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**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

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

RECIPROCAL SWITCHING

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INITIAL COMMENTS OF SANDY CREEK ENERGY ASSOCIATES, BRAZOS SANDY
CREEK ELECTRIC COOPERATIVE, AND LOWER COLORADO RIVER AUTHORITY

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I. Introduction and Summary

Pursuant to the Notice of Proposed Rulemaking issued by the Surface Transportation Board (“STB” or “Board”) herein on July 27, 2016¹ (and the Notice extending the procedural schedule issued on September 1, 2016), Sandy Creek Energy Associates (“SCEA”), Brazos Sandy Creek Electric Cooperative, Inc. (“Brazos”), and Lower Colorado River Authority (“LCRA”), co-owners of the Sandy Creek Energy Station (“Station”) in Riesel, Texas (collectively, “the Sandy Creek co-owners”) hereby submit their Initial Comments in response to the NPRM. The Sandy Creek co-owners appreciate the opportunity to present suggested revisions to the NPRM for effective implementation of reciprocal-switching (or, as may be a more accurate description, competitive-switching) rules.²

The Sandy Creek co-owners joining in these Comments appreciate the STB’s most recent actions to revise and enhance its existing regulatory structure in a manner that will allow shippers and their customers to obtain competitive access, which in turn will lead to operational and economic efficiencies in our businesses. The Sandy Creek co-owners are a prime example of the sort of customers for whom competitive switching is appropriate, because the Sandy Creek co-owners joining in these Comments together own a large (932 MW), modern (the Station opened in 2013), highly efficient (i.e., “super-critical”) coal-fired electric generating facility in Riesel, Texas that has access to only one Class I railroad—Union Pacific Railroad Company (“UP”), but which could be served by BNSF Railway through a connection with UP about 15-20 rail miles from the Station. Because the Station is now served only by UP, it is being charged rates that prevent electricity from the Station from “dispatching” (i.e., being sold for use on the grid) much of the time, except during periods of high demand for electricity, such as in the summer.

II. Background Information Regarding the Sandy Creek Co-owners

SCEA is the majority owner in the Station, with a 64 percent interest. It is an affiliate of the LS Power Group. SCEA is headquartered in East Brunswick, New Jersey. The LS Power Group is an independent, employee-owned power company founded in 1990. As a power generation and transmission group, LS Power Group has over 30,000 megawatts of electric generation, and over 500 miles of electric transmission development, construction, and operations experience with over \$30 billion of financing activities.

Brazos owns a 25 percent interest in the Station. It is an affiliate of Brazos Electric Power Cooperative (“BPEC”). BPEC is the largest and oldest electric generation and

¹ Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching*, 81 Fed. Reg. 51,149 (Aug. 3, 2016) (“NPRM”).

² Historically, railroads provided reciprocal-switching services to one another, especially when they jointly owned switching tracks such as “belt railroads” around large cities. However, after many mergers, leading to single-carrier control over most belt railroads, railroads now are less inclined to provide such reciprocal-switching services. Hence, the Sandy Creek co-owners believe that the more accurate term for the subject of the NPRM is “competitive switching.”

transmission electricity cooperative in the State of Texas, serving 68 counties from the Texas Panhandle to Houston.

LCRA owns an 11 percent interest in the Station. LCRA was created in 1934 as a wholesale provider of electricity in Central Texas. LCRA has a diverse power generation portfolio of 11 plants and over 3,671 MW from combined-cycle gas, traditional natural gas, coal-fired plants, and six hydroelectric dams. Additionally, LCRA provides vital services to customers in the Southwestern United States, managing 5,150 miles of transmission and 380 substations and the water supply and environment of the lower Colorado River basin, providing public recreation areas, and supporting community development.

The Station is captive to UP. Despite the fact that it is highly efficient, and one of the newest coal-fired power plants in the United States, the Station often does not generate electricity at a cost that is competitive, and so may be “dispatched” in the regional (i.e., Electric Reliability Council of Texas (“ERCOT”)) marketplace, because the rates for coal transportation on UP are too high. Those high UP rates in turn drive up the Station’s electric bid prices, which must include the marginal costs of production. The Sandy Creek co-owners have tried repeatedly to convince UP to reduce its rail tariff rate so that the costs of operating the Station are reduced, thus permitting the Station to dispatch electricity for a much greater percentage of the year. UP, however, has been unwilling to reduce its rate to allow the Station to operate more frequently. UP, in fact, sets its tariff rate at what is ostensibly 180 percent of variable costs, but under applicable STB precedent, those variable costs are determined using system-average costs, rather than movement-specific costs (which are far lower for lengthy unit-train shipments, as here). As a result, the Sandy Creek co-owners estimate that the actual revenue-to-variable cost ratio for the movement of coal from the Powder River Basin (“PRB”) in Wyoming to the Station is actually approximately 223 percent of variable costs, if not more.

The Board’s policies now require use of system-average costs rather than movement-specific costs to calculate the jurisdictional threshold in the event of a challenge to a rail rate.³ That threshold —set by statute at 180 percent of variable costs “with adjustments specified by the Board” (49 U.S.C. § 10707(d)(1)(B)), but which the Board chooses to calculate without adjustments for actual (i.e., movement-specific) costs—therefore precludes rate relief to the Sandy Creek co-owners, unless the Board were to commence a rulemaking proceeding so as to

³ Ex Parte No. 657 (Sub-No. 1), *Major Issues in Rail Rate Cases*, slip op. at 61 (served Oct. 30, 2006) (“If a party believes that [the Uniform Railroad Costing System (“URCS”)] could be improved, or better tailored to particular movements, it may request a separate rulemaking in which it offers its specific proposal and the proposal is subject to public comment and, if adopted, uniform application. That is how URCS has evolved since its initial adoption in 1989. In an individual rate reasonableness proceeding, we will use our existing URCS model, without further movement-specific adjustment, for both *the jurisdictional inquiry* and to set the floor for rate relief.”) (emphasis added). The Board apparently assumed that the difference between using average costs, and actual (i.e., movement-specific) costs, was only approximately 1-3 percent. *Id.* at 53. The actual spread of more than 40 percentage points, in the case of a lengthy unit-train shipment such as that serving the Station, would warrant a rulemaking proceeding.

permit the Sandy Creek co-owners to seek relief from the existing rule requiring use of system-average costs to calculate the jurisdictional threshold.

Accordingly, because the rail rate charged by UP sets the Sandy Creek co-owners' rail rate at 180 percent of its system-average variable costs as described above, and yet that rate is preventing the Station—the newest and perhaps most efficient coal-fired plant in ERCOT—from dispatching much of the time except at times of peak electricity demand, the Station would benefit greatly from the availability of a competitive-switching remedy from the Board. BNSF Railway could transport coal for the Station from the PRB to an interchange in or near Waco, Texas, and then UP could transport the coal via competitive switching from Waco, Texas to the Station.

III. Comments on the Board's Proposals and Analysis

Like many other shippers, a number of whom have reached out for decades to the STB, and to the Interstate Commerce Commission ("ICC") before that, the Sandy Creek co-owners believe that the current competitive rail regulations must be revised in order to effectuate the intent of their enabling statutes and to provide a realistic opportunity for shippers to obtain access to a second rail carrier. At present, the absence of a viable competitive-switching remedy is exacerbated by what is essentially a lack of effective alternative methods of challenging unduly high rates that evolve from monopoly power at the Station.

As explained above, UP is taking advantage of the Board's policy establishing the jurisdictional threshold at 180 percent of variable costs (calculated using system-average costs), even though the revenue-to-variable-cost ratio for the Sandy Creek co-owners' rate is actually about 223 percent of variable costs if movement-specific costs are used, if not more.⁴ Unless the Board were willing to change its rule requiring use of system-average costs to calculate the jurisdictional threshold (which the Board thus far has not shown any inclination to do), the Sandy Creek co-owners cannot reasonably pursue rate relief for the Station at the Board.

The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), Pub. L. No. 104-88, 109 Stat. 803, both of which are codified at 49 U.S.C. §§ 10101, *et seq.*, enacted a number of provisions to provide rail carriers more latitude than other utilities and common carriers at the time when they were in severe economic crisis. Those times have long since passed. There will, of course, always be small ups and downs in the rail markets and rail revenues, just as there are in all

⁴ The Sandy Creek co-owners were disappointed that the Board proposed to make technical changes to its URCS in Ex Parte No. 431 (Sub-No. 4), *Review of the General Purpose Costing System* (see Supplemental Notice of Proposed Rulemaking, served Aug. 4, 2016 therein), but did not propose to use actual (i.e., movement-specific) costs, but rather proposed to continue to use system-average costs (even for highly efficient unit-train shipments such as those to the Station) in STB rate-reasonableness proceedings. See Comments of the Western Coal Traffic League, filed October 11, 2016 in Ex Parte No. 431 (Sub-No. 4) for a thorough review of the reasons why movement-specific costs should be used, especially for western unit-train shipments of coal.

industries. But the core economic difficulties that warranted the unusual regulatory elements of the Staggers Act and ICCTA are no longer present.

In the Rail Transportation Policy, at 49 U.S.C. § 10101, Congress ordered the STB to balance the need for carriers' improvement "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board"⁵ with the fair treatment of the rest of American commerce "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail"⁶ and "to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense."⁷

The NPRM frames the needs of railroads and shippers as "important yet conflicting goals."⁸ The Sandy Creek co-owners believe that the goals for railroads and shippers need not be a "conflicting" and ongoing battle; rather, with the STB's input, "effective competition among rail carriers and with other modes" can benefit both the railroads and other elements of the American economy.⁹

Many stakeholders and other observers believe that the STB's trend of enhancing rail revenues has gone too far. The STB has not granted competitive access or effective rate relief in recent years, despite the strong economic position of the railroads.¹⁰ In addition, the White

⁵ 49 U.S.C. § 10101(3).

⁶ *Id.* § 10101(1).

⁷ *Id.* § 10101(4).

⁸ *See, e.g.*, NPRM, 81 Fed. Reg. at 51,155 and n.16; *see also id.* at 51,162 (Vice Chairman Miller commenting).

⁹ In this respect, the Sandy Creek co-owners are disappointed by the Association of American Railroads' ("AAR") September 27, 2016 letter to Congress, complaining about the STB's proposed actions in this proceeding. *See* Letter from Edward R. Hamberger, President and Chief Executive Officer, AAR, to Chairman and Members, Committee on Commerce, Science, and Transportation, U.S. Senate (Sept. 27, 2016). AAR is simply wrong to complain, because the STB's proposal merely implements *current* law in 49 U.S.C. § 11102. Moreover, AAR's analogy to Coke having to manufacture for Pepsi is simply inapt (*id.* at 2); Coke and Pepsi are not utility-like entities with essential facilities, but railroads are. Indeed, an early railroad case explained the need for sharing of essential facilities for a fee. *United States v. Terminal R.R. Ass'n of St. Louis*, 224 U.S. 383, 395 (1912) ("The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable every [rail]road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines, upon identical terms.").

¹⁰ The most recent competitive-access proceeding under existing agency rules also was resolved in favor of the incumbent railroad and against the shipper concerning direct competitive access to the existing origin and destination. *Entergy Ark., Inc. v. Union Pac. R.R. Co.*, Docket No. NOR 42104, 2011 WL 888237 (STB Mar. 15, 2011), *reconsideration denied*, Docket No. NOR 42104, 2012 WL 5906867 (STB Nov. 26, 2012). In addition, the STB conceded in the NPRM that the ICC or STB had not ruled in favor of competition from a second railroad in even one such

House has recently expressed concern about the increasing lack of competition throughout the country, and has asked all federal agencies to do everything within their authority to enhance competition.¹¹ Accordingly, it is now time to rebalance the regulatory process to provide for a truly level playing field—not to tilt regulatory benefits overly to the shipper side, but simply to place the economic structures back on an even keel.

It must also be recognized that a competing, substitute railroad will receive new and additional revenues under reciprocal switching—so that overall, financial health of the rail industry will continue—even if the revenues shift, or change from those under the current monopoly charges. Indeed, the Rail Transportation Policy’s reference to the promotion of competitive rail service implicitly recognizes such revenue shifts, and therefore those shifts alone cannot be the basis for denying access.

The Sandy Creek co-owners believe that it is necessary for the STB, consistent with its statutory mandate, to remedy the current lack of competitive-switching access. This would in turn allow the Station to operate on a cost-competitive basis, such that the significant investments in the facility can be justified and so as to provide reliable base-load generation to homes and businesses in Texas.

The Sandy Creek co-owners recommend that the STB modify the proposed regulations in several respects. These modifications, discussed in detail below, are necessary to enable all shippers and their customers to have appropriate competitive access, in an effective and economically reasonable manner, without extensive, expensive, and impractical hurdles for the shipper to surmount simply to qualify for the statutory access.

A. *The Board Should Streamline and Simplify the “Practicable and in the Public Interest” Prong So That It Can Be Accessible and Implementable*

Requiring each shipper to bear the initial burden of proof to engage in a relatively open-ended, multi-faceted petition for switching under the “practicable and in the public interest” prong, as currently proposed in the NPRM, would likely make the competitive-switching remedy unavailable to many shippers, in the same way that bringing a rate proceeding at the agency is hampered today. *See* note 10, *supra*.

In the Petition for Rulemaking that initiated this proceeding, the National Industrial Transportation League (“NITL”) recommended several conclusive presumptions—for example, a presumption that a lack of competition exists if a shipper’s existing rate is greater than 240 percent of the incumbent railroad’s variable costs, and a presumption that there is a working interchange within a reasonable distance if the shipper’s facility is within 30 miles of an

proceeding, as a result of the agency’s adoption of the “competitive abuse” standard. NPRM, 81 Fed. Reg. at 51,150 (citing *Midtec Paper Corp. v. Chicago & N. W. Trans. Co.*, 3 I.C.C.2d 171, 171 (1986); *Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331 (1989)).

¹¹ Exec. Order No. 13725, *Steps To Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy*, 81 Fed. Reg. 23,417 (Apr. 15, 2016).

interchange between the Class I rail carrier and another rail carrier. The STB rejected NITL's recommended conclusive presumptions. In doing so, the STB acknowledged that, under NITL's proposal, "a shipper could still seek to obtain reciprocal switching by proving the criteria without use of the conclusive presumptions."¹²

Hence, while the Sandy Creek co-owners appreciate the STB's effort to expand criteria beyond those proposed by NITL, supposedly to allow more shippers to have effective access to the remedy, the open-ended nature of the STB's proposed criteria is likely to have the opposite effect: i.e., make the process protracted and prohibitively costly, and therefore limiting access to the remedy. In short, it would appear that, unless a number of factors in the first prong are streamlined, the proposed rules could, as has been the case with rail rate regulation at the STB, be ineffectual.

1. Line-by-Line Analysis of the NPRM

49 C.F.R. § 1145.2(a)(1)(i) and (ii)

The proposed elements in 49 C.F.R. § 1145.2(a)(1)(i) and (ii) would be relatively straightforward.¹³ These criteria are logical, and shippers of all sizes and locations should be able make a *prima facie* presentation without massive financial outlay.

49 C.F.R. § 1145.2(a)(1)(iii)

The Sandy Creek co-owners have a number of concerns with respect to proposed 49 C.F.R. § 1145.2(a)(1)(iii), and hereby request that this section be streamlined and simplified. As currently proposed, this section would impose, as a threshold matter, a burden on the shipper to prove, in a non-specific analysis, whether the "potential benefits from the proposed switching arrangement outweigh the potential detriments."¹⁴ It deploys multiple, broad sub-factors (A)–(H) that could be subject to many different interpretations:

- (A) Whether the proposed switching arrangement furthers the Rail Transportation Policy of 49 U.S.C. [§] 10101 [which in turn has 15 separate policy conditions];
- (B) The efficiency of the route under the proposed switching arrangement;
- (C) Whether the proposed switching arrangement allows access to new markets;
- (D) The impact of the proposed switching arrangement, if any, on capital investment;
- (E) The impact of the proposed switching arrangement on service quality;
- (F) The impact of the proposed switching arrangement, if any, on employees;
- (G) The amount of traffic the party seeking switching would ship pursuant to the proposed switching arrangement; and

¹² NPRM, 81 Fed. Reg. at 51,154 n.12 (citing NITL Pet. 35-36; NITL Reply 35-36).

¹³ *Id.* at 51,165. The proposal to exempt short-line carriers from being subject to the competitive-switching rules is discussed further below in Section III.E.

¹⁴ *Id.* at 51,156 & 51,165.

(H) The impact of the proposed switching arrangement, if any, on the rail transportation network.¹⁵

Any one of these factors could turn the STB proceeding into something far more complex than it needs to be; all the more is this concern when taking the factors together. For example, analysis of the “impact . . . on the rail transportation network” alone could expand to the size of a rulemaking-level discussion. Nor is it clear what is meant by “access to new markets.” The incumbent carrier could seek to expand, re-define, and include novel elements, and possibly employ data or information that is solely within its possession, in order to rebut the opening effort on behalf of the shipper, stretching out the proceeding in an unduly burdensome manner.

In addition to the eight open-ended factors in (A)–(H), section 1145.2(a)(1)(iii) of the NPRM allows for other unspecified factors to be assessed, because the grant of access based on potential benefits outweighing detriments can include but is “not limited to” sub-factors (A)–(H) in the opening sentence of (iii), i.e., the list is a “non-exhaustive list of factors.”¹⁶

The STB recently recognized, in its Advance Notice of Proposed Rulemaking for rate case improvement,¹⁷ that open-ended criteria create hurdles for those with limited resources seeking access to the STB:

For example, [National Grain and Feed Association] argues that even the simplest of the Board’s rate reasonableness methodologies, the Three-Benchmark approach, *is ineffective because railroad defendants raise numerous expert-intensive “other relevant factor” arguments* and arguments for the use of current waybill data in the possession of the defendant railroad, *which greatly increase the complexity and costs of those cases.* (NGFA Opening 15.)¹⁸

....

We recognize that, *even with a word limit and limits on or exclusion of discovery, allowing parties’ presentations to include “other relevant factors” evidence could substantially increase the cost and time required to prepare for submission of a case.* For instance, we do not expect that the examples noted above—a density adjustment or PTC adjustment—could be easily calculated by a small entity without hiring outside consultants. Therefore, the Board invites comment on the advisability of allowing parties’ presentations to include “other relevant factors” evidence.¹⁹

¹⁵ *Id.* at 51,165.

¹⁶ *Id.* at 51,156 & 51,165.

¹⁷ Ex Parte No. 665 (Sub-No. 1), *et al.*, *Rail Transportation of Grain, Rate Regulation Review; Expanding Access to Rate Relief*, 81 Fed. Reg. 61,647 (Sept. 7, 2016) (“Ex Parte No. 665 ANPRM”).

¹⁸ *Id.* at 61,649 (emphasis added).

¹⁹ *Id.* at 61,655 (emphasis added).

These same problems could apply with respect to proposed 49 C.F.R. § 1145.2(a)(1)(iii) in relying on offering the possibility of other non-specified factors.

49 C.F.R. § 1145.2(a)(1)(iv)

Even after a shipper might meet its burden on all of the above requirements, which could take years of litigation, under the proposed rules there would be yet another possible opportunity for the railroad to argue against a competitive-switching remedy based on (again) relatively vague criteria about safety and feasibility asserted by the carrier under proposed 49 C.F.R. § 1145.2(a)(1)(iv).

In terms of timing, it is not clear whether subsection (iv) would be presented by the carrier simultaneously, or in a second phase, which could prolong the proceeding unnecessarily. In any event, it appears that the proposed subsection (iv) factors duplicate the broad, open-ended portions of subsection (iii), obviating the need for subsection (iv), even if the process is properly streamlined as the Sandy Creek co-owners have proposed. In addition, it should be noted that, while NITL's Petition suggested that safety and feasibility should be considered, it made this recommendation in the context of a much more streamlined proposed approach, and hence the section (iv) factors were simply to confirm safety and feasibility once the rest of the analysis had been performed. If the rail carrier to which the shipper seeking competitive-switching relief seeks to obtain access supports the shipper's contention that the interchange would be both feasible and safe, this factor should not be further considered, absent unusual circumstances, because all rail carriers are required to operate safely, and so the determination by the competing carrier that it could interchange safely with the incumbent carrier seems almost certainly to be determinative.

2. Protracted Process Will Prevent Many Shippers from Seeking Relief and Will Impose a Greater Burden on the STB Staff and Board Members; Rules Should Be Streamlined and Provide for Expedient Implementation

The proposed rules to implement the first prong likely would prevent most shippers from seeking competitive-switching relief because the process could become as protracted and nearly as complicated as "stand-alone" rate proceedings. Indeed, as explained above, the STB recently observed in the Ex Parte No. 665 ANPRM proceeding that use of open-ended factors results in an overly complicated, laborious, and time-consuming proceeding. The same is true with respect to the proposed competitive-switching rules.

In addition, such broad, undefined standards will likely also impose a greater burden (with respect to issues, complexity, and time demands) on the agency's limited staff and Board Members to analyze, concur in, and issue final decisions in these proceedings in a timely fashion. The STB has previously expressed concern about its limited funding to timely deal with the great number of complex matters pending before it.²⁰ In order for the competitive-switching rules to

²⁰ The agency's announcement delaying action in Ex Parte No. 722, *Railroad Revenue Adequacy* (Nov. 4, 2014) (which also apparently will involve consideration of revised rate-reasonableness rules with respect to revenue-adequate railroads), until at least June of 2017, was justified in part

be effective and expeditious, the STB should not invite parties (especially railroads) to introduce evidence and argument on unnecessarily complicated, multi-faceted factors that provide no real benefits, and which would almost certainly overwhelm the agency's ability to implement expeditiously a petition for competitive switching under the final rules.

Nor are the many proposed factors necessary for the STB to evaluate a switching request. Instead, the agency could streamline this process by setting forth a straightforward, *prima facie* test for the shipper to present in its opening case, which generally would be from information publicly available to or in the possession of the shipper. (As NITL proposed, shippers that do not meet the *prima facie* requirements would still have an opportunity to present a case for STB consideration.) For example, such factors could include:

- a. Currently having access to only one Class I carrier, including through an interchange commitment or other arrangement that thwarts access to a second Class I railroad from origin or destination;
- b. A reasonably safe and efficient interchange connection with a second Class I carrier; and
- c. Willingness to pay fully allocated costs as a presumptive (not conclusive) ceiling for the fee charged by the incumbent rail carrier for competitive switching.

3. Requiring Specific Commitments Going Forward

The STB should clarify with respect to the first prong—as it has made clear in the NPRM with respect to the second prong²¹—that a shipper would have the choice between using the incumbent carrier or the competing carrier or a mix of carriers depending on which one provided the better specific rates or service. The NPRM's discussion on this point relative to the first prong is somewhat unclear.²²

4. Revenue Adequacy Should Not Be a Factor

The NPRM makes clear that railroad revenue adequacy will not be a factor for applications brought under the second prong.²³ The Sandy Creek co-owners believe that, similarly, this should not be a factor for applications brought under the first prong, because the statute does not direct the STB to consider the incumbent carrier's revenue adequacy in determining whether to grant relief.

upon precisely this point—the number of proceedings already pending requiring significant effort and public participation.

²¹ NPRM, 81 Fed. Reg. at 51,160.

²² *See id.*

²³ *Id.* at 51,165 (proposed 49 C.F.R. § 1145.2(b)(2)) (“In considering requests for reciprocal switching under (a)(2) of this section, the overall revenue inadequacy of the defendant railroad will not be a basis for denying the establishment of a switching arrangement.”).

B. *The Second Prong—“Necessary to Provide for Competitive Railroad Service”—Should Not Require a Showing of Market Dominance, Because There Is No Statutory or Practical Basis for Imposing That Standard in the Case of Competitive Switching*

The Sandy Creek co-owners believe that there is no statutory basis for requiring a shipper to prove market dominance with respect to the second prong—“necessary to provide for competitive railroad service.” Use of this test will likely add significant complication and delay in competitive-switching proceedings.

The Board itself in the NPRM states that market dominance is not a statutory requirement for implementing ICCTA’s competitive-switching oversight: “market dominance is not a jurisdictional prerequisite to obtaining relief in an access proceeding under [49 U.S.C. §] 11102 . . . unlike rate reasonableness cases, where the statute creates such a prerequisite to obtaining rate relief, 49 U.S.C. § 10707(c), there is no such statutory requirement for reciprocal switching.”²⁴

The Sandy Creek co-owners take this analysis one step further and contend that there is no statutory basis for denying competitive switching on the basis of intermodal competition. Under the Rail Transportation Policy, 49 U.S.C. § 10101(4), the railroads are expected to engage in “effective competition among rail carriers and with other modes.” Hence, even if there are other modes available, and that can vary widely, the statute contemplates effective competition between rail carriers *and* (not *or*) competition with other modes. Clearly, and this point has been conceded in some rail-rate challenges, there is no effective competition for the transportation of coal from the PRB in Wyoming to Texas except via railroad.

Even though it conflicts with the controlling statute, the STB proposes to require shippers to prove there is market dominance in order to obtain relief under the second prong of its proposed rules. The STB champions the market-dominance test on the grounds that it is a “mature analytical framework” that it is “familiar to litigants before the Board.”²⁵ But, it would be more accurate to say that it is familiar to only a small subgroup (some coal shippers and a few chemical shippers) out of the much larger universe of shippers such as the Sandy Creek co-owners that could, and should, be able to obtain competitive switching under the proposed rules, most of which have not previously engaged in a rate or market dominance analysis before the STB. In many rate-reasonableness proceedings, where proof of market dominance is required, use of that test has added significant delay—indeed, years—and complexity to the proceeding.²⁶

²⁴ *Id.* at 51,158 (citing *Midtec*, 3 I.C.C.2d at 180).

²⁵ *Id.*

²⁶ *See, e.g.*, some of the most recent chemical rate-reasonableness proceedings, *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, NOR 42121 (served Sept. 14, 2016); *Sunbelt Chlor Alkali P’ship v. Norfolk S. Ry. Co.*, NOR 42130 (served June 30, 2016), *pet. for review pending sub nom.* *Sunbelt Chlor Alkali Partnership v. STB and United States*, Case No. 16-15701 (11th Cir.); and *M & G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123 (served Sept. 27, 2012/updated Dec. 7, 2012) (subsequently dismissed due to settlement, see STB decision served Jan. 7, 2013)).

In most instances, proving market dominance is a tedious and expensive process for the shipper that should not be considered unless required by Congress.

Indeed, in the Ex Parte No. 665 ANPRM, the STB just recently observed that market dominance in its “mature analytical framework” has become overly complex, particularly in the qualitative segment, and sought comment on streamlining market dominance in that context, with the Board engaging in the preliminary portion, and the shipper providing “an abbreviated evidentiary submission” on qualitative market dominance.²⁷ All the more should the STB rethink its proposal to apply the market dominance test in the competitive-switching context, where that test is not part of the statutory threshold.

Further, it is unnecessary for the Board to apply the market-dominance test to determine whether a movement is without effective intermodal or intramodal competition. It is obvious that, in terms of access, the incumbent carrier is market-dominant, as it is the only railroad serving the shipper, and the shipper would not be seeking access to a second railroad if it is receiving reasonable (i.e., competitive) rail rates and service from the incumbent. Hence, it should be straightforward—if, under 49 C.F.R. § 1145.2(a)(2)(i), a shipper demonstrates that it has access to only one rail carrier at a given site, that should prove a lack of competition sufficient to satisfy the second prong of 49 U.S.C. § 11102. (If other modes were to present effective competition, a circumstance not applicable to the Station, presumably the shipper would not seek competitive-switching relief but, in any event, the provision of such relief to another rail carrier would not affect the incumbent railroad, given the competition it would already be experiencing.)

Finally, as noted above with respect to the first prong, the meaning of “feasible” and “unduly hamper the ability . . . to serve its shippers” with respect to 49 C.F.R. § 1145.2(a)(2)(iv), needs to be clarified such that these seemingly straight-forward concepts do not become additional barriers to relief.²⁸

C. The Rules Should Prescribe a Specific Timeline to Govern the Petition Process and Agency Final Decision, So That Access Can Be Promptly Provided, and Unduly High Litigation Costs Can Be Avoided

Petitions for competitive-switching relief filed under the revised rules should be governed by a fair and efficient timeline for resolution. While some of the largest shippers may have the funds needed to engage in multi-year litigation, most shippers do not, and therefore, in order for the proposed rules to apply universally, the Sandy Creek co-owners believe it is critical for the STB to impose a reasonable, specific timeline for the proceedings. Doing so would also be responsive to the Executive Branch’s recent emphasis on all federal agencies being proactive in increasing competition.²⁹

²⁷ Ex Parte No. 665 ANPRM, 81 Fed. Reg. at 61,655.

²⁸ See NPRM, 81 Fed. Reg. at 51,165.

²⁹ See note 11, *supra*.

As recently noted by the STB in Ex Parte No. 665 ANPRM, ICCTA requires “expeditious handling and resolution of all proceedings.”³⁰ Yet despite the statutory command, in the recent past, STB proceedings lasted for extended periods of time, proving to be prohibitively expensive and obstructive for all but the largest shippers.

It appears that the STB now recognizes the importance of timely resolution of petitions for competitive switching. The NPRM provides that “[a]ny proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.”³¹

Unfortunately, the NPRM provides no further specifics. Without precise deadlines, as distinct from the generic wording “expedited,” the revised switching rules can easily relapse into lengthy and hyper-costly litigation, as has been the norm in prior rate and competitive-access proceedings, despite the overriding statutory requirement of “expeditious” resolution. The long and costly timelines have effectively shut down much of the access to the STB that is statutorily required, because many shippers cannot afford to wait years for a remedy.

In particular, proceedings involving competitive switching require expeditious resolution because, unlike rate proceedings, they do not provide for refunds to be issued to prevailing applicants. Put another way, a shipper is never made whole for its losses incurred during the period in which it was entitled to, but not allowed, access to a second carrier.

Therefore, the Sandy Creek co-owners respectfully request that the entire process for obtaining competitive-switching relief should be governed by express deadlines, and concluded with a final decision from the STB within a specified number of days. The Sandy Creek co-owners recommend that the rule require the STB to issue a final decision within 180 days from the filing of the petition, consistent with 49 U.S.C. § 11102(d), unless the shipper agrees to extend the deadline.³²

The Board also should consider adopting for competitive-switching proceedings the restrictions it has provided in Ex Parte No. 665 ANPRM to enable proceedings to move more

³⁰ Ex Parte No. 665 ANPRM, 81 Fed. Reg. at 61,648 (quoting 49 U.S.C. § 10101(15)). *See also* 49 U.S.C. § 10101(2)) (calling for “fair and expeditious regulatory decisions when regulation is required”).

³¹ 81 Fed. Reg. at 51,165 (proposed 49 U.S.C. § 1145.2(b)(3)).

³² A feasible schedule would be as follows: the date of the shipper’s filing, with its *prima facie* case (both evidence and arguments) included, would be Day 0; any supporting filings by other shippers or other supporting parties should be required to be filed by Day 30; the incumbent railroad’s opposition (both evidence and argument) would be due by Day 60; the shipper’s discovery requests (if any) would be due by Day 80; the railroad’s responses to discovery would be due by Day 100; the shipper’s reply (both evidence and argument) would be due by Day 120; and the STB’s decision would be issued by Day 180 (at latest), unless the shipper seeking relief agreed to extend any of those deadlines. If the Sandy Creek co-owners’ approach is followed, the *prima facie* case for the shipper should be sufficiently straightforward, and dependent on information known to the railroad, so that discovery by the railroad should not be necessary.

quickly, including “limiting discovery, establishing mandatory disclosures, limiting the length of filings, and establishing an evidentiary hearing in lieu of rebuttal evidence.”³³

D. The Competitive-Switching Charge Must Be Reasonable and Not Defeat the Effectiveness of the Competitive-Switching Remedy

Various parties, including the STB, have suggested alternative approaches with respect to the methodology for determining the switching access charge. The Sandy Creek co-owners believe that a straightforward mechanism to determining the charge is necessary, so that the remedy may be implemented in a timely manner.

The Sandy Creek co-owners recommend that the competitive-switching fee should be limited to, at most, the incumbent carrier’s fully allocated costs (which already include a return). The critical aspect of any competitive-switching fee is to permit true and proper switching access to the railroad available to serve at the working interchange, without double-charging the shipper and thereby denying the very relief supposedly being made available. To that end, the NPRM seeks comment on whether the incumbent railroad may *de facto* receive extra compensation above its costs for providing access, to retain the profit it otherwise would receive in retaining a non-competitive arrangement.³⁴ The NPRM explains that UP has argued that the competitive-switching fee must cover the serving railroad’s actual cost of providing the switching service as well as the serving railroad’s entire lost contribution from the long-haul.³⁵

The Sandy Creek co-owners believe that in no event should a “Lost Contribution” or “Opportunity Costs” element to be added to the switching charge. Permitting the incumbent railroad to retain some or all of its existing monopoly rate return as part of the competitive-switching fee is not appropriate, because it would defeat the very remedy supposedly being provided, nor would it be in keeping with ICCTA’s overriding policy goals to promote effective competition. An incumbent railroad that no longer provides long-haul service on account of the switching mandate should not be permitted to continue to charge the customer for any of those costs that were connected to such transportation.

The combination of such “loss contribution or opportunity costs,” together with the newly competing carrier’s charges (which will include a return, of course) and the fee for competitive switching, likely would exceed the preexisting monopoly rate charged by the incumbent carrier in the absence of competitive switching. This would essentially upend the entire process, and would be contrary not only to the policy goals of ICCTA, as explained above, but also to the STB’s stated willingness to provide a competitive-switching remedy.

E. Short-Line Railroads Should Not Be Exempted from the Proposed Rules

The Sandy Creek co-owners believe that the STB’s proposal to exclude short-lines from the revised competitive-switching rules lacks a basis in law, and as a practical matter will be

³³ Ex Parte No. 665 ANPRM, 81 Fed. Reg. at 61,151.

³⁴ See NPRM, 81 Fed. Reg. at 51,159.

³⁵ *Id.* (citing UP Comments 61-62).

highly problematic to implement. The STB should not erect barriers to relief under ICCTA that Congress itself did not provide. Exempting short-lines from the proposed rules would essentially nullify the STB's efforts to promote competitive switching on a significant segment of the national rail network, and would contradict the Rail Transportation Policy.

The Sandy Creek co-owners see no reason why short-lines should be exempt from the competitive-switching regulations. Many short-lines already provide switching service, and they do so because it benefits them financially. Indeed, short-lines typically benefit when their customers' facilities have access to rail-to-rail competition.

IV. Conclusion

Consistent with Congressional intent, the STB should revise its competitive-switching rules to afford all shippers and their customers a meaningful opportunity to obtain competitive access. As large coal shippers, the Sandy Creek co-owners would benefit greatly from the operational and economic efficiencies of rail-to-rail competition. At the same time, because the rail carrier obtaining access to the Sandy Creek Station would collect substantial revenues for providing transportation services, the net revenue impact on the railroad industry would likely be small, and is in any event irrelevant under the statute.

With respect to the "practicable and in the public interest" prong, the STB should adopt rules that clearly lay out the elements of the *prima facie* case (which would be based on information that should be known to the incumbent railroad, in most instances) that a shipper must prove to create a rebuttable presumption in favor of relief. If a shipper presents evidence and argument sufficient to constitute such a *prima facie* case, the STB should conclude that the burden has been shifted to the incumbent railroad to demonstrate, if it can and chooses to do so, that such relief should not be provided. If the incumbent railroad presents sufficient evidence and argument to rebut the shipper's *prima facie* case, the shipper, of course, should (with expedited discovery if need be) have the opportunity to rebut the incumbent railroad's case.

With respect to the "necessary to provide for competitive railroad service" prong, there is no statutory basis for requiring shippers to demonstrate market dominance in the competitive-switching context. Use of this test would likely add significant cost, complication, and delay in competitive-switching proceedings; the STB recently found the test cumbersome and overly complex in the Ex Parte No. 665 ANPRM. If a shipper demonstrates that it has access to only one carrier at a given site, but is seeking competitive-switching relief, it should be obvious that the shipper lacks rail-to-rail competition, and therefore the shipper's filing should be sufficient to satisfy the "necessary to provide for competitive railroad service" prong.

Under the revised rules, the STB should commit to decide competitive-switching matters promptly, i.e., within 180 days of the filing of the shipper's petition, to effectuate the over-riding purpose of the Staggers Act and ICCTA "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." An expedited approach is particularly appropriate in the competitive-switching context because these proceedings do not provide for refunds to be issued to prevailing applicants.

The competitive-switching fee must be set so that it does not double-charge the shipper and thereby deny the very relief supposedly being made available. The Sandy Creek co-owners recommend that the competitive-switching fee should be limited to, at most, the incumbent railroad's fully allocated costs. In no case should a "Lost Contribution" or "Opportunity Costs" element be added to the switching charge; inclusion of these costs would contradict ICCTA's overriding policy goals to promote effective competition.

The Sandy Creek co-owners believe that the STB's proposal to exclude short-lines from the revised competitive-switching rules is contrary to law and to the Rail Transportation Policy. A short-line railroad is often the "last mile" at origin or destination in a captive shipping arrangement; exempting short-lines from the proposed rules would essentially nullify the STB's efforts to promote competitive switching on a significant portion of the national rail grid.

The Sandy Creek co-owners appreciate this opportunity to provide Initial Comments on the NPRM and commend the STB for its efforts to revise its competitive-switching rules in order to promote rail-to-rail competition.

Respectfully submitted,

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