products from Kansas City, MO to Texas*, 87 I.C.C. 144, 147 (1924) (“As we have said, respondent’s principal justification for closing these desirable routes out of Kansas City under joint rates is to reserve to itself the long haul. But the item by which it seeks to effect this excepts one of its connections, the M., K. & T. Section 3 of the interstate commerce act prohibits carriers from discriminating as between connecting lines in the interchange of traffic. *The provisions of that section are as weighty as those of section 15, upon which respondent relies.*”) (emphasis added).

The Concerned Coal Shippers are not aware of any instance in recent history in which the agency has specifically addressed the meaning or significance of 49 U.S.C. § 10705(a)(2)(A). The provision, however, remains a part of the current statute and expands the Board's authority to prescribe through routes that would short-haul a destination monopolist that refuses to afford "reasonable, proper, and equal facilities" for the interchange of traffic with an upstream carrier.

Although it did not address the impact of reasonable interchange as an exception to the short-haul restriction, the Board has, on limited occasions, made reference to Section 10742. Specifically, in its *Bottleneck I* decision, the Board acknowledged Section 10742 in its statement that "railroads are required, under their common carrier obligation, to establish rates and routes to move a shipper's traffic from origin to destination . . . and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. 10742." *Bottleneck I*, 1 S.T.B. at 1063. Moreover, in *Bottleneck II*, the Board observed that "[h]istorically, interchange cases under section 10742 (and former section 3(4), its statutory predecessor) have mainly concerned discrimination issues between carriers; *i.e.*, whether, under section 10742, a rail carrier has failed to provide a complaining rail carrier with interchange facilities 'equal' to those offered to other railroads." *Bottleneck II*, 2 S.T.B. at 243 n.10. The Board distinguished the relevance of 10742 in that case, however, adding that "[i]n that regard, the cases are of little help in resolving interchange disputes in bottleneck rate cases which do not raise those issues, but instead involve routing and rate issues between bottleneck carriers and

shippers.” *Id.* Finally, in its decisions in the *Entergy* case, the Board made brief references to Section 10742 in the context of its discussion of the destination carriers’ obligation to accept northern Powder River Basin traffic in interchange from BNSF Railway Company. *See Entergy 2009*, STB Docket No. 42104, at 8 n.9; *see also Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pac. R.R.*, STB Docket No. 42104, at 6 n.11 (STB served March 15, 2011) (“*Entergy 2011*”) (same).

**E. Supreme Court Interpretations Regarding Through Routes and Rate Reasonableness**

In the years following the 1920 Transportation Act, the Supreme Court offered guidance regarding the scope of the short-haul provision and regarding the nature of the Commission’s authority to evaluate rates on through movements. These cases shaped Congress’ future modification of the statute and have had a direct impact on the outcome of the 1990’s *Bottleneck* cases and the present inquiry regarding competitive access.

**1. The “Subiaco” Case**

In *United States v. Missouri Pac. R.R.*, 278 U.S. 269 (1929) (“*Subiaco*”), the Supreme Court considered the question of whether the short-haul restriction set forth in Section 15(4) of the Interstate Commerce Act applied only for the benefit of originating carriers. Contrary to the Commission’s interpretation (which had afforded protection only to originating carriers under the existing version of the short-haul provision), the Supreme Court found that a broad interpretation of the short-haul provision’s protection of carriers was required. Stated differently, the Supreme Court

found that the agency's power to prescribe through routes was more limited than the Commission had maintained.

In the decision under review, the Commission had determined that a carrier was entitled to the protection of the Section 15(4) short-haul restriction only after that carrier had received the subject traffic in interchange. Under the facts in dispute, the Ft. Smith, Subiaco & Rock Island Railroad Company ("Subiaco") sought the prescription of through routes that would allow it to participate as an intermediate carrier on westbound movements that would originate on the Chicago, Rock Island & Pacific Railway ("Rock Island") and would terminate on the Missouri Pacific Railroad Company ("Missouri Pacific"). In one movement at issue, the Missouri Pacific would have had the ability to move the subject traffic 308 miles from Memphis to Ft. Smith in single line service, but was limited to a 46-mile haul as the terminating carrier on a three-carrier movement between the same end points via the Rock Island, the Subiaco, and itself. *Id.* at 276. Finding that its decision to require the Missouri Pacific to participate in that three-carrier interline movement was not inconsistent with the short-haul restriction of Section 15(4), the Commission stated that "this order shall not be construed as requiring any defendant to participate in any through route . . . which would require it to surrender possession of traffic which it has originated or received from a connecting carrier to another carrier for transportation over a route which embraces less than the entire length of such defendant's railroad . . . which lies between the termini of such route." *Id.* at 275. Stated differently, the Commission determined that the Missouri Pacific was entitled to short-haul

protection only as between its point of interchange with the Subiaco and the destination of the traffic, rather than over the entire length of haul that would have been possible if the traffic had originated on the Missouri Pacific.

After a district court decision set aside the Commission's through route prescription, the case reached the Supreme Court. In its decision on review, the Supreme Court found that the Commission's interpretation of Section 15(4) was improper and that the agency lacked the authority to prescribe the requested through routes:

The act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of paragraph (3) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long haul routes of carriers. *It is clear that, within the meaning of paragraph (4), the mileage of the Missouri Pacific between its Mississippi river crossings and Ft. Smith lies between the termini of all routes through or from such gateways west-bound over the line of the Subiaco. . . .* The order is plainly repugnant to the rule prescribed by [paragraph (4)].

*Id.* at 276-77 (emphasis added).

The Supreme Court next addressed the Commission's view that Section 15(4) protected the long-haul of delivering carriers only beyond the point at which they receive traffic in interchange, finding that interpretation of the statute to be flawed and suggesting that a statutory modification would be necessary in order to give the Commission broader route prescription authority:

The appellants oppose the application of paragraph 4 according to its terms and insist that it should not be construed to cover all routes which short-haul the carrier, but only those which deprive the carrier of its long haul after it has obtained possession of the traffic. *The proviso contained in the order, reflecting that view, falls far short of protecting the carrier's long-haul routes as contemplated by paragraph (4).* The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. . . . It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation.

*Id.* at 277-78 (emphasis added). While Congress did not specifically seek to override this Supreme Court view of the scope of the short-haul restriction of Section 15(4), subsequent Congressional action (in 1940) did create an additional, broad exception to the short-haul restriction that would give the agency the authority to short-haul carriers in situations in which the agency finds that the proposed through route is needed to provide “adequate, and more efficient or economic, transportation.” *See* 49 U.S.C. § 10705(a)(2)(C). Congress also subsequently adopted language confirming that in prescribing through routes, the agency should give reasonable preference to originating carriers. 49 U.S.C. § 10705(a).

## **2. The Great Northern Case**

A second Supreme Court case in this same general time period addressed the scope of the Commission's rate prescription authority. Specifically, in *Great Northern Ry. v. Sullivan*, 294 U.S. 458, 475 (1935), the Supreme Court held that the

reasonableness of through rates established by carriers should in general be evaluated from origin-to-destination, rather than on a segment-by-segment basis.

The Court explained further, however, that a distinction exists between the agency's rate review authority for purposes of evaluating the reasonableness of rates as opposed to purposes of determining reparations. Absent an order requiring the payment of reparations, *Great Northern* confirms that the agency has the authority to review a proportional rate without addressing the level of the rate as a whole:

The commission has power to determine rates to be unreasonable in violation of section 1 (49 USCA § 1) without determining whether their application has resulted or will result in pecuniary loss or damage to the shipper. *It may determine whether a proportional constituting part of a combination rate violates section 1 without passing upon the validity of the rate as a whole. Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, 776, 49 S. Ct. 494, 73 L. Ed. 947. But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable.

*Id.* at 462-63 (emphasis added); *see Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, 776 (1929) (“The Commission’s power to declare rates unreasonable applies alike to all rates, be they joint, local, or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate, and that factor may be a proportional rate.”).

Since the shipper in *Great Northern* sought reparations, however, the Supreme Court held that it could only challenge the level of the entire through rate:

Plaintiff seeks to recover the difference between the proportional established by defendant and that found by the

commission to be just and reasonable notwithstanding its fuel was hauled from mines to the competitive field for a just and reasonable charge. That position cannot be maintained for as to the shipments here involved the Great Northern proportional cannot be applied save as it is part of the through rate. . . . The proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate. . . . The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff.

*Great Northern*, 294 U.S. at 463.

In the *Bottleneck* decision, the Board addressed the shippers' argument that the *Great Northern* case actually supported their request to separately challenge bottleneck segment rates based on the noted distinction between reparations and prescription. *See Bottleneck I*, 1 S.T.B. at 1073. The Board rejected this argument, and found that *Great Northern* and *Santa Fe* were not relevant to the bottleneck dispute. *Id.* Significantly, however, the Board explained the irrelevance of those decisions to the bottleneck dispute in a manner that actually confirms the relevance of those same decisions to issues arising under Section 10705. Specifically, the Board suggested that *Santa Fe* is relevant to disputes regarding the bottleneck carrier's effort to use pricing to foreclose the competing carrier's participation in the movement:

*Great Northern*, which arose in the context of a reparations case, did not address the appropriate regulatory treatment of a prescription case. Moreover, *Santa Fe* did not hold that shippers could seek the prescription of a proportional rate alone. Rather, *it involved a suit between railroads concerning a carrier's duty to establish a reasonable rate on its portion of a through route so as not to foreclose that route for another carrier.* The case did not address a shipper's

challenge to the reasonableness of the proportional rate, but only the reasonableness of the rate as it might prejudice the route for a connecting carrier. 279 U.S. at 772-75. As a result, the Court did not suggest in either *Great Northern* or *Santa Fe* that, for purposes of a shipper's request for a rate prescription, we may consider the reasonableness of a proportional rate alone, without regard to the reasonableness of the total charges.

*Id.* (emphasis added). This authority, coupled with the agency's authority under Section 10705(b) to set divisions on prescribed through routes, collectively suggest that the Board can impose rules that prevent bottleneck carriers from frustrating the utility of through route prescription orders. Stated differently, the Board has sufficient authority to ensure that non-bottleneck carriers are given sufficient financial incentive to participate in alternative through routes.

**F. The 1940 Amendments to the Interstate Commerce Act**

Congress next amended the Interstate Commerce Act in 1940. The legislative developments leading up to the passage of these amendments demonstrate the tension associated with the interpretation of the short-haul provision, and in certain respects, reflect a legislative response to the *Subiaco* case (which as noted above, confirmed that the short-haul provision should be interpreted as protecting carriers who otherwise only would receive traffic in interchange). As an initial matter, it is noteworthy that following the issuance of the *Subiaco* decision, the Commission itself repeatedly requested that Congress eliminate the short-haul restriction and instead allow the Commission to prescribe any through routes deemed to be in the public interest. *See Pennsylvania R.R. v. United States*, 54 F. Supp. 381, 387 (D. Md. 1944), *aff'd*, 323 U.S.

588 (1945) (following the issuance of the *Subiaco* decision, “the Commission, in several of its annual reports to Congress, urged an amendment which would overcome this decision, and various bills were introduced in Congress for this purpose”); *id.* (“[I]t is appropriate to note, because not disputed, that the Commission requested of Congress complete authority to fix through routes and joint rates with no limitation other than that there must be proven need for same in the public interest.”).

Ultimately, Congress declined to afford the Commission power to grant through routes in all circumstances, but the end result of a Conference Committee effort to reconcile competing versions of the bill led to significant modifications of the through route provision that are relevant to the instant proceeding. While the Senate’s bill would have eliminated the short-haul provision entirely and the House bill would have left the provision intact, the Conference Committee instead adopted a compromise solution that retained the short-haul provision but amended it in order to insert an additional exception that would allow the agency to short-haul a carrier if “the Commission finds that the through route proposed to be established is needed in order to provide *adequate, and more efficient or more economic, transportation*”:

In the bill which finally became the Transportation Act of 1940 . . . , the short-haul restriction had been entirely eliminated from Section 15(4). The House amended the bill and reinserted Section 15(4). Thereupon, clause (b) [regarding a finding that the through route is needed in order to provide adequate, and more efficient or more economic, transportation] was written into the bill by the Conference Committee on the disagreeing votes of the two Houses, in the form in which it was finally enacted.

*Id.* at 387; *see also id.* at 387-88 (quoting the Committee Report’s explanatory statement from Mr. Lea regarding the new exception to the short-haul provision). This same exception exists in the current version of the statute at 49 U.S.C. § 10705(a)(2)(C) (providing that the Board may short-haul a carrier if “the Board decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation”).

Moreover, in the 1940 amendments, Congress also inserted a preference in the through route provision (*i.e.*, Section 15(4)) for origin carriers. *See* 11 *Interstate Commerce Acts Annotated*, 9269-70 (1943). Specifically, the new language stated that “in prescribing through routes the commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic.” *Id.*; *see also Pennsylvania R.R. v. United States*, 54 F. Supp. at 388 (“The Commission, in the exercise of this additional authority [to prescribe through routes], is directed to give reasonable preference in any particular case to the carrier by railroad which originates the traffic, so far as is consistent with the public interest and subject to the limitations with respect to unreasonably long routes and the necessity of providing adequate and more efficient or more economic transportation.”).

Finally, the 1940 amendments also adopted a provision in section 15(3) preventing carriers from cancelling through routes in the absence of the consent of all carriers involved or a showing that the cancellation would be in the public interest. 11

*Interstate Commerce Acts Annotated* at 9268 (“If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the commission, is suspended by the commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.”). Significantly, the Commission’s subsequent interpretation of this cancellation provision and the Commission’s adoption of certain conditions in merger proceedings ultimately led to the complex situation that the 4R Act and the Staggers Act sought to simplify.

**G. The Supreme Court’s Interpretation of the New Short-Haul Exception in its *Pennsylvania R.R. v. United States* Decision**

In the years following the adoption of the 1940 amendments, a dispute arose as to the proper interpretation of the new exception to the short-haul provision that allowed short-hauling if needed to provide “adequate and more efficient or economic transportation.” In particular, certain carrier interests argued that the Commission was to view this clause only from the perspective of the carriers, and should not consider shipper interests in determining whether a through route prescription was appropriate. The Commission rejected this view and sided with shippers who had argued that the statute also was designed to protect their interests.

In *Pennsylvania R.R. v. United States*, 323 U.S. 588 (1945), the Supreme Court upheld the Commission’s determination that the “adequate and more efficient or

more economic” considerations embrace both shippers’ and carriers’ interests – not just carriers’ interests:

The opposing view of the parties may be summarized. The appellants argue that the phrase ‘adequate, and more efficient or more economic’ refers to carrier operations and expense and has no reference to the broader public interest which embraces service to shippers and the rates they pay. The appellees urge that the phrase comprehends the adequacy of service, its cost to the shipper, and the convenience, efficiency, and cost of the carriers’ operations. The Commission took the latter view. In its decision it purported to consider all these elements and, on appraisal of them, concluded the two routes it prescribed were justified by § 15(4). The court below sustained the Commission. We think its judgment was right.

*Id.* at 591.

The Court based its decision upon its interpretation of the language of the statute and reasoned that Congress must have intended to strike a balance between shipper and carrier interests in amending the Interstate Commerce Act based upon the specific terms that it added to the statute:

[I]f the Commission is asked to abrogate the general rule with regard to the short-haul, the statute says it must have regard to several matters. The first of these is adequacy of transportation. The expression would seem to apply only to the interest of the shipping public. The second and third matters to be considered are efficient and economic transportation. These expressions may well embrace both shippers’ and carriers’ interests. Congress had a purpose in amending the provision, and *we think the Commission was not in error in construing the language used as evincing an intent that both interests should be considered and a fair balance found.*

*Id.* at 592-93 (emphasis added). The Supreme Court’s finding in this regard provides valuable insight into the proper operation of the short-haul provision and confirms that the competitive access rules should accommodate the interests of shippers in seeking the prescription of through routes. The modifications in the regulations that the Concerned Coal Shippers are proposing should improve the prospects that through routes will be prescribed in instances in which they are needed to provide adequate and economic service.

**H. The Through Route Provisions of the 4R Act and the Staggers Act were a Necessary Response to the Complex Situation that Arose because of the “DT&I” Merger Conditions and the “Commercial Closing” Doctrine**

The Commission’s approach to prescribing through routes gradually became more complex in the decades following the *Pennsylvania R.R.* decision, and by the 1970’s, had reached the point at which that approach ceased to advance the public interest. Specifically, the Commission’s method of implementing Title 49 became encumbered with various Commission-imposed rules that – working in conjunction with the railroads’ establishment of joint rates in rate bureaus that were immune from antitrust regulation – ultimately hindered the competitive environment by imposing rate equalization requirements on carriers and establishing excessive evidentiary burdens on carriers seeking to cancel through routes.

In implementing its authority to prescribe through routes and its authority to preclude the cancellation of through routes (both under Section 15(3) of Title 49), the Commission adopted a system of “open routing” and “rate equalization.” *See generally*

*Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 110 (D.C. Cir. 1987); *id.* at 110-11 (“The ICC presumably sought to preserve the widest possible network of through routes in order to protect disadvantageously located shippers, and apparently viewed price competition on routes between the same two points as a form of improper ‘discrimination.’”). In addition to its power under Section 15(3), the ICC maintained the open routing system (and rate equalization) using two specific tools; DT&I merger conditions and the commercial closing doctrine:

[T]he ICC for many years imposed conditions on its approval of railroad mergers (“DT&I Conditions”)[<sup>12</sup>] that required a surviving railroad to maintain all existing routes, including through routes – even if the railroad could, as a result of the merger, provide the same service over a single line. [In addition,] the ICC enforced the “commercial closing doctrine” – whereby any attempt by a railroad to lower the rate on one route “closed” (i.e., put out of business) all higher-priced through routes between the same points.[] Such a closing was held to be unlawful if it violated DT&I Conditions requiring the “closed” route to be kept open. Even if no DT&I Conditions were applicable, absent the consent of all affected railroads, the closing triggered the requirement set out in 49 U.S.C. § 10705(e) that a railroad show cancellation of a “closed” route is consistent with the public interest – which the ICC seldom found.

*Baltimore Gas & Elec. Co.*, 817 F.2d at 111; *see also id.* (“Railroads with more efficient routing were typically prevented from offering lower rates, which retarded the industry’s

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<sup>12</sup> *See Detroit, Toledo & Ironton R.R. – Control*, 275 I.C.C. 455, 492-93 (1950).

ability to compete with other modes of transportation such as trucks, barges and pipelines.”) (citing S. Rep. No. 499, 94th Cong., 1st Sess. 10-11 (1975)).<sup>13</sup>

Faced with a financial crisis in the railroad industry, Congress passed the 4R Act in 1976 and the Staggers Act in 1980, each of which had an impact on the Commission’s open routing and rate equalization policies. Significantly, however, while Congress took action to counteract the Commission’s implementation of its through route authority, Congress nevertheless retained the fundamental principle that the Commission had the authority – and the obligation – to prescribe through routes deemed to be desirable in the public interest, subject only to the short-haul restriction (and its various exceptions).

Each of these two major Acts imposed certain changes designed to rectify the complexity associated with open routing and rate equalization. As an initial matter, the 4R Act (in Sections 203(a) and 202(e)(2)) made two changes to the Interstate Commerce Act designed to limit the Commission’s ability to restrict through route cancellations:

Section 203(a) of the 4R Act cut back on ICC discretion to deny through route and joint rate cancellations . . . by

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<sup>13</sup> *Western Railroads – Agreement*, 364 I.C.C. 635, 645 (1981) (“Traditionally [under the ‘commercial closing’ doctrine], rate changes eliminating rate equality between routes have often been held to constitute route closings, thus triggering certain proof requirements under section 10705(d). Rate changes of this type were often found unlawful also because the proposals were found to violate traffic protective conditions imposed in specific merger or consolidation proceedings.”); *accord Fibreboard or Pulpboard, Montana to California*, 357 I.C.C. 211, 219 (1977).

specifying the factors germane to the pre-existing public interest test:

(1) . . . the distance traveled and the average transportation time and expense required using (A) the through route, and (B) alternative routes, between the places served by the through route; (2) . . . any reduction in energy consumption that may result from the cancellation; and (3) . . . the overall impact of cancellation on the shippers and carriers that are affected by it.

49 U.S.C. § 10705(e) (1982). Congress, it would seem, implicitly modified prior regulatory barriers – such as the commercial closing doctrine – that the ICC had utilized to maintain open routing and rate equalization.[] In effect, Congress required the ICC to balance the interests of shippers affected by a cancellation against the interest of the railroad seeking cancellation, making cancellations easier to obtain. As a corollary, section 202(e)(2) of the 4R Act limited the ICC’s authority to preliminarily suspend a proposed cancellation to situations where “(i) without suspension the proposed rate change will cause substantial injury to the complainant . . .; and (ii) it is likely that such complainant will prevail on the merits.” 90 Stat. 31, 38 (1976).

*Baltimore Gas & Elec. Co.*, 817 F.2d at 112.

Similarly, the Staggers Act further restricted the agency’s ability to limit through route cancellations, but Staggers also increased the agency’s ability to address competitive access situations by confirming its power to require reciprocal switching:

Section 207(c) [of the Staggers Act] placed even further limitations upon the ICC’s power to preliminarily suspend cancellations of through routes and joint rates, by permitting suspension only when a party challenging the lawfulness of the cancellation is “substantially likely” to succeed on the merits, 49 U.S.C. § 10707(c)(1)(A) (1982), and the protesting party cannot be protected by subsequent refunds. 49 U.S.C. § 10707(c)(1)(C) (1982). Section 223, in contrast, *increased*

the ICC's regulatory power – by authorizing the agency to require railroads to enter into agreements to “switch” other railroads' cars to and from shippers located along each other's lines “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. § 11103(c)(1) (1982). The Commission's authority to order such switching arrangements had previously been unclear. See H.R. Rep. No. 1035 at 67.

*Id.* at 113 (emphasis in original).

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As the foregoing summary of the first 90+ years of experience under the Interstate Commerce Act (*i.e.*, 1887-1980) reflects, the agency's through route prescription authority was an important tool in striking the appropriate competitive balance between carriers and shippers. Where judicial interpretations limited the Commission's ability to strike such a balance, Congress intervened to fine-tune the through route provision. At various times, Congress: (i) defined and strengthened the Commission's affirmative duty to prescribe through routes; (ii) sought to protect carriers from indiscriminate through route prescription (via the short-haul restriction); (iii) recognized the need to consider both rail carriers' and rail shippers' interests in evaluating through route prescription requests; (iv) carefully tailored the short-haul provision to create exceptions that would allow the Commission to short-haul a carrier where necessary to respond to a particular competitive need; and (v) authorized the Commission to grant terminal trackage rights and reciprocal switching to afford service via other carriers.

**II. The Board's Competitive Access Regulations Have Failed to Serve their Intended Purpose and Have Disrupted the Competitive Balance that was "At the Heart" of the Staggers Rail Act of 1980**

Although well-intentioned, the Commission's 1985 adoption of the competitive access rules created a significant impediment to the continuing availability of through route prescription. In particular, these rules placed evidentiary burdens upon shippers that experience has proven were both vague and excessive. Vice Chairman Simmons repeatedly cautioned in dissenting opinions at the time that the new rules (at least as applied by the agency) were inconsistent with Congressional intent and would prevent shippers from obtaining meaningful competitive access relief. The Commission nevertheless left those rules in place and did not alter their application.

The past twenty-five years have demonstrated beyond question that Vice Chairman Simmons was exactly right. The competitive access rules are a complete bar to relief and effectively have eliminated Sections 10705 and 11102 from the statute. The Board should take this opportunity to restore the balance that Congress intended in the Staggers Act.

**A. Adoption of the Competitive Access Rules**

Following the issuance of the Staggers Act, the Commission set about the task of attempting to develop regulations to implement many aspects of the new statute. The Commission adopted competitive access rules as a part of that process in Ex Parte No. 445 (Sub-No. 1). *See 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). Those rules were the result of the Commission’s request that interested parties agree upon solutions to problems associated with the implementation of the Act. *Id.* at 822 (citing *The Staggers Rail Act of 1980 – Conference of Interested Parties*, ICC Ex Parte No. 456). In particular, the Commission largely adopted a proposal sponsored by the National Industrial Transportation League (“NITL”), the Association of American Railroads (“AAR”), and the Chemical Manufacturers Association (“CMA”). The final rules also included certain aspects from a competing proposal that a group of regional railroads called Railroads Against Monopoly (“RAM”) had submitted.

The competitive access regulations impose requirements upon a shipper seeking the prescription of a through route (or the establishment of a switching arrangement) that go far beyond the language of 49 U.S.C. § 10705 or 49 U.S.C. § 11102. In particular, these regulations require the shipper to show that the prescription “is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 11101 or is otherwise anticompetitive . . . .” 49 C.F.R. § 1144.2(a)(1). The regulations include a number of other elements that place evidentiary burdens upon the shipper (*e.g.*, requiring the shipper to confirm – at a time when the applicable rate is still unknown – that it will use the prescribed route for a “significant portion” of its traffic) that are excessive and unreasonable:

Sec. 1144.2 Prescription.

(a) General. A through route or a through rate shall be prescribed under 49 U.S.C. 10705, or a switching

arrangement shall be established under 49 U.S.C. 11102, if the Board determines:

(1) That 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 49 U.S.C. 10705 and 11102, as appropriate.* In making its determination, the Board shall take into account all relevant factors, including:

(i) The revenues of the involved railroads on the affected traffic via the rail routes in question.

(ii) The efficiency of the rail routes in question, including the costs of operating via those routes.

(iii) The rates or compensation charged or sought to be charged by the railroad or railroads from which prescription or establishment is sought.

(iv) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section; and

(2) That either:

(i) The complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.

(b) Other considerations.

(1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) When prescription of a through route, a through rate, or reciprocal switching is necessary to remedy or prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

(4) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

49 C.F.R. § 1144.2 (emphasis added).

It is evident that the Commission regarded the competitive access rules as a favorable development for shippers. *See Intramodal Rail Competition*, 1 I.C.C.2d at 831 (“In this proceeding, we are adopting a number of significant changes that should prove helpful to shippers by enhancing competitive access.”); *id.* at 837 (“The rules 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.”); *id.* (the combination of the *Coal Rate Guidelines* and the competitive access rules “should

improve our implementation of the twin Staggers Act goals of railroad revenue adequacy and shipper protection from monopoly pricing”).

In addition, Commissioner Strenio offered a separate “commenting” opinion that further praised the value of the competitive access rules and that predicted a substantial liberalization of competitive access relief:

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.

. . . [T]his constitutes a significant change in the way the Commission will determine competitive access issues in the future, and clearly demonstrates the Commission’s deep – and unanimous – commitment to a fair balancing of the views of diverse groups in reaching public interest determinations.

. . . On the whole . . . I think this decision represents yet another positive element in a series of cases that respond sympathetically to shipper concerns. . . . Such remarkable change in such a short period of time should shatter for good any remaining perception that the Commission is unable or unwilling to fine-tune its implementation of the Staggers Act.

*Id.* at 838-39. By way of summary, it is evident from the language of the Commission’s decision that the agency believed that the new competitive access rules were valuable to shippers and would play an important role in the fulfillment of the Staggers Act goal of balancing the competitive interests of carriers and shippers. Subsequent events would demonstrate that these rules failed to meet that need.

**B. Judicial Approval of the Competitive Access Rules**

Two parties sought review of the Commission's adoption of the competitive access rules, Baltimore Gas & Electric Company ("BG&E") and Consolidated Rail Corporation ("Conrail"). *See Baltimore Gas & Elec. Co.*, 817 F.2d at 110. BG&E mounted a broad attack on the regulations, whereas Conrail generally supported the regulations and sought review of only a single issue related to the suspension of through routes and joint rates. Ultimately, the court approved the Commission's decision over both parties' objections. *Id.* at 119.

BG&E principally argued that the competitive access rules were inconsistent with the Commission's congressional mandate. BG&E claimed that the Commission was obligated to restore open routing:

BG&E challenges the Commission's decision to prescribe through routes and joint rates, and establish switching arrangements, *only* to remedy or prevent "anticompetitive" acts, and to set aside *only* "anticompetitive" through route and joint rate cancellations, as inconsistent with the rail transportation policy of 49 U.S.C. § 10101a (1982). . . . BG&E argues that Congress intended the ICC to take more drastic action: "to negate the monopoly power railroads hold over sunk facilities such as trackage and switching," and thereby "preserv[e] and promot[e] rail-to-rail competition whenever possible." The regulations, BG&E states, are "precisely the wrong approach." BG&E would have us direct the ICC to return essentially to its old regulatory regime, by prescribing through routes on all possible combinations of tracks between all points.

*Id.* at 114-15 (emphasis in original).

Although the court expressed some approval of BG&E's position and commented that BG&E's position might be reasonable, the court ultimately found that its role was limited to determining whether the Commission's approach was impermissible:

BG&E's position might well reflect sound economics, and might – we do not decide – be a reasonable interpretation of the statute [but] it is not the *only* reasonable interpretation, because as we have noted, 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. . . . We conclude that the regulations do that.

*Id.* at 115 (emphasis in original).

Notably, the D.C. Circuit's decision in *Baltimore Gas & Electric* did not address the differences in the language of Section 10705 and Section 11102 as between the "may" versus "shall" trigger for agency action. That issue arose, albeit in an incomplete fashion, one year later in the D.C. Circuit's 1988 review of Commission's *Midtec* decision.

**C. The *Midtec* Case and Subsequent Efforts to Obtain Competitive Access**

**1. *Midtec***

Disputes within the Commission itself as to the utility of the competitive access rules began to surface shortly after their issuance. Specifically, in *Midtec Paper Corp. v. Chicago and North Western 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), the Commission declined to grant reciprocal switching or terminal trackage rights under the new

regulations.<sup>14</sup> The majority of the Commission determined that Midtec Paper Corporation had failed to demonstrate the existence of an act that was contrary to the competition policies of Section 10101a or was otherwise anticompetitive. *Id.* at 174-75 (“While the Staggers Act incorporated new emphasis on the importance of intramodal competition, we think it correct to view the Staggers changes as directed to situations where some competitive failure occurs. . . . [O]n this record, no such abusive conduct has been demonstrated.”).

In a lengthy dissent, however, Vice Chairman Simmons took strong exception with the majority’s application of the competitive access rules and warned that the majority’s interpretation had upset the competitive balance or “tradeoff” that Congress had intended in the Staggers Act:

In the previous decision in this proceeding, I concluded that based upon the existing record Midtec had satisfied the standards of 11103(a) and (c) and that, therefore, alternative relief under both of these subsections should have been granted. Nevertheless, the majority devised an ill-conceived requirement that a shipper seeking competitive access must demonstrate market dominance and rate unreasonableness as prerequisites for relief and dismissed the complaint. Exercising its right of appeal, Midtec sought review before the U.S. Court of Appeals. Faced with mounting criticism that this new standard was illogical, contrary to the statute, and totally inconsistent with clear Congressional intent, we asked the court to remand the *Midtec* case so that we could consider the complaint under the new guidelines promulgated in *Intramodal*. Complainant agreed to forego its appeal for the present in the belief the

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<sup>14</sup> *Midtec* did not involve a request for through route prescription.

Commission would not use the new rules as obstacles to obtaining competitive access.

. . . I maintain that subsections 11103(a) and (c) are not intended to focus simply on the carrier's alleged misconduct or punish a rail carrier with a monopoly for some acts which could be labeled anticompetitive. Rather, the statute requires that the issue we should address is whether the availability of another line-haul carrier has the potential for providing needed service and rate options to the affected shipper. This should also be the approach under our *Intramodal* guidelines. Although the statute clearly does not provide for "competitive access on demand," the relevant inquiry is much broader than that undertaken by the majority.

Prior to the Staggers Act, rates on shipments of similar commodities moving from one region to another tended to be equalized. The Commission had within its power the authority to strike any rate complained of and entertain claims of discrimination between railroads' customers. As a result of the Staggers Act, rail carriers now have substantial ratemaking and routing flexibility. *In exchange for this freedom, the Act dictated that we liberalize use of reciprocal switching agreements and terminal trackage rights as a means of providing shippers with competitive opportunities. In reducing the use of the rate complaint as leverage, shippers were given the opportunity to enjoy liberal competitive access. This compromise, or tradeoff if you will, is at the heart of the Staggers Act. Consequently, our rules and policies should not be used as barriers to restrict competitive access.* This sentiment is contained in the Congressional record:

Simply stated, both provision[s] [§ 11103(c) and a new provision *easing* entry] will introduce additional competition between railroads. Under reciprocal switching, one railroad is given the opportunity to have access to another railroad's operating territory thereby providing many shippers with competition in rail service which they do not presently enjoy. (emphasis added).

126 Cong. Rec. H 5906 (Daily Ed., June 30, 1980). Further, the Joint Conference Committee of the Congress declared that the Congress intends for the competitive access provisions of section 11103(c) to provide “an avenue of relief for shippers where only one railroad provides service . . .” (H.R. Rep. No. 96-1430, 96th Cong. 2d Sess. 116 (1980)).

. . . Although the majority has overruled that portion of its first decision which erected a “market dominance” barrier to grants of competitive access, today’s decision reflects a similar apparent hostility towards the very concept of access. This is demonstrated in footnote 13 in the text, where the Midtec/Soo proposal is termed “forced switching.” Meaningful competitive access means more than CNW’s willingness to enter into joint rates with the Soo Line. In the context of section 11103(c), the word access must be accompanied by the word “competitive.” With the Soo Line able to reach Midtec’s facility, the marketplace would determine the service options available to the shipper. When we evaluate the competitive service test, we must determine whether granting relief would permit market forces to dictate the adequacy of service and the level of prices. *This is true competitive access. It should not be necessary for a complainant to demonstrate that a railroad has refused to accept interchange or is unwilling to provide service upon request. . . .*

I am disappointed in the majority’s decision as I am sure are many of the shippers and railroads who supported the pro-competitive standards of *Intramodal* and its emphasis on eased entry and marketplace initiatives. In this proceeding, the Commission had an opportunity to provide rail competition where none exists. Instead, *by this decision, the Commission continues to ignore Congressional intent.*

*Id.* at 185-89 (emphasis added); *see also id.* at 190-91 (Commissioner Lamboley, dissenting) (“Terminal trackage rights and reciprocal switching are pro-competitive statutory remedies, and are to be liberally construed for those purposes. . . . I believe that the availability of statutory relief should not be limited to, and solely predicated on, a

finding of anticompetitive acts by a carrier, but may as well be based on a shipper's demonstrable need for price and/or service options that are operationally feasible and practical, or necessary to provide competitive rail service.”).

## **2. The D.C. Circuit's Review of the *Midtec* Decision**

Following the Commission's decision in *Midtec*, the complainant sought review in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit supported the Commission's action, but its decision raises a critical point that itself demonstrates the unreasonableness of the competitive access rules in the context of through route prescription. *See Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

Specifically, the D.C. Circuit based its decision approving the Commission's action on the explicitly permissive nature of the terminal trackage rights and reciprocal switching statutes, which use the word “may” in describing the nature of the agency's discretion either to grant or not grant such relief. As noted above, there is a distinction in the statute as between the nature of the agency's authority to prescribe through routes and to grant terminal trackage rights or reciprocal switching. Although the Interstate Commerce Act initially stated that the Commission “may” prescribe through routes that are desirable in the public interest, in 1920, Congress introduced the word “shall” into Section 15(3) of the Act to create an affirmative agency duty to grant through route requests found to be desirable in the public interest. As part of that same 1920 legislation, Congress first introduced the agency's authority to grant terminal

trackage rights, and in so doing, used a permissive formulation akin to the “may” formulation that it simultaneously changed to a mandatory “shall” for through route prescription.<sup>15</sup>

In this regard, the D.C. Circuit in its *Midtec* decision first noted that the statute “merely authorizes and does not require” the Commission to prescribe reciprocal switching when the statutory criteria of 49 U.S.C. *former* § 11103(c)(1) are met:

As we have seen, the Commission did not expressly address *Midtec*’s complaint under the criteria of section 11103(c)(1): “practicable and in the public interest or . . . necessary to provide competitive rail service.” The petitioner and the intervenors supporting it argue, each in its own way, that the agency’s failure to do so requires a remand. *Midtec* argues that, notwithstanding the permissive language of section 11103(c)(1) (“The Commission *may* require rail carriers to enter into reciprocal switching agreements”), the Commission is required to order reciprocal switching whenever it is either practicable and in the public interest or necessary to provide effective rail competition. *If Midtec is correct in this, then it seems it need not demonstrate that the C&NW engaged in conduct that is contrary to the competition policy of the Staggers Act or that is otherwise anti-competitive*, which, as we have seen, is a threshold requirement under the CARs.

*Midtec*, 857 F.2d at 1499 (emphasis added).

Relying upon Seventh Circuit precedent for the proposition that “[t]he purpose of the Staggers Act was to encourage, under the appropriate circumstances, but not require, the Commission to approve railroad switching agreements,” the D.C. Circuit

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<sup>15</sup> Likewise, in 1980, Congress granted authority to the agency to order reciprocal switching, and again used the “may” formulation. Accordingly, the D.C. Circuit’s *Midtec* decision should be understood with this background in mind.

rejected Midtec’s argument and concluded that the permissive nature of Section 11103(c)(1) permitted the ICC to impose additional restrictions on its exercise of discretion. *Id.* (citing *Central States Ent. v. ICC*, 780 F.2d 664, 679 (7th Cir. 1985)); *id.* (“Our own review of the legislative history confirms [that] the Commission is *under no mandatory duty* to prescribe reciprocal switching where it believes that doing so would be unwise as a matter of policy.”) (emphasis added). In other words, since the reciprocal switching statute afforded permissive authority to the agency, it was not unreasonable for the ICC to determine that it would refrain from exercising the broadest possible “practicable in the public interest” authority contemplated by Section 11103(c)(1).

The court likewise explained that the statute governing Midtec’s accompanying request for terminal trackage rights (*i.e.*, 49 U.S.C. *former* § 11103(a)) also was phrased in permissive terms (“the Commission ‘may require’ terminal trackage rights where ‘practicable and in the public interest’”), and that this discretionary language therefore permitted the agency to impose additional competition-related constraints on its exercise of that discretion. *Id.* at 1502-1503 (“Under these circumstances, we cannot say it is unreasonable for the Commission to require Midtec and the Soo to demonstrate that terminal trackage rights are necessary to remedy or to prevent an act on the part of the C&NW that is contrary to the competition policy of the Staggers Act or that is otherwise anticompetitive.”).

The D.C. Circuit’s decision in *Midtec* therefore supports the narrow proposition that, when developing regulations to govern its exercise of statutory authority

to prescribe reciprocal switching arrangements and terminal trackage rights, the Commission was entitled to limit its exercise of discretion to those situations in which the complainant had shown that “the respondent railroad had committed or was likely to commit an act contrary to the competition policy of the Staggers Act or [was] otherwise anticompetitive . . . .” *Midtec*, 857 F.2d at 1499. Stated differently, the court held that – although the statutory criteria at issue in the case permitted the Commission to order reciprocal switching if “practicable and in the public interest or . . . necessary to provide competitive service” – the agency could elect to *further* limit the exercise of its own power under the applicable statutory authorization.

Given the difference in statutory language (and the 1920 legislative modification of the various competitive access provisions), that same rationale cannot justify the application of discretion-limiting rules for through route requests under Section 10705. Instead, the competitive access rules should be seen as an improper limitation on the Board’s affirmative duty to prescribe through routes when desirable in the public interest. In fact, the D.C. Circuit expressed the view in *Midtec* that if the Commission were *required* to order reciprocal switching whenever it is practicable and in the public interest, it would not seem necessary for the shipper to demonstrate anti-competitive conduct. *Midtec*, 857 F.2d at 1499. Applying this sound logic in the context of through route prescriptions under Section 10705(a)(1), it should not be necessary for a shipper seeking relief to demonstrate anti-competitive conduct.

Even in the context of Section 10705(a)(2), however, it is clear at this late date that the Commission's intent in adopting the competitive access rules has been frustrated rather than fulfilled. As the Commission stated in its decision adopting the competitive access rules when discussing proportional rates: "In this proceeding, we are adopting a number of significant changes that should prove helpful to shippers by enhancing competitive access. We think it advisable to assess the effectiveness of these changes before making additional modifications . . . [relating to proportional rates]." *Intramodal Rail Competition*, 1 I.C.C.2d at 831-32. Any reasonable analysis must conclude that the rules have been completely ineffectual in enhancing competition. The requirement for a showing of anticompetitive abuse – *not* articulated in the statute – has had the practical effect of depriving the agency of the opportunity to consider the factors that *are* specified in the statute in determining whether relief under Section 10705 is appropriate because shippers have concluded, with good reason, that efforts to seek relief are a lost cause. The Concerned Coal Shippers' proposal, as described in detail below, seeks replacement of the Board's current rules with an approach that will fulfill the intent of enhancing competitive access while protecting rail carriers' legitimate interests.

### **3. Subsequent Efforts to Obtain Competitive Access**

Two additional post-*Midtec* proceedings before the Commission demonstrated the significant difficulty associated with obtaining relief under the competitive access rules, and reflected the continued fracturing of opinion at the agency regarding the question of whether the competitive access rules were serving their

intended purpose. First, in *Intramodal Rail Competition – Proportional Rates*, ICC Ex Parte No. 445 (Sub-No. 2), 1990 WL 287993 (Decided April 17, 1990), the Commission refused to reconsider its prior denial of a request for rulemaking from a shipper that sought the availability of proportional railroad rates on demand. In refusing to grant the shipper’s request for reconsideration, the Commission emphasized that the availability of the competitive access rules precluded any need to require carriers to quote proportional rates on request.

That reliance, however, sparked a separate opinion from then-Commissioner Simmons, who reprised his arguments in dissent from the *Midtec* case and in so doing, seriously questioned the value of the competitive access rules, as applied by the agency. *See id.*, 1990 WL 287993, at \*3 (Commissioner Simmons, concurring) (“The discussion in support of this decision relies substantially on the availability of our competitive access rules to provide relief of the type sought by petitioners. While those rules may be efficacious on their face, I do not believe they have been applied in a manner which offers any real hope of competitive access to complaining shippers. My dissent in *Midtec II* demonstrates my continuing concern that the Commission approach requests for rail intramodal competition fairly and evenhandedly.”).

Second, in *Vista Chem. Co. v. The Atchison, T. & S.F. Ry.*, 5 I.C.C.2d 331, 342 (1989), the Commission denied a request for reciprocal switching relief on the grounds that the competitive access rules “stand[] for the proposition that the Commission will use its authority to require a switching agreement only where there has

been a demonstration of actual or threatened harm [and that since] Vista purchased the Oklahoma City facility, its business has grown, and it continues to do well”). In a separate dissenting opinion, Commissioner Andre argued that competitive access relief should have been available under the Commission’s rules because of the degree of control exercised by the defendant over the subject traffic. *See id.* at 343-43 (Commissioner Andre, dissenting) (“I would have granted mandatory switching, with the terms of the switching subject to negotiations. This case can be distinguished from Midtech, *supra*, by the much higher level of railroad dominance here (virtually 100%) in contrast to Midtech, *supra*, (61-63%), a dominance the defendant made no effort to rebut. The geographic competition discussed in the decision, while admittedly present, is not strong enough to rebut the lack of intramodal and intermodal competition.”).

**D. The Bottleneck Decisions**

Over the ensuing twenty years, the agency repeatedly responded to shipper requests for various forms of competitive relief by encouraging shippers to proceed under 49 U.S.C. § 10705 and the Board’s competitive access rules. It is the agency’s repeated encouragement in this regard that largely has shaped the Concerned Coal Shippers’ Comments in this proceeding. Stated differently, the Concerned Coal Shippers agree with the Board that statutory authority exists in the form of Section 10705 (and Section 11102) to strike an appropriate competitive balance between carriers and shippers. The Concerned Coal Shippers regard the agency’s urging in this regard as a good faith indication that the Board views these provisions as a potentially valuable tool in

regulating the railroad industry that will allow the agency to meet particular shipper needs without returning to the days of open routing. As described in these Comments, the competitive access rules have deprived those provisions of their potential value and have left the agency in the position of unsuccessfully pleading with shippers to seek relief under those provisions of the statute.

The first instance of this type of agency endorsement of Section 10705 relief occurred in the “*Bottleneck*” cases in which several shippers attempted to challenge the local rate of a destination monopolist solely from the point of interchange with an upstream competitive carrier to the destination. *See Bottleneck I* and *Bottleneck II*. The Board denied the shippers’ efforts, and emphasized that the proper approach to seeking relief from a bottleneck monopolist was to proceed under Section 10705:

Central to the disposition of each case is whether the bottleneck carriers properly refused to establish a “local” unit-train or trainload rate over the bottleneck segment. As a threshold matter, railroads are required, under their common carrier obligation, to establish rates and routes to move a shipper’s traffic from origin to destination, 49 U.S.C. 11101(a), and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. 10742. . . .

However, in providing service from a mine to a utility plant – either by itself or in interline service with another carrier – the bottleneck carrier is not required to establish a local rate for the bottleneck segment. . . . The utilities’ argument that they have a right to a local rate rests on the mistaken belief that, under the common carrier obligation, a carrier must hold out to provide all possible rates and services that a shipper may request. . . .

[I]n establishing through routes and rates to complete the transportation of the utility’s coal to the generating

station, the bottleneck carrier may, in the first instance, determine the interchange through which that service will be provided. The carrier is not required to open an additional route through a different interchange simply because the shipper asks it do so, without regard to the criteria of 49 U.S.C. § 10705(a). . . .

. . . [S]hippers dissatisfied with a railroad's response to a request for service must seek relief through the competitive access rules.

*Bottleneck I*, 1 S.T.B. at 1063-65; *see also id.* at 1067-68 (“A shipper seeking an alternative routing from an origin from which it is already served by the bottleneck carrier, either directly or in interline service, must proceed under the competitive access provisions of the statute.”).

In response to its perception that shippers regarded the competitive access rules as unfavorable, the Board insisted that it was prepared to interpret those rules in a manner that would provide competitive access relief – and in particular, through route prescription – where appropriate:

Although the competitive access rules were the product of shipper/carrier negotiation, we perceive a sense among the shippers that, as construed in such cases as *Baltimore Gas* and *Midtec*, they stacked the deck against shippers ever obtaining ‘competitive access’ relief. We disagree. *Midtec* and the other prior cases addressing competitive access all involved requests for reciprocal switching or terminal trackage rights, ‘access’ remedies that are far more intrusive than the prescription of through routes.[] Moreover, they involved the application of the rules to their unique facts.

*Id.* at 1068-69 (emphasis added). The Board added that one vehicle for making a competitive access case for through route prescription “would appear to be a transportation contract entered into for service over a non-bottleneck segment”:

We can foresee situations where contracts contain service terms providing benefits, advantages, and projected efficiencies that would make the proposed service over the non-bottleneck segment “better” than that presently offered by the bottleneck carrier over the existing through route, and make the bottleneck carrier’s “foreclosure” of that service over an additional through route conduct that would warrant prescription relief. Assuming the shipper presents sufficient facts in that regard, there is nothing in our competitive access regulations to preclude a competitive access remedy<sup>16</sup>, and we are prepared to interpret the rules in a manner that will provide for relief in appropriate circumstances.

*Id.* at 1069.

The Board also took issue with the suggestion that carriers would decline to provide contracts for service over non-bottleneck segments, particularly in light of the consolidation in the railroad industry. In remarks that, in retrospect, have proven to have been overly optimistic, the Board explained its confidence in the willingness of the remaining carriers to compete with one another:

The shippers’ concerns over tying contracts to competitive access and other relief appear[] to be motivated, at least in part, by their perception that they will be unable to obtain contracts unless we force – or at least strongly encourage through regulatory action – the carriers to enter into contracts. In particular, at oral argument they asserted

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<sup>16</sup> The Board’s language in this portion of its decision seems to indicate that the Board may not have completely accepted the ostensible requirement of showing anticompetitive conduct and/or abuse.

that the railroads' increasing concentration through recent mergers, and the defendant carriers' resistance to the requested relief in these complaint cases, is somehow evidence of a broader non-competitive "mindset" in the railroad industry. This mindset, they claim, would preclude shippers from obtaining competitive contract offers from non-bottleneck carriers unless the Board first prescribed local rates over the bottleneck segment. . . .

There is no basis on which to conclude that recent merger applications filed by particular railroads are indicative of a non-competitive mindset in the industry.[] To the contrary, recent decisions have found that competition has remained vigorous even where the number of competitors has been reduced from three to two as a result of a merger.[] The fact that the railroad industry, through its positions in these complaint proceedings, has indicated a desire to maximize industry-wide profits has no bearing on whether individual railroads will compete with each other when asked by individual shippers to do so. To the contrary, in these proceedings, at least some non-bottleneck carriers have indicated their readiness to enter into contracts for the non-bottleneck portion of their service that the shippers claim they seek.

*Id.* at 1070-71.

In concluding its discussion of the use of through route prescription as a legitimate solution to the bottleneck dispute, the Board emphasized that its competitive access rules "were not designed to defeat legitimate competitive efforts by other rail carriers and shippers by permitting bottleneck carriers to foreclose more innovative, advantageous, and efficient service." *Id.* at 1071-72.<sup>17</sup>

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<sup>17</sup> Again, the Board's language raises some question as to whether it viewed a showing of anticompetitive conduct as being strictly required.

The Board's 1997 clarification decision went to even greater lengths to emphasize the meaningful nature of the relief provided and the potential value of through route prescription under Section 10705. *See Bottleneck II*. In fact, in her separate commenting opinion, then-Chairman Morgan insisted that the *Bottleneck* decisions' reliance on the Section 10705 remedy would provide a substantial benefit to shippers and that the Board fully anticipated that non-bottleneck carriers would be willing to enter into contracts allowing shippers to obtain the benefits of competition:

Some of the shippers have expressed their concern that the Board has not afforded them meaningful relief. I disagree. The Board has given the shippers the opportunity to obtain significant relief, within the limits of the statute, while keeping in mind the interest of balancing the objectives of the law. The Board has not provided for "open access," but existing law does not permit that sort of remedy. The law directs the Board to promote competition, but not to governmentally force it simply upon demand, and these decisions do just that.

Thus, while access is not automatic where a bottleneck carrier already provides origin-destination service, the Board will afford competitive access relief where efficient, innovative and competitive service is being precluded. . . .

The Board cannot indicate more clearly that we view the competitive access remedy as a real one that we will take seriously when a case is brought to us.

Likewise, I disagree with those representatives in the railroad industry that, in response to MidAmerican's petition for clarification at issue in this decision, have characterized our bottleneck decision as changing little. To the contrary, in reaffirming that bottleneck carriers cannot refuse a shipper's request for service from an origin not now served, and, as clarified today, providing the availability of bottleneck-segment rate relief should it obtain a separate contract for

service over the non-bottleneck segment of this “new-origin” traffic, the Board has taken the opportunity presented by the cases before us to clarify and strengthen the legal conclusion that the railroads’ rate and route initiative is not absolute and must be balanced against the statutory objective of promoting competition. . . .

I recognize that the relief that these decisions provide is not self-executing. As noted, competitive access cases must be brought where a carrier already provides origin-to-destination services, and, as indicated in today’s decision, the Board may need to resolve interchange disputes brought to it in “new source” cases where carriers cannot agree on an interchange point. Moreover, shippers, to secure separate bottleneck-segment rate review, will have to enter into contracts with non-bottleneck railroads. However, if history is any guide, and if shippers are diligent in negotiating, railroads will seek out contracts to capture new business. Initiative can produce positive results.

. . . If shippers and competing railroads pursue the competitive avenues afforded them in these decisions, they will find that our decisions have provided real opportunities.

*Bottleneck II*, 2 S.T.B. at 248-50.

In retrospect, it is fair to observe that Chairman Morgan’s appraisal of the post-merger competitive situation – however well-intentioned and firmly held at the time – unquestionably was inaccurate. Carriers have declined to compete voluntarily and the availability of the competitive access remedy on which the Board’s *Bottleneck* decisions rested has proven to be meaningless. The Board cannot, and should not, place itself in the position of making the fulfillment of its statutory duty to prescribe needed through routes contingent upon the willingness of duopoly rail carriers to participate. Instead, as the Concerned Coal Shippers suggest, *infra*, the Board should devise an approach to

evaluating competitive access requests that – in situations of objectively demonstrated need – allows shippers to obtain relief without relying upon the concurrence of rail carriers. Critically, this form of relief would not constitute open access or open routing, but instead, would be entirely restricted to situations in which a rail carrier insisted upon obtaining revenues that vastly exceed its costs. Moreover, the recommended approach would provide sufficient value to encourage non-bottleneck carriers to participate in through routes by defining, in advance, that divisions on prescribed through routes would be set on the basis of a straight mileage pro-rate (absent agreement between the carriers, an agreement between one carrier and the shipper, or evidence of a cost-based justification for a different result).

**E. The *Entergy* Decisions**

Much like its finding in the 1990's *Bottleneck* cases that a through route prescription request was needed to obtain relief, the Board similarly found in 2009 that a shipper seeking relief from the continued enforcement of a paper barrier restriction likewise should seek relief under Section 10705. In particular, in *Entergy 2009*, the Board explained that Section 10705 provided a “straightforward path” through which Entergy could “directly address and remedy the precise problem about which Entergy complains . . . .” *Entergy 2009*, STB Docket No. 42104 at 2.

Ultimately, the Board declined to afford Entergy relief in response to its Section 10705 request, and the Board explained that it would defer its determination of the proper legal standard under Section 10705 until its decision in the instant proceeding.

*Entergy 2011*, STB Docket No. 42104, at 7-8 & n.16 (“The Board expects to reconcile these lines of precedent, and more fully explore the proper legal framework to govern competitive access cases, in *Competition in the Railroad Industry*, Ex Parte 705.”).

The Concerned Coal Shippers share the Board’s view that Section 10705 should play an important role in maintaining the appropriate competitive balance between carriers and shippers. The Concerned Coal Shippers believe that a revised set of rules – sufficient to overcome rail carriers’ reluctance to compete – could provide some of the benefit that the Board (and the Commission) historically expected regarding competitive access.

### **III. The Concerned Coal Shippers’ Proposal**

Despite the Board’s repeated encouragement for parties to seek competitive access relief, there has been virtually no activity in that regard over the past twenty-five years. The Concerned Coal Shippers respectfully submit that the absence of shipper efforts to seek this form of relief (and instead to attempt to obtain relief at the Board pursuant to other theories) is due to the widely held view of rail shippers that the competitive access rules – as written and as applied by the Board – prevent any meaningful opportunity for relief. In that regard, the Concerned Coal Shippers must take exception with the Board’s previously stated view that the rules offer a fair and evenhanded approach to the implementation of the statute.

The anticompetitive conduct standard set forth in the rules (although not universally cited by the Board in decisions)<sup>18</sup> places a far more daunting obstacle in the path of relief than the statute contemplates. As explained above, Section 10705 obligates the Board to prescribe through routes (“shall . . . prescribe”) when it considers it desirable to do so in the “public interest.” 49 U.S.C. § 10705(a)(1). This affirmative agency responsibility has gone unfulfilled over the last twenty-five years because of the extreme burden associated with demonstrating that a carrier has engaged in anticompetitive conduct (or satisfying the various other formulations of the Board’s governing standard).

Stated simply, there is no basis for the Board’s competitive access rules under the public interest standard of Section 10705(a)(1). Moreover, history has demonstrated that the competitive access rules likewise fail to provide an even-handed approach to implementing Section 10705(a)(2). The Board will more completely uphold its statutory obligations by ensuring that, in situations of objectively verifiable need, through route prescription will be available to shippers. The carriers’ interest in preserving traffic on their own lines should not be permitted to override the terms of the statute or a reasonable interpretation of the public interest. *See, e.g., Mason Valley Mines Co. v. Western Pac. R.R.*, 64 I.C.C. 477, 481 (1921) (“The effect upon the Western Pacific of the possible diversion of this traffic should be given consideration; nevertheless its desire to retain the traffic on its own lines should not be permitted to outweigh the

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<sup>18</sup> *See Entergy 2011*, at 7-8 & n.16.

public interest if the establishment of joint rates is shown to be necessary or desirable therein.”).

In addition, the Board’s competitive access rules improperly conflate the standards applicable to Section 10705 and Section 11102. By using the same standard to govern requests for discretionary relief under the “may” language of Section 11102 and requests for relief under the “shall” language of Section 10705(a)(1), the rules overlook a key distinction in the statute regarding the availability of through route prescription. As discussed above, based on the D.C. Circuit’s reasoning in *Midtec*, the agency’s intentional limitation of its affirmative obligation under Section 10705 lacks a textual basis in the statute.

Likewise, while the *Bottleneck* cases purport to offer relief to shippers who obtain contracts over non-bottleneck segments (either automatically from a new origin or subject to a Section 10705 case for a current origin), the difficulties that shippers face in obtaining such contracts have prevented this relief from becoming a meaningful tool to restore competitive balance. Stated differently, if non-bottleneck carriers are not willing to enter into such contracts (as appears to be the case nearly universally), the “*Bottleneck*” remedy is worthless.

Accordingly, the Concerned Coal Shippers respectfully submit that it is appropriate for the Board to revise its competitive access rules in a manner that would more effectively serve the purpose of the statute and allow the Board to strike a reasonable competitive balance between carriers and shippers. In order to achieve that

goal, the Concerned Coal Shippers request that the Board adopt through route prescription regulations that would include the following essential components:<sup>19</sup>

**A. Adopt an Objective R/VC Measure to Gauge the Availability of Relief Under Section 10705(a)(1) and Section 10705(a)(2)(C)**

Under the Board’s current rules, great uncertainty exists as to what facts and circumstances would warrant a finding under Section 10705(a)(1) that the prescription of a through route is “desirable in the public interest.” This uncertainty is even more pronounced with regard to short-haul determinations under Section 10705(a)(2). In particular, the Board’s regulations do not provide any clear guidance as to the facts that would be required to demonstrate that a proposed through route is “needed to provide adequate, and more efficient or economic, transportation.” 49 U.S.C. § 10705(a)(2)(C). Adding insult to injury, the agency’s scant precedent on the subject of competitive access gives rise to the impression that shippers will be required to identify and document some nefarious conduct on the part of the carrier in order to justify relief.

The Concerned Coal Shippers respectfully submit that the proper response to the current situation is the promulgation of an objective measure of the existing carrier’s revenue demands as a means of ascertaining whether the prescription of an additional through route would be “desirable in the public interest” and is needed to provide “adequate, and more efficient or economic transportation.” In this regard, the

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<sup>19</sup> Significantly, a showing of anticompetitive conduct or abuse would not be required to obtain competitive access relief under any of the following proposed rules.

Board has enjoyed great success through its use of class exemption procedures in which the Board identifies a specific standard that parties must meet in order to obtain relief (*e.g.*, the two-year out-of-service class exemption for abandonments). Similarly, Title 49 itself relies upon an objective, revenue-to-variable cost measure to trigger Board jurisdiction. That objective measure gives carriers a safe harbor for determining whether their rate offers will be immune from STB review, and gives shippers the ability to assess those rate offers in an objective manner in the context of negotiations.

In much the same way, an objective R/VC-based trigger for gauging Section 10705(a)(1) and Section 10705(a)(2)(C) determinations would allow carriers and shippers to have a mutual understanding about the facts and circumstances that would warrant a finding that through route prescription is appropriate. The Concerned Coal Shippers propose that the Board adopt a rule that if the R/VC ratio of a bottleneck carrier's common carrier rate offering – calculated using the STB's URCS Phase III costing program – exceeds the carrier's most recent single-year RSAM level, that fact should operate as a trigger for the shipper's right to obtain an alternative through route prescription under Section 10705(a)(1) and Section 10705(a)(2)(C). A bottleneck carrier that elects to price its common carrier services at a level below the trigger level would know that the shipper would not be able to obtain an automatic order requiring the prescription of an alternative through route on the basis of Section 10705(a)(1) and Section 10705(a)(2)(C). Conversely, a bottleneck carrier that chooses to price its

common carrier services at levels that exceed the trigger level would understand that the shipper would be able to obtain such an alternative through route prescription.

Significantly, the Concerned Coal Shippers do not seek “open routing” through this proposal, and it would be improper to characterize this request in that manner. Over the more than twenty-five years since the adoption of the competitive access rules, there have been no orders prescribing additional through routes under Section 10705 (*i.e.*, completely “closed” routing, so to speak). The Concerned Coal Shippers anticipate that the number of carriers pricing their services at levels in excess of the trigger percentage will be low, and that in those situations, the public interest warrants inquiry into the question of whether some alternative combination of rail carriers may be in a position to handle the subject traffic in a more efficient and more economic manner.

One would further expect that in many cases, the current routing may have physical advantages in terms of overall length that would allow the incumbent carrier to offer a better set of economic terms than any alternative. Nevertheless, where a bottleneck carrier uses its control over the non-competitive segment of a movement to preclude the shipper from obtaining service over a route that could provide a reasonably priced alternative, the Board has an interest (on behalf of the public) to allow access to another through routing option. Ultimately, the rate offered on the alternative routing may lead the shipper to conclude that the existing routing is preferable, but giving options to a shipper faced with heightened revenue demands from a bottleneck carrier should permit the shipper to determine whether competition could provide a more favorable

resolution. Accordingly, this limited form of “competitive” access is fundamentally distinct from “open” access and should be regarded as a reasonable balancing of the competing elements of the policy goals of 49 U.S.C. § 10101.

Notably, in its recent decision in *Entergy 2011*, the Board evaluated the shipper’s request for a through route prescription on the basis of the R/VC ratio associated with the existing Union Pacific-Entergy contract. In particular, the Board concluded that Entergy should not be entitled to the prescription of an additional through route because the existing Union Pacific *contract* rate was low. *See Entergy 2011*, STB Docket No. 42104 at 15 (“[T]he R/VC level of the current UP/MNA rate is below 125% of variable cost. Such a rate cannot be attributed to an abusive exercise of market power.”). If a low R/VC ratio constitutes an indication that a carrier has refrained from abusing its market power, then a very high R/VC ratio conversely should constitute evidence that a carrier is acting in a manner that demonstrates an absence of adequate or economic transportation. This analysis logically should apply with equal or even greater force in the context of a rail carrier’s response to a request for a common carrier rate, rather than merely in the context of contract rates.

Moreover, in the Board’s Notice in *Policy Alternatives to Increase Competition in the Railroad Industry*, STB Ex Parte No. 688 (STB served April 14, 2009), the Board expressed an interest in the possibility of tying the availability of competitive access relief to the bottleneck carrier’s financial status. *Id.* at 4 (“Under 49 U.S.C. 10101(6), it is the policy of the U.S. government ‘to maintain reasonable rates

where there is an absence of competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and attract capital.’ Please comment on the relationship between revenue adequacy and bottleneck-rate and competitive-access relief. Should the Board’s competitive access policies be different for a carrier deemed to be revenue adequate? What would be the impact of such different policies on differential pricing and the ability of the industry to achieve adequate revenues?”). While the Concerned Coal Shippers’ proposal is not directly tied to revenue adequacy, it does create a relationship between revenue need and the ability to preclude competitive routing alternatives.

In the present transportation marketplace, a rail carrier that receives a request for common carrier rates must decide if it will price its services below the jurisdictional safe-harbor (*i.e.*, 180% of variable costs) or whether the carrier wishes to seek greater revenues at the risk of a finding that its rates exceed a reasonable maximum level. Under the Concerned Coal Shippers’ proposal, monopolist carriers would face an additional decision as to whether they wish to price their services below the alternative through route safe harbor (*i.e.*, that carrier’s RSAM level) or whether the carriers wish to seek greater revenues at the risk of having to “beat” competition. There may be situations, depending upon the relative advantages and disadvantages of each potential routing, that the bottleneck carrier would face little to no risk of losing its long-haul even if it were to price its services in excess of the RSAM level. For example, the bottleneck carrier may recognize that its current single-line route has a substantial length-of-haul

advantage over any alternative through route, and therefore may not regard the risk of traffic moving to an alternative route as a realistic possibility. Similarly, the bottleneck carrier may believe that stand-alone rate relief is not a realistic possibility for the alternative routing option (*e.g.*, due to low traffic density and/or unfavorable terrain), thus diffusing the competitive “threat” provided by the theoretical alternative.

But in situations in which the alternative routing sought by the shipper constitutes a legitimate competitive option based on its physical characteristics and existing traffic levels, the bottleneck carrier would be required to give serious consideration to the possibility that – if it prices its services above the threshold level – it may fail to retain all of the possible contribution available for the movement. The Concerned Coal Shippers respectfully submit that public policy, as reflected in the careful balance of 49 U.S.C. § 10705, strongly supports the adoption of rules that would require bottleneck carriers to constrain their pricing in such situations.

**B. Adopt an Objective Measure to Gauge the Availability of Relief Under 49 U.S.C. § 10705(a)(2)(B)**

Similarly, the Concerned Coal Shippers request that the Board adopt a rule that would provide a bright-line standard for determining when through route prescription is available under Section 10705(a)(2)(B). As described above, Section 10705(a)(2)(B) provides that the Board may short-haul a rail carrier if inclusion of that carrier’s lines “would make the through route unreasonably long when compared with a practicable alternative through route that could be established.” *Id.*

In this regard, the Concerned Coal Shippers request that the Board provide an alternative through route to a shipper that demonstrates that: (i) the alternative through route would be shorter than the current routing; (ii) the alternative through route constitutes a practicable means of handling the traffic on the basis of evidence regarding the physical characteristics of the proposed routing; and (iii) the R/VC ratio for service over the existing route exceeds the existing carrier's most recent single-year  $R/VC_{>180}$  level.

The rationale supporting this request is that the statute itself recognizes the significance of relative length of haul in determining whether the agency may short-haul a carrier. The fact that a given carrier has sole access to a destination (or sole access to an origin) should not permit that carrier to foreclose shorter potential routings while simultaneously pricing its services at rate levels that substantially exceed its costs. Consequently, the "trigger" R/VC ratio under this provision of the statute logically should be lower than under the more general Section 10705(a)(1) and Section 10705(a)(2)(C).<sup>20</sup>

Under this proposal, a bottleneck carrier could preclude the shipper's access to shorter alternative routings by limiting its revenue demands to rates below the  $R/VC_{>180}$  level. If the carrier elects to price its service above the  $R/VC_{>180}$  level,

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<sup>20</sup> If, as a result of the subject carrier's revenue adequacy, the carrier's  $R/VC_{>180}$  figure is higher than its RSAM figure, the shipper could obtain relief under Section 10705(a)(2)(C) and this alternative approach involving Section 10705(a)(2)(B) would be irrelevant.

however, then the shipper would have the opportunity to obtain service over the shorter alternative through route. As observed above with regard to the RSAM trigger for relief under Section 10705(a)(1) and Section 10705(a)(2)(C), a bottleneck carrier in a Section 10705(a)(2)(B) situation may believe that operational or “traffic density” difficulties associated with the proposed alternative routing (despite its shorter length) would limit the possibility that the shipper would pursue alternative through route relief. In such a circumstance, the bottleneck carrier likely would continue to price its services on the existing routing subject only to its concern regarding the possibility of the shipper filing a maximum rate reasonableness complaint.

However, if because of high traffic densities and low costs, the alternative (shorter) through route is likely to be subject to a maximum rate prescription at a level at or near the Board’s jurisdictional threshold, the bottleneck carrier will face some pressure to price its service on the (longer) existing route at a level below the  $R/VC_{>180}$  level. Again, the Concerned Coal Shippers respectfully submit that Board policy – in line with the policy reflected in Title 49 – should favor efficient, shorter routings for traffic, rather than permitting bottleneck carriers to prevent shippers from having recourse to more efficient routing options.

**C. Apply a Modified Version of These Proposals  
Where a Shipper First Obtains a Contract  
with a Competing Carrier**

The Board’s *Bottleneck* decisions address two situations in which a shipper first secures a contract for service over non-bottleneck segments. In particular, the

Board's decisions distinguish between the shipper's right to obtain alternative service from origins presently served by the bottleneck carrier and alternative service from origins not presently served by the bottleneck carrier. *See Bottleneck II*, 2 S.T.B. at 240-46. The Board found that if the bottleneck carrier serves the origin of the traffic, then in order to obtain alternative service, the shipper would be required to proceed under the access rules:

In the first situation, the shipper seeks to forego the bottleneck carrier's single-line service by separately contracting with a second rail carrier that also serves the origin for transportation to an interchange point on the bottleneck segment. . . .

In this situation, our prior decision is clear. As we stated there, where a bottleneck carrier already serves the origin, either directly or in interline service, it need not provide, on request, an additional rate for transportation over the bottleneck segment of an alternative interline route from that origin. Instead, the shipper must first proceed under our competitive access regulations to obtain an order requiring the opening of that route. . . . We stated that, where it is shown, pursuant to the rules, that a carrier's refusal to establish an alternative through route would foreclose more efficient service, we will prescribe that route. We also explained that a contract obtained for service over a non-bottleneck segment of the shipper's preferred route may be useful in making a successful access case. . . .

We determined, however, that a shipper-carrier contract entered into under 49 U.S.C. 10709 for rail service over the non-bottleneck segment, though itself insulated from further regulatory oversight, would not relieve the shipper from having to make an access case . . . .

*Id.* at 240-41; *see also id.* at 242 ("In contrast, we found in our *Bottleneck* decision that, for traffic from an origin *not* currently served by the bottleneck carrier, either directly or

in interline service, but destined to a point on its line, the carrier cannot refuse a shipper's request for service.”).

The Concerned Coal Shippers propose that where the shipper first secures a contract for service from an origin already served by the bottleneck carrier (*i.e.*, where a competitive access showing is required), the Board modify its competitive access rules to rely upon the RSAM or  $R/VC_{>180}$  trigger values. First, the Board should calculate an imputed bottleneck rate by subtracting the contract rate (for the non-bottleneck segment) from the bottleneck carrier's single-line rate for origin-to-destination service.

Second, the Board should calculate an R/VC ratio for the bottleneck segment using the imputed bottleneck rate and the bottleneck carrier's costs calculated using the URCS Phase III costing program.

Finally, the Board should compare that bottleneck R/VC ratio to either: (i) the bottleneck carrier's most recent single-year RSAM figure; or (ii) the bottleneck carrier's most recent single-year  $R/VC_{>180}$  figure (depending upon whether the current routing is longer or shorter than the proposed routing). If the bottleneck R/VC ratio exceeds the applicable trigger threshold, then the shipper should be entitled to the prescription of an alternative through route that would be comprised of contract service for the non-bottleneck segment and common carrier service for the bottleneck segment.

Under this proposal, the level of the imputed bottleneck rate will be affected by the level of the contract rate. The lower the contract rate is in relation to the bottleneck carrier's single-line rate, the higher the “imputed” bottleneck rate will be. The

Concerned Coal Shippers submit that this is an appropriate manner of balancing the interests of captive shippers and bottleneck carriers in such fact situations.

**D. Allow Petitions for Seeking Through Routes in Accordance with Section 10705(a)(2)(A)**

Section 10705(a)(2)(A) includes an additional set of exceptions to the general rule against short-hauling. Specifically, the statute authorizes the Board to short-haul a carrier where that carrier has subjected the shipper to unreasonable discrimination (49 U.S.C. § 10741), where the carrier has failed to provide “reasonable, proper, and equal” facilities for interchange (49 U.S.C. § 10742), or where the prescription of a through route is necessary to effectuate relief under 49 U.S.C. § 11102.

The Concerned Coal Shippers request that the Board adopt a stream-lined “petition” system for shippers who seek relief in one of these situations. In evaluating the merits of such a petition for the prescription of an alternative through route, the Board should refrain from requiring a showing of anticompetitive conduct as a pre-condition to relief under Section 10705(a)(2)(A).

The Concerned Coal Shippers acknowledge that there is some uncertainty as to the intended scope of these exceptions to the short-hauling restriction. If read in a broad manner, the exception associated with Section 10742 (regarding reasonable, proper, and equal interchange facilities) could “swallow” the entire rule against short-hauling. Nevertheless, the exception must be construed as having some meaning because any contrary result would interpret Section 10705(a)(2)(A) as being superfluous.

The Concerned Coal Shippers propose that a proper interpretation of this exception would support the rule that – at the very least – destination bottleneck carriers that interchange with multiple originating carriers but who themselves do not have access to the subject origin (such as a short-line carrier serving a given destination) must afford equal access to interchange with the upstream carriers. Absent such equal access to interchange, the Board should prescribe alternative through routes. The same rule would apply to originating bottleneck carriers that interchange with multiple delivering carriers but who themselves do not have access to the subject destination. An originating bottleneck carrier that failed to provide equal access to interchange likewise would be subject to the prescription of a through route.

**E. Establish a Rule for Calculating Divisions on Prescribed Through Routes**

Next, the Concerned Coal Shippers request that the Board promulgate a rule confirming that, in the absence of an agreement between the rail carrier participants in a prescribed through route, the Board will set divisions pursuant to 49 U.S.C. § 10705(b) on the basis of a straight mileage pro-rate. *See* 49 U.S.C. § 10705(b) (“The Board shall prescribe the division of joint rates to be received by a rail carrier providing transportation subject to its jurisdiction under this part when it decides that a division of joint rates established by the participating carriers under section 10703 of this title, or under a decision of the Board under subsection (a) of this section, does or will violate

section 10701 of this title.”); *see also* 49 U.S.C. § 10705(a)(1) (the Board has the authority to prescribe the “division of joint rates”).<sup>21</sup>

The Board removed its prior division of revenue regulations (*see former* 49 C.F.R. § 1137.1) in 2003 because of certain changes in the statute since the date on which the Commission had issued those regulations, and because no party had filed a division of revenue complaint in over twenty years. *See Removal of Divisions of Revenue Regulations*, STB Ex Parte No. 637 (Sub-No. 1), at 2 (STB served Aug. 29, 2003) (“The regulations at 49 CFR 1137.1 concerning divisions of revenue cases will be removed.”). Those regulations provided cumbersome and time-consuming notice of intent and complaint procedures as well as pre-complaint discovery. If the Board adopts the Concerned Coal Shippers’ proposal to modify the rules governing competitive access requests, the Board likewise should impose new rules governing the calculation of divisions of rates on prescribed through routes.

A bottleneck carrier developing a joint rate designed to compete against its own single line rate will, of course, attempt to price the joint movement out of

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<sup>21</sup> Notably, in the *Bottleneck II* proceedings, the AAR suggested that one possible approach to dealing with joint rate issues would involve the Board prescribing, under 49 U.S.C. § 10705(a)(1), joint rates with appropriate divisions for the bottleneck carrier. *Bottleneck II*, 2 S.T.B. at 246 (citing AAR Opposition at 8) (“Suggesting that [allowing separate challenges of bottleneck rates in situations where the non-bottleneck carrier enters into a contract with a shipper] may not be the only proper remedy, AAR asserts that we could prescribe, under 49 U.S.C. 10705(a)(1), a joint rate with an appropriate division for the bottleneck carrier.”). The Board rejected this proposal – not on the grounds that it lacked the authority to prescribe rates and divisions, but instead, because the AAR’s approach would “impermissibly allow the bottleneck carriers to avoid competition.” *Id.*

consideration. The bottleneck carrier will seek to ensure that the rate for the alternative routing is extremely high, or in the alternative, will insist that its share of the revenue on the alternative movement is sufficiently high that it will allow the carrier to obtain the full level of its contribution on the existing routing even where it will provide only a small fraction of the total service. Consequently, if the Board's through route prescription authority under Section 10705(a) is to have any real benefit, the Board also must exercise its authority under Section 10705(b) to prevent bottleneck carriers from insisting upon an unreasonable share of the through rate on prescribed through routes. It is critical that this division be established by rule because leaving this matter to case-by-case determinations will create substantial uncertainty as to the Board's intentions (and potentially will create delay), and those factors will greatly inhibit non-bottleneck carriers from seeking to become involved in bidding for service.

In terms of the sequence of events in a through route prescription case, the carriers subject to a Board order prescribing an alternative route would have the right, in the first instance, to determine what type and what level of rate they will offer to the shipper. If both carriers are aware of the default rules that the Board will prescribe in the absence of agreement, the carriers will be more likely to reach a reasonable resolution on their own (which may or may not set divisions based upon a straight mileage pro-rate). It is in all parties' interests that any Board rules regarding divisions allow the determination of appropriate divisions on a much more expedited schedule than had been the case under 49 C.F.R. § 1137.1. In fact, establishing a rule setting divisions in through route

prescription cases on a straight mileage pro-rate basis would substantially simplify the administrative process and would eliminate the possibility that through route cases would be halted by carrier disputes over appropriate revenue shares.

The Board is well aware, of course, of the difficulties in maximum rate reasonableness cases associated with calculating the divisions on joint rates as between stand-alone railroads and residual incumbents. It would be administratively complex and unwieldy to force consideration of similar factors in attempting to divide revenues between the parties to a prescribed through route, particularly where the overall level of such revenues could – as discussed below – still be the subject of a maximum reasonableness challenge. Consequently, the Concerned Coal Shippers request that the Board adopt an administratively simple and clear rule that divisions will be set on the basis of a straight mileage pro-rate.<sup>22</sup>

**F. Confirm that Rate Relief would be Available for Either Current Routes or Prescribed Through Routes**

The Concerned Coal Shippers also request that the Board clarify that the prescription of a through route pursuant to Section 10705 would not constitute evidence

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<sup>22</sup> If, notwithstanding an order from the Board prescribing an alternative through route, a bottleneck carrier refuses to negotiate with the competing non-bottleneck carrier (either regarding divisions or regarding the overall joint rate) in a reasonable manner, the bottleneck carrier will face the increased likelihood that the non-bottleneck carrier will enter into a transportation contract with the shipper.

of a lack of market dominance in a maximum rate reasonableness case challenging the rate applicable either to the existing route or the prescribed route.<sup>23</sup>

As noted with respect to the question of divisions, if the prescription of a through route is to have meaningful value, some limit must exist on the revenue demands of the carriers subject to the prescription order. Significantly, under Section 10705(a)(1), the Board has the authority to prescribe joint rates if it considers doing so to be desirable in the public interest. The prescription of an alternative through route should not be deemed to constitute effective competition with respect to the movement of coal from origin to destination where the destination or origin segment is served by the same carrier under either the existing routing or the prescribed routing. *See* 49 U.S.C. § 10707 (“‘[M]arket dominance’ means the absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies.”). Consequently, a shipper receiving: (i) a common carrier rate offer for an existing routing; and (ii) a common carrier rate offer for a prescribed alternative routing, should be permitted to challenge either or both rates under the Board’s *Coal Rate Guidelines*.

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<sup>23</sup> The proposed R/VC thresholds for determining whether through route prescription is appropriate should not have any impact on a shipper’s ability to challenge the reasonableness of the rate on its current routing. Stated differently, the shipper should be able to complain about the level of the current carrier’s common carrier rates whether those rates were above or below the RSAM threshold or the R/VC<sub>>180</sub> threshold. Such a maximum rate reasonableness proceeding would – if successful for the shipper – establish rates at the higher of the stand-alone cost level or the Board’s 180% jurisdictional threshold.

*See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom.*

*Consolidated Rail Corp. v. ICC*, 812 F.2d 1444 (3d Cir. 1987).

Moreover, if the non-bottleneck carrier agrees to enter into a contract with the shipper, then according to the *Bottleneck* decisions, the shipper should be permitted to challenge the reasonableness of the bottleneck rate itself. *See Bottleneck I* at 1074 (“[W]hen one of the components of service over the through route is embodied in a transportation contract, we cannot assess the reasonableness of the through route in its entirety.”); *id.* (“[I]n a complaint against a bottleneck proportional rate that operates in combination with a contract rate, we conclude that, in light of section 10709(c)(1), we may consider only the reasonableness of the bottleneck rate. . . . Thus, where through-route service combines contract and proportional rates, a shipper may present a rate reasonableness challenge to the discrete bottleneck proportional rate, tested by the stand-alone cost for the bottleneck segment.”). The Board will make contracts over non-bottleneck segments far more likely if it defines, in advance, the rules that it will impose to set divisions (and maximum reasonable rates) on prescribed through routes.

**G. Ease the Standards for Seeking Relief Under the Terminal Trackage Rights/Reciprocal Switching Statute**

While Section 11102 of Title 49 grants permissive authority to the Board with respect to terminal trackage rights and reciprocal switching (contrary to the “shall” language of Section 10705), the Concerned Coal Shippers submit that the Board’s competitive access regulations nevertheless establish an improper impediment to relief in either respect. Experience over the past twenty-five years has confirmed that these

statutory remedies are no longer a part of STB practice, and without a change to the Board's regulations, are unlikely to play any role in STB practice in the future. This is particularly inappropriate given the fact, as noted above, that Congress first formally granted the agency the authority to require reciprocal switching in the Staggers Act. It is evident that Congress intended reciprocal switching to play a role in striking the Staggers Act's competitive balance between carriers and shippers. The complete absence of that remedy in agency practice strongly suggests that the agency has disrupted Congress' intended balance.

In the STB's Ex Parte No. 575 proceedings, shippers sought a modification to the Board's regulations regarding terminal trackage rights and reciprocal switching. *See Review of Rail Access and Competition Issues*, STB Ex Parte No. 575, "Subscribing Shippers' First Status Report Regarding Competitive Access Issues," at Appendix B (filed May 29, 1998). The Concerned Coal Shippers adopt those same proposals, as set forth below, as a reasonable manner of fulfilling the competitive balance intended by Section 11102:

Terminal Trackage Rights (49 U.S.C. § 11102(a) and (b))

1. *Definitions*

(a) "Terminal" should be broadly construed, and defined to include identifiable areas within whose boundaries railroads pick-up or deliver appreciable volumes of freight; contiguous trackage or stations accessible to more than one shipper; trackage over which two (2) or more rail carriers operate; or interchanges or gateways where two (2) or more rail carriers can or may interchange traffic.

(b) A “reasonable distance” beyond a terminal should be determined based upon the facts of each individual case, consistent with the goal of maximum reliance on effective competition. If trackage rights are sought for the origination or termination of traffic, the total length of the line-haul should be relevant in determining whether the distance over which trackage rights are sought is reasonable. In this regard, however, it should be understood that the Board has the power to include a main line distance of at least 25 miles in a trackage rights order.

## *2. Standard of Relief*

(a) Trackage rights should be deemed “practicable” if (i) the proponent of trackage rights presents a feasible plan for joint operations over the line; and (ii) either (A) signaling and safety equipment on the line is adequate under applicable regulations to handle any incremental increase in traffic, or (B) the proponent or its nominee is prepared to bear its share of the cost of any necessary additional or upgraded signaling or safety equipment, on a usage basis.

(b) Trackage rights should be presumed to be in the public interest whenever they would promote effective intramodal rail competition or permit the proponent to avail itself of such competition to or from the terminal area in question.

(c) In making a showing sufficient to meet the public interest criterion of 49 U.S.C. § 11102(a), a proponent should not be required to demonstrate more than (i) that there is an absence of effective intramodal rail competition to or from the subject terminal area; and (ii) that the requested trackage rights would promote such competition, or permit the proponent to avail itself of such competition. A showing of anticompetitive conduct should not be required for a grant of relief.

## *3. Compensation*

If the Board is required or called upon to establish conditions or compensation for use of facilities, it should

establish compensation on a usage basis, based upon a sharing of roadway maintenance expenses, dispatching expenses, ad valorem taxes (if applicable) and return of and on net book investment in road property.

### Reciprocal Switching (49 U.S.C. § 11102(c))

#### 1. *Repeal of Current Rules*

To the extent that they relate to the requirement that rail carriers enter into reciprocal switching arrangements, the rules set forth at 49 C.F.R. Part 1144 should be repealed.

#### 2. *Standard of Relief*

(a) The Board should clarify that an extensive inquiry into whether reciprocal switching is “practicable” is not required where such switching is necessary to provide competitive rail service; i.e., where there are no other feasible means by which competitive rail service can be provided.

(b) Reciprocal switching should be deemed “practicable” if (i) necessary track connections and related facilities are in place to permit the requested service, or the proponent is prepared to bear its share of the cost of any such necessary facilities, on a usage basis; and (ii) the proponent of the switching arrangement presents a feasible plan for conduct of the switching operation.

(c) Reciprocal switching should be presumed to be in the public interest whenever the arrangement would promote effective intramodal rail competition, or permit the proponent to avail itself of such competition.

(d) In making a showing sufficient to meet the public interest criterion of 49 U.S.C. § 11102(c)(1), a proponent should not be required to demonstrate more than (i) that there is an absence of effective intramodal rail competition for the traffic identified by the proponent; and (ii) that the requested arrangement would promote or permit the proponent to avail itself of such competition. A showing of anticompetitive conduct should not be required for a grant of relief.

### 3. *Compensation*

If the Board is required or called upon to establish conditions or compensation for the provision of reciprocal switching, it should establish compensation to equal the operating and maintenance expenses attributable to the switching, plus a share of the return of and on net book investment in road property and equipment used by the railroad in providing the switching, allocated on a usage basis.

Coupled with the relief that the Concerned Coal Shippers propose with regard to the prescription of alternative through routes, these modifications to the competitive access rules would allow terminal trackage rights and reciprocal switching to play an important role in protecting the interests of shippers in appropriate situations.

#### **IV. Responses to Additional STB Inquiries**

The Board's January 11, 2011 Notice in this proceeding identifies several additional topics as to which the Board invites comments. The Concerned Coal Shippers offer the following responses:

- *The Financial State of the Railroad Industry (Notice at 6):* As the Board explains in its Notice, the current financial state of the railroad industry is robust. *See* Notice at 6 (“Today, the industry is in substantially stronger condition financially.”). The circumstances that existed in the 1970's are no longer present. Instead, railroads enjoy substantial pricing power, and as a result of their various consolidations, face little competition for essential services. Moreover, as a result of the consolidation in the railroad industry, even some shippers with access to multiple carriers at destination

appear not to be receiving “competitive” bids. The recent acquisition of BNSF Railway Company at a substantial premium provides compelling evidence of the perceived financial value of the Class I railroads. Stated simply, there is no basis for any concern that Class I railroads may be suffering financially. In any event, the Concerned Coal Shippers’ proposal takes revenue adequacy into account through the use of the RSAM and R/VC<sub>>180</sub> standards.

- *The circumstances under which carriers may seek to protect their long-hauls (Notice at 6):* The Board must intervene to establish reasonable limits (in accordance with Title 49) on the extent of the protection available to carriers who seek to protect their long-hauls in all circumstances. The Concerned Coal Shippers’ proposal would provide an appropriate check on the carriers’ self-interest in maximizing their contribution on a given shipper’s traffic. It is reasonable for the agency to allow carriers to preserve their long-hauls where those routes have an efficiency advantage over potential alternatives, provided that the carriers do not price their services in a manner that prevents the shipper from obtaining access to adequate and more efficient or economic transportation.

- *The Applicability of Section 10705(a)(2) in Multiple Originating Carrier Situations (Notice at 6):* The Concerned Coal Shippers acknowledge that Section 10705(a)(2) applies where multiple carriers can originate traffic but only a single carrier can deliver the traffic to its destination. This is the factual pattern set forth in the Supreme Court’s *Subiaco* case. While Section 10705(a)(2) applies in such situations, the

exceptions set forth within that subsection are broad enough to permit the Board to afford relief to captive shippers that are subject to objectively excessive rate demands.

- *Should freight rail customers be allowed to determine intermediate origin and destination points? (Notice at 7):* The Concerned Coal Shippers recognize that in the first instance, carriers should determine the intermediate origin and destination points that would enable a competing carrier to serve the shipper's final destination. The Board, however, should be available in appropriate instances to resolve disputes that may exist as to the specific routing selected for prescribed through routes.

- *Access Pricing (Notice at 7):* The Concerned Coal Shippers' proposal addresses the subject of pricing on prescribed through routes, and for terminal access and reciprocal switching. The Concerned Coal Shippers submit that in the context of determining divisions on through routes, a carrier's "current financial standing and future prospects" should not have any bearing. To the extent that a shipper seeking maximum rate reasonableness relief with regard to a joint rate imposed over a prescribed through route, the Board's *Coal Rate Guidelines* would govern that determination. As applied in stand-alone cost cases, those *Guidelines* incorporate an assessment of projected traffic and revenue levels for the defendant carrier(s).

- *The Impact of any proposed changes on the industry (Notice at 7):* The Concerned Coal Shippers' proposal would impact only a small percentage of traffic; namely, traffic moving over routes with rates well in excess of the jurisdictional threshold and, in certain instances, distances that exceed the lengths of competing routes that

bottleneck carriers have foreclosed. While a given carrier may see some reduction in its revenues on certain captive traffic, that carrier is equally likely to capture additional revenues on traffic as to which it enjoys an efficiency advantage relative to the bottleneck carrier currently serving that other traffic. The principal impact of the Concerned Coal Shippers' proposal, therefore, is that the overall economic efficiency of the industry will be enhanced by allowing more efficient through routing options to compete in situations in which a less efficient carrier has priced its services at excessive levels.

## CONCLUSION

For the reasons set forth above, the Concerned Coal Shippers request that the Board amend its competitive access rules in the manner described herein.

Respectfully submitted,

CONCERNED CAPTIVE COAL SHIPPERS

By: /s/ C. Michael Loftus  
C. Michael Loftus  
Andrew B. Kolesar III  
Slover & Loftus LLP  
1224 Seventeenth St., N.W.  
Washington, D.C. 20036  
(202) 347-7170

*Attorneys for the Concerned Captive  
Coal Shippers*

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**SUMMARY OF RELEVANT HISTORY**

<u>Year</u>	<u>Event</u>
1887	Congress passes the Interstate Commerce Act; the Act requires carriers to afford all reasonable, proper, and equal facilities for interchange, but does not give the agency the authority to prescribe through routes.
1906	The Hepburn Act requires carriers to participate in through routes and gives the Commission authority to prescribe through routes provided that no “reasonable or satisfactory” route already exists.
1910	The Mann-Elkins Act eliminates the “reasonable or satisfactory” limitation on the Commission’s through route prescription authority, but introduces a restriction on through route prescriptions that would short-haul a carrier (unless the existing route is unreasonably long as compared with another practicable alternative route)
1920	Congress amends the Interstate Commerce Act to make the Commission’s duties more affirmative in nature. To that end, Congress modifies the language of the through route statute from “may” to “shall” prescribe through routes that are desirable in the public interest. At the same time, Congress gives the Commission permissive authority to grant terminal trackage rights. Finally, Congress created a new exception to the short-haul restriction which would allow the Commission to short-haul a carrier that had failed to afford “reasonable, proper, and equal” facilities for interchange.
1929	The Supreme Court rules in the <i>Subiaco</i> case that the short-haul restriction is not limited to protecting only originating carriers.
1935	The Supreme Court rules in <i>Great Northern</i> that shippers seeking reparations can only challenge an entire through rate, but explains that challenges to the reasonableness of proportionals are appropriate in other contexts
1940	Congress amends the Interstate Commerce Act to create a new exception to the short-haul restriction that would allow the agency to short-haul a carrier if “the Commission finds that the through route proposed to be established is needed in order to provide <i>adequate, and more efficient or more</i>

*economic, transportation.*” Congress also specifies that in prescribing through routes, the Commission shall give priority to originating carriers.

- 1945 The Supreme Court rules in *Pennsylvania R.R.* that the new exception to the short-haul restriction contemplates a review of adequacy and efficiency from the perspective of shippers.
- 1976 The 4R Act simplifies the process for carriers seeking to cancel through routes. That process had grown complex and burdensome as a result of the DT&I merger conditions and the commercial closing doctrine.
- 1980 The Staggers Act further simplifies the process of cancelling through routes, and formalizes the agency’s authority to order reciprocal switching.
- 1985 The Commission adopts the competitive access rules in *Intramodal Rail Competition*.
- 1986 The Commission applies its new rules in the context of the *Midtec* terminal trackage rights/reciprocal switching dispute. Vice Chairman Simmons and Commissioner Lamboley each dissent.
- 1987 The D.C. Circuit approves the adoption of the competitive access regulations in *Baltimore Gas & Electric*.
- 1988 The D.C. Circuit affirms the *Midtec* decision on the basis of the permissive nature of the Commission’s authority to grant terminal trackage rights and reciprocal switching.
- 1996-97 The Board decides the *Bottleneck* cases and encourages parties to file requests for through route prescription under Section 10705.
- 2009 The Board finds in *Entergy 2009* that the proper means for seeking relief from a paper barrier is to request through route prescription under Section 10705.