

BEFORE THE
SURFACE TRANSPORTATION BOARD

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PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES

Record

RESPONSIVE COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION

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Dated: May 30, 2013

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In accordance with the Board's decisions served July 25, 2012 and October 25, 2012, Arkansas Electric Cooperative Corporation (AECC) ^{1/} submits these comments in response to opening comments of BNSF Railway (BNSF), Union Pacific Railroad (UP), and the Association of American Railroads (AAR) (collectively referred to as the "railroad parties" or the "railroads") regarding the proposal submitted by The National Industrial Transportation League (NITL) to increase rail-to-rail competition through expanded use of reciprocal switching

^{1/} AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve over 500,000 customers, or members, located in each of the 75 counties in Arkansas and in surrounding states. In order to serve its 17 member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. For example, AECC holds ownership interests in the White Bluff plant at Redfield, AR and the Independence plant at Newark, AR, each of which typically uses in excess of 6 million tons of Powder River Basin (PRB) coal each year. In addition, AECC holds ownership interests in the Flint Creek plant at Gentry, AR and the Turk plant at Fulton, AR, each of which typically uses on the order of 2 million tons of PRB coal each year. Because of the large volume of coal consumed by these plants, the need for long-distance rail transportation to move this coal, and the rail captivity of three of these plants, AECC has a direct interest in the Board's competitive access policies and their impacts on coal transportation options.

(hereafter, "NITL Proposal"). In addition, AECC provides some insights and observations regarding the NITL Proposal from AECC's perspective as a coal shipper.

SUMMARY

The railroad parties criticize the NITL Proposal on several grounds, none of which withstands scrutiny. Indeed, the railroads' own evidence shows the inadequacy of the competition they now provide, and the importance of the types of market forces the NITL Proposal would bring to bear under the circumstances that have evolved in the industry.

The railroads claim that increasing intramodal competition for captive rail shippers by expanding reciprocal switching would be nothing more than a back door form of rate regulation, which would improperly undermine differential pricing and the principles of Constrained Market Pricing (CMP). On the contrary, as AECC shows below, under current market conditions, where the large Class I railroads have achieved the robust financial health that was one of the objectives of the Staggers Act, CMP requires the implementation of new policies and practices to rein in excess differential pricing.

The railroads also claim that the NITL Proposal would cause traffic to be routed inefficiently, rather than via the supposedly efficient routes chosen by the incumbent monopoly railroad. On the contrary, as AECC shows below, the absence of effective rail-to-rail competition causes inefficiency, whereas increased competition that would result from the adoption of the NITL Proposal would foster efficiency (as competition commonly does).

Similarly, the railroads claim that increased competition through the adoption of the NITL Proposal would disrupt rail service, but again they overlook the benefits of competition. As AECC shows below, a monopoly railroad does not face the same market

discipline to maintain and restore high levels of service as does a railroad that faces competition.

In addition to refuting the railroad parties' arguments against the NITL Proposal, AECC discusses issues related to the application of the Proposal under the distinct operating, economic, and regulatory conditions faced by coal and other unit train movements. AECC also identifies issues that appear to require further consideration and development for the NITL Proposal to achieve its potential benefits for coal and unit train movements.

DISCUSSION

A. Responses to Railroad Parties' Claims

1. Because The Class I Rail Industry Has Achieved Robust Financial Health, It Is Appropriate To Allow Increased Intramodal Competition To Constrain Differential Pricing.

The railroad parties mischaracterize the NITL Proposal as an improper form of backdoor rate regulation, and claim that it undermines differential pricing and is inconsistent with Constrained Market Pricing (CMP). ^{2/} However, the rail parties' claims ignore fundamental limitations on differential pricing that have been recognized since the original development of CMP. These limitations take on overriding importance as the objective of revenue adequacy is achieved.

The highly robust financial health of the Class I rail industry is documented in mounting recent evidence, including the following:

^{2/} See, for example, Opening Comments and Evidence of Union Pacific Railroad Company (March 1, 2013) ("UP Opening Comments") at 6; Opening Comments of the Association of American Railroads (March 1, 2013) ("AAR Opening Comments") at 36.

- The Board's own experts, Christensen Associates, determined that the rail industry has been able to access efficient amounts of capital since at least 1995, 3/ that it achieved revenue sufficiency in approximately 2006, 4/ and that in the presence of growing volumes revenue sufficiency can be maintained with diminishing levels of differential pricing; 5/
- Large and increasing acquisition premiums have been paid for Class I rail assets above and beyond the current market values of those assets, as seen most recently in the enormous premium paid by Berkshire Hathaway for BNSF. 6/ Savvy investors do not pay such premiums for marginal companies in marginal industries, and these premiums therefore provide evidence that the market regards the Class I rail industry as financially healthy now and for the foreseeable future.
- Evidence is coming to light that the Board's revenue adequacy methodology may systematically be overstating the railroads' cost of capital and therefore understating their achievement of revenue adequacy. The Board averages the results of two methodologies, Multi-Stage Discounted Cash Flow (MSDCF) and Capital Asset Pricing Model (CAPM), to estimate the cost of capital. 7/ AECC previously identified factors that could cause both methodologies to overstate the estimated cost of capital, related primarily to

3/ See Christensen Associates, An Update to the Study of Competition in the U.S. Freight Railroad Industry (January 2010) ("Christensen Study") Table 3-13 on p. 3-18, as discussed in Docket No. EP 705, Competition in the Railroad Industry, Initial Comments of Arkansas Electric Cooperative Corporation ("AECC Initial Comments"), VS Nelson at 8.

4/ See Christensen Study, Executive Summary at ii, as discussed in Docket No. EP 705, Competition in the Railroad Industry, AECC Initial Comments, VS Nelson at 9.

5/ See, for example, Docket No. EP 705, Competition in the Railroad Industry, AAR Reply Comments, RVS Eakin/Meitzen at 6: "a lesser markup over marginal cost is needed to achieve sufficient revenues"; and at page 10: "A key finding of our revenue sufficiency analysis is that the needed markup has declined in recent years, but the actual markup observed has not declined by as much."

6/ See Docket No. EP 705, Competition in the Railroad Industry, AECC Initial Comments, VS Nelson at 6-7.

7/ See, for example, Docket No. EP 558 (Sub-No. 15), Railroad Cost of Capital—2011, Decision served September 13, 2012.

actual or expected increases in the exercise of rail market power. 8/ More recently, WCTL has identified an apparent source of overstatement of the rail industry cost of capital by MSDCF. 9/ If it is determined that the MSDCF portion of the Board's methodology overstates the actual cost of capital for the reason identified by WCTL, or that both methodologies do so for reasons previously raised by AECC, the actual rail industry cost of capital would be lower than the values estimated in recent years and currently in use. Indeed, Christensen Associates has already determined that, based on CAPM results, the rail industry achieved revenue adequacy around 2001; 10/ and,

- Notwithstanding the possible overstatement of the cost-of-capital embedded in the Board's current estimates, even those estimates indicate that, as of 2011, **the four Class I mega-systems as a group had achieved revenue adequacy.** 11/

When revenue adequacy is achieved, CMP unambiguously requires that the Board develop and implement effective methods for reining in higher levels of differential pricing, as the Board recognized in its notice served July 25, 2012 in this proceeding. The Board

8/ See Docket No. EP 664 (Sub-No. 1), Use of a Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry's Cost of Capital, "Comments of Arkansas Electric Cooperative Corporation" (April 14, 2008) and (September 15, 2008), as discussed in Docket No. EP 705, Competition in the Railroad Industry, AECC Initial Comments, VS Nelson at 13.

9/ See Docket No. EP 558 (Sub-No. 16), Railroad Cost of Capital—2012, Reply Statement of the Western Coal Traffic League (May 10, 2013). The results of the MSDCF portion of the Board estimate have been systematically higher than the results found using the CAPM method for the period of time when both methods have been used.

10/ See Christensen Associates, A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition (November 2009) Figure 8-23 on page 8-32, as discussed in Docket No. EP 680, Study of Competition in the Freight Railroad Industry, AECC Comments (December 22, 2008), Nelson Statement at 7.

11/ See Docket No. EP 552 (Sub-No. 16), Railroad Revenue Adequacy—2011 Determination, Decision served October 16, 2012. From Appendix B, the sum of "Adjusted Net Railway Operating Income" for BNSF, CSX, NS and UP is \$10,747,058; the sum of "Tax Adjusted Net Investment Base" for those 4 carriers is \$92,513,568; and the consolidated "Tax Adjusted Return on Investment" for those 4 carriers is 11.62%. In EP 558 (Sub-No. 15), Railroad Cost of Capital—2011, Decision served September 13, 2012, the Board determined that the 2011 railroad industry cost of capital was 11.57%.

said (in footnote 11 on pages 7-8), describing how the Stand-Alone Cost (SAC) test it uses to implement CMP limits the permissible amount of differential pricing on individual movements:

...the maximum amount of differential pricing the SAC test will permit depends in part on the revenues the railroad earns from other traffic that shares those facilities. Holding everything else constant, if the carrier earns more revenue, the amount of differential pricing needed falls, and vice versa. [emphasis added]

The prevention of earnings above the level needed to provide a market rate of return on required investment (hereafter, “supracompetitive” earnings) is a bedrock principle of CMP, and the economics on which it rests, that the Board already has recognized and adopted.

Ramsey-type differential pricing, which provides the foundation for allowing higher markups over marginal cost for rail traffic with inelastic demand, was originally adopted by the ICC – and blessed at the time by a panel of 16 eminent economists ^{12/} – on the basis that it is needed to minimize distortions in resource allocation relative to the pattern of traffic movement that (hypothetically) would occur under marginal cost pricing. ^{13/} The same insensitivity to rates that enables some traffic to bear high markups in the first place requires that rate reductions needed to prevent supracompetitive earnings be applied first to traffic with the highest markup and least elastic demand. For such traffic, any given rate reduction

^{12/} See ICC Ex Parte No. 347 (Sub-No. 1), Coal Rate Guidelines – Nationwide, Verified Statement of Economists Supporting the Principles of Constrained Market Pricing (June 1983) (hereafter, “VS Economists”). A copy of this document is accessible in Docket No. EP 657 (Sub-No. 1), Major Issues in Rail Rate Cases, Comments of BNSF Railway Company (May 1, 2006), VS Willig, Exhibit RDW-2. Page number references to this document are based on the pagination of the document (at the bottom of each page), and not the numbering appended to the upper right corner of each page in the copy appearing in Exhibit RDW-2.

^{13/} VS Economists at page 4.

constitutes the smallest possible percentage change and smallest possible impact on traffic movement patterns. 14/

For these reasons, “compression” of rates for traffic with the highest markups and least elastic demand has been recognized from the outset of differential pricing as being not only consistent with, but integral to, implementation of CMP where unfettered differential pricing would produce supracompetitive earnings. As stated unambiguously by the ICC, and endorsed by the economists:

We emphasize that Ramsey pricing is not the same as monopoly pricing because the markups above marginal cost can be constrained by whatever limits on the firm’s overall earnings are set by the regulator. 15/

Earnings over the revenue adequacy level are a per se indicator of competitive abuse, under any credible definition of the term. At least for the four Class I mega-systems that collectively now are revenue-adequate, the NITL Proposal, which introduces limited market forces for traffic that experiences the highest levels of differential pricing, is far more consistent with CMP principles, the appropriate exercise of railroad market power, and sound regulatory practices than is the railroads’ “business as usual” scenario.

2. Reciprocal Switching Would Enhance Operating Efficiency, Not Reduce It As The Railroads Claim.

The railroad parties go to great lengths to highlight the supposed inefficiencies that would result from the NITL Proposal, as shipments that otherwise would move in

14/ Mathematical development and examples of this in the analogous context of compressing SARR revenues in a SAC analysis are shown in Docket No. EP 657 (Sub-No. 1), Major Issues in Rail Rate Cases, AECC Rebuttal Comments (June 30, 2006), Rebuttal Testimony of Michael A. Nelson at 3-5.

15/ VS Economists at 4.

“efficient” single-line service might instead require extra handling to be moved via reciprocal switching. This argument fails because a single-line route is not necessarily the most efficient route. One of the studies performed for the Board by Christensen Associates demonstrated that, notwithstanding rail industry claims and rhetoric, the actual benefits of “single-line service” in the mergers that created the four Class I mega-systems were outweighed by the substantial inefficiencies introduced by such factors as the shielding of circuitous single-line routings from competitive discipline (as institutionalized by the Board’s Bottleneck Rule). 16/ Even if reciprocal switching pursuant to the NITL Proposal would entail some additional work events, the findings of the Christensen study show that the increased costs would tend to be more than offset by other efficiencies resulting from the application of market forces.

Indeed, the railroads appear to concede that reciprocal switching is appropriate where the alternative routes introduced through reciprocal switching are more efficient. 17/ They just fail to acknowledge the way the market forces unleashed by reciprocal switching act to ensure that the alternative routes are utilized only when they are advantageous. 18/

Far from being the source of inefficiency that the railroads claim, reciprocal switching promotes efficiency by providing an opportunity and mechanism for traffic to shift

16/ See Christensen Study, Figures 3-2 through 3-5 on pages 3-21 and 3-22, as discussed in Docket No. EP 705, Competition in the Railroad Industry, AECC Initial Comments, VS Nelson at 13-14.

17/ UP, for example, devotes an entire section of its opening comments (beginning at page 61) to methods of “encourag(ing) shippers to invoke forced reciprocal switching only when more efficient service would result”.

18/ UP, for example, recognizes that a shipper’s decision to utilize reciprocal switching will depend largely on the rate quoted by the alternative carrier, but claims that it “cannot predict the ultimate outcome from the shipper’s perspective.” See UP Opening Comments at 63 n. 38.

toward the most efficient and direct routes. All else equal, a carrier with a more efficient route can earn a higher contribution than a carrier with a less efficient route for a given movement. This gives the carrier with the more efficient route an advantage in price competition, and encourages the carrier with the more efficient route to commit resources to the movement, while leading the carrier with the less efficient route to deploy its resources elsewhere.

For example, suppose that reciprocal switching is introduced in a market in which the incumbent monopolist has the more efficient route, but is currently exercising excessive differential pricing. The new competitor can undercut the current rate to obtain the traffic, but the incumbent with the more efficient route can (and presumably would) drop its rate to undercut the competitor and retain the traffic while still earning a higher contribution than could the new competitor. Thus, if the incumbent has the more efficient route for a movement, it may face pricing pressure due to the introduction of reciprocal switching, but it would still be the strongest competitor for, and therefore likely to retain, the movement. Excessive differential pricing would be curtailed without the traffic shifting to a less efficient route.

3. Reciprocal Switching Would Improve Rail Service, Not Degrade It As The Railroads Claim.

The railroad parties also claim that service would be inferior under reciprocal switching, ignoring the service benefits associated with the availability of competitive

routes. 19/ The four Class I mega-systems have demonstrated their susceptibility to major service disruptions, and since the mid-1990's repeatedly have subjected shippers – particularly captive shippers - to episodes of widespread poor service, many of which have been caused or exacerbated by the railroads' own misjudgments and poor practices. 20/ The market forces introduced by reciprocal switching provide rail management with extra motivation to avoid episodes of poor service, and provide shippers with an option to move traffic via different routes when the service provided by a given carrier is inadequate.

Overall, the railroads are now seeking to have the Board perpetuate a balkanized railroad industry structure in which each railroad moves "its own" traffic over "its own" routes at whatever level of service its management decides to provide. A railroad that faces no risk of losing "its" traffic to another railroad has no need to maintain capacity sufficient to handle fluctuations in future traffic flows, and has no urgent need to restore service when unexpected events cause it to be disrupted. In markets where healthy competition is occurring, of course, it is commonplace for a firm to maintain reserves and resources to deal with fluctuations and emergencies, not only to retain its existing business, but also perhaps to vie for business

19/ Indeed, it should be recalled that in Docket No. EP 705, Competition in the Railroad Industry, Canadian National and Canadian Pacific conceded outright that competitive access, in the form of "interswitching" that is similar in many respects to the NITL Proposal, forms an effective basis for service competition. See Joint Reply Comments of Canadian National Railway Company and Canadian Pacific Railway Company at 2-3.

20/ An overview of service problems affecting coal transportation was provided in Congressional Research Service, Rail Transportation of Coal to Power Plants: Reliability Issues (September 26, 2007) Order Code RL34186. In its Opening Comments, at 17, UP acknowledges both the sensitivity of the performance provided by the mega-carrier networks to local problems (at page 3) and its own role in precipitating service problems that arose in 2004-5. UP should be credited for its candor on these points.

currently handled by a competitor. To the Class I railroads serving rail-dependent customers, the investment in such reserves and resources apparently is now being viewed purely as a cost that can be avoided, and not as an essential element of the railroad's competitive capability. If the Board is still uncertain whether the time has come for a boost in rail-to-rail competition, it need only read page 66 of UP's Opening Comments. There UP does not even mention competition from other railroads as a possible market response to hypothetical UP price increases on traffic not eligible for reciprocal switching.

The statutory and economic framework for the Board's regulation contemplates exactly the opposite – i.e., that rail-to-rail competition will be increased to promote industry financial health through the exercise of market forces. For the four Class I mega-systems, the NITL Proposal enables the Board to begin to curtail supracompetitive revenues that now are resulting from the highest levels of differential pricing, and to address efficiency problems and service instabilities the mega-systems have exhibited, by introducing a limited increase in market forces. The NITL Proposal is reasonable, and among the least intrusive actions the Board could consider, to address the competitive issues that have come to light in the industry.

B. Coal and Unit Train Issues

Coal and other unit train shipments have distinct operating, economic, and regulatory characteristics that may affect the rate, efficiency, and service benefits such traffic is able to realize from the NITL Proposal. As a coal shipper, AECC offers the following comments to illuminate issues raised by the NITL Proposal that are particularly relevant or unique to coal and unit train shipments.

Reciprocal Switching vs. Rate Case Relief. The relief provided to coal shippers under reciprocal switching would differ from the relief available from the Board's rate case procedures, and would complement rate case relief in ways that produce important public interest benefits. Both the 240% R/VC standard proposed by NITL and the RSAM-based standard suggested by the Board would only introduce reciprocal switching when rates are far above the jurisdictional threshold, which has provided the basis for prescribed rates in several recent coal rate cases. ^{21/} Thus, after adoption of the NITL Proposal there would still be a substantial number of situations in which the rate case procedures offered shippers the only available remedy for excessive rail rates. However, in situations where a reciprocal switching remedy was available, it would offer benefits to the shipper and the public that could not be provided by a rate case. Rate cases provide no leverage over efficiency and service quality issues, which have many important consequences. For example, obtaining access to a shorter route furthers the public interest goal of minimizing resource costs, in part by reducing the size of the railcar fleet and car-miles, as well as the locomotive hours and miles, required to move the shipper's coal. Likewise, obtaining more reliable service translates to reduced needs for spare trainsets and coal stockpile inventory. If the service reliability problems on the incumbent railroad were caused by capacity limitations on portions of its route, reciprocal switching could reduce the need for expensive capacity expansion projects by routing traffic over surplus capacity on the lines of other carriers. The market forces released by the NITL Proposal would

^{21/} Recent examples of this include the KCPL/Montrose (Docket No. NOR 42095) and OGE/Muskogee (Docket No. NOR 42111) cases. Of course, a coal shipper would still need to incur the higher level of cost, complexity, and time commitment associated with a rate case in order to have the prospective ability to compel rates at or near the jurisdictional threshold.

not necessarily have widespread impacts on rates paid by coal shippers, but they could be very beneficial in other important areas. 22/ Consideration therefore should be given to the possibility of adding efficiency and service triggers to the rate and share triggers proposed by NITL. 23/ Such triggers would enhance the public interest benefits of the NITL Proposal for coal traffic.

Interchange Facilities. The railroad parties claim that implementation of the NITL Proposal would be impeded by the absence of interchange facilities at specific locations, particularly for unit train traffic. These claims overlook the fact that, by statute, the railroads have an obligation (under Section 10742) to provide interchange facilities that are “reasonable, proper and equal” where interchange is needed. If the Board determines that it is in the public interest for reciprocal switching to be made available in defined circumstances, the railroads have an obligation to provide appropriate facilities.

22/ AECC provided to the Board a detailed description of several adverse efficiency and public interest impacts on coal traffic that have resulted from the combination of protecting carrier long hauls (via the Bottleneck Rule) and greatly extending the lengths of those hauls (via the mergers that created the duopolies). See Docket No. EP 680, Study of Competition in the Freight Railroad Industry, AECC Comments (December 22, 2008), Nelson Statement at Appendix A. The availability of reciprocal switching pursuant to the NITL Proposal would mitigate at least a portion of those adverse impacts.

23/ For example, reciprocal switching could be made available where the alternate route is shorter; where the incumbent carrier’s route entails a gross weight or train length restriction that the alternate route does not; where a carrier has failed to move tendered volumes for a specified period of time; where a carrier has provided a captive facility with service levels inferior to that provided to similarly-situated competitive facilities; etc. Efficiency and service are not mentioned explicitly in Section 11102(c), but Section 11102(c)(1) indicates that reciprocal switching can be ordered when it is “in the public interest” or “necessary to provide competitive rail service”. Section 10705(a)(2) plainly articulates public interest efficiency and service criteria for providing competitive access.

Furthermore, as a practical matter, a railroad that would obtain new traffic as a result of the interchange would have a direct financial incentive to ensure the adequacy of such facilities.

Unit Train Interchange Efficiency. As discussed in Part A of this Discussion, the railroad parties' complaints that reciprocal switching would cause inefficiency are without merit because they disregard the benefits that can result from the availability of a more efficient route. This is particularly true with respect to long-distance heavy-haul coal traffic, for which the circuitry and topography of available routes can have major effects on the viability of the movement. The railroads highlight what they claim are logistical problems that would supposedly be caused by the interchanges required for reciprocal switching, but even if such problems did exist for some classes of traffic, they are comparatively minor for unit trains, as the Board found in the UP/SP merger case. ^{24/} Given that interchange costs are minor, market forces would tend to shift unit train traffic to the most direct and efficient routes.

Compensation Formula. The compensation formula proposed by NITL is on a "per car" basis, even when it is to be applied to unit train movements. In Docket No. EP 431, the Board is devoting considerable effort to address some of the issues that arise in determining the costs of unit trains when costs are treated on a "per car" basis, and has introduced the concept of treating some costs on a "per shipment" basis. Unit trains may vary in length from around 40 to 135-150 cars, complicating the use of compensation on either a "per car" or "per shipment" basis. A 135-car train plainly costs more to switch than does a 45-car train, but

^{24/} The Board specifically found that "...interline movements do not significantly detract from the efficiencies of run-through unit coal trains." See Decision No. 44 (August 6, 1996) at page 154.

almost certainly not 3 times as much. Furthermore, costs for unit train movements are understood to vary largely as a function of gross weight and distance moved. There should be further consideration of compensation for reciprocal switching (origin to point of forwarding or point of receipt to destination) movements of unit trains, including, but not limited to, the possibility of multiplying URCS costs for the movement times the 240% R/VC standard proposed by NITL or the RSAM values suggested by the Board. This would reasonably link the compensation to the cost-causing characteristics of the movement while providing contribution consistent with the standard used to establish eligibility for reciprocal switching.

“Winners and Losers”. The railroads argue that the NITL Proposal creates “winners” and “losers” among shippers, with “losers” including coal shippers who supposedly would experience losses of revenue from cross-over traffic in rate cases, leading to higher stand-alone costs and rate prescriptions than would be the case absent the NITL Proposal. ^{25/} This argument is myopic, and should not concern the Board, for at least two reasons. First, as outlined previously, the NITL Proposal may not produce rate reductions for coal shippers that are anywhere near as substantial as the reductions available through a rate case. Under the NITL Proposal, a railroad hypothetically could charge a rate up to an R/VC ratio of 239% on a coal movement to a facility near a common point with a potential competitor without facing the possible introduction of reciprocal switching. For the same movement, the railroad easily could face a much lower prescribed rate from a rate case. The NITL Proposal will produce downward pressure on rates for some coal shippers, but the availability of the Board’s major rate case procedures limits to some extent the scope of such direct benefits. Second, for coal

^{25/} See, for example, AAR Opening Comments at 16-17.

shippers who would not benefit directly from the NITL Proposal, including those ineligible for reciprocal switching under the Proposal and those who theoretically would experience increased SAC rates, tangible indirect benefits may result from downward pressure on fuel supply costs at specific facilities produced by the NITL Proposal through “coal-by wire” and similar considerations.

Additional Efficiency and Public Interest Benefits. For coal shippers who are able to use the NITL Proposal, the ability to access a beneficial alternative route without having to consume resources to construct a duplicative rail spur or conveyor, undertake costly transloading and truck service, etc., is a substantial efficiency and public interest benefit of the NITL Proposal. The enhanced ability it provides for some coal shippers to constrain high rail rates without the cost and effort associated with a rate case also has an element of efficiency.

75 Percent Criterion. The opening comments of several parties noted the existence of measurement problems associated with NITL’s proposed 75% criterion. AECC acknowledges that, due to volume commitments made under contracts and/or public pricing documents, coal traffic may move up to 100 percent by a single carrier in a given time period, even where effective competition exists. However, that does not alter the fact that a high percentage of traffic handled by a carrier over a period of time is indicative, all else equal, of a lack of full effectiveness of the competition offered by other carriers who physically may be

able to participate in the given traffic. 26/ Some refinements of the 75% criterion may need to be developed.

3-to-2 Harms. The NITL Proposal would provide a start towards undoing some of the unmitigated harms to the price/service options for coal traffic caused by 3-to-2 reductions in the number of carriers (as occurred in the mega-mergers). Such harms were identified in the Christensen Study conducted for the Board. 27/

Regulatory Remedies for Poor Service. The railroads refer to existing regulatory remedies for poor service as if such remedies would be preferable to reciprocal switching. UP specifically observes that “any shipper receiving such poor service that it would prefer forced switching should be able to obtain relief under existing law”. 28/ For coal shippers this is an interesting, albeit ironic, point of view. In Docket No. EP 705, UP admitted that during the PRB service disruption that began in 2005 UP actually increased its shipments of southern PRB coal to noncaptive (including new) customers, while captive plants suffered a huge shortfall. 29/ Those captive plants included the facility that was the subject of a through route application

26/ The 75 percent criterion implies that one or more alternative carriers are physically able to participate in the traffic, but do not or cannot compete effectively. Because a carrier’s physical ability to serve a given point does not ensure the competitiveness of routes it may offer to/from any other given point, the Joint Coal Shippers (Entergy Arkansas, KCPL, Seminole and WE Energies) are correct that reciprocal switching does not necessarily introduce effective competition for any given movement. See Joint Coal Shippers Opening Comments at 8-14. Simple eligibility for reciprocal switching therefore should not govern market dominance determinations.

27/ See Christensen Study, at 6-10 and Table 6-3 at page 6-11, as discussed in Docket No. EP 705, Competition in the Railroad Industry, AECC Initial Comments, VS Nelson at 15-16.

28/ See UP Opening Comments at 5.

29/ See Docket No. EP 705, Competition in the Railroad Industry, UP Reply Comments (May 27, 2011), RVS Koraleski at 17, Figure 2.

considered in Docket No. 42104, which had a repeated history of delivery shortfalls sufficient to necessitate costly burn restrictions. After years of litigation, the Board denied the through route application, which the Board itself had suggested as the preferred method for addressing the subject facility's chronic service problems. This denial mirrored the denial of an application for emergency service filed by the subject facility's sister plant (White Bluff) – which at the time was also captive - when it was experiencing delivery shortfalls and costly burn restrictions more than a decade earlier. ^{30/} In advocating a preference for the existing “remedies” for poor service, the railroads undoubtedly are aware of the track record in which the Board routinely has forced captive shippers to bear the very substantial burdens stemming from the multiple episodes of service degradation and failure that have arisen since the creation of the four Class I mega-carriers. The Board can reasonably view this preference as an indication that even the limited availability of reciprocal switching contemplated in the NITL Proposal would establish greater accountability for service problems than has occurred under the existing regulatory remedies.

CONCLUSION

AECC does not claim that reciprocal switching is a panacea for all competitive problems in today's railroad environment. However, it would introduce market forces to counteract to some degree the conditions contrary to the public interest that have developed

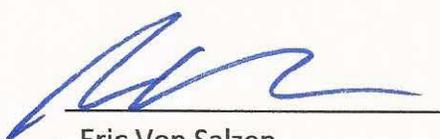
^{30/} See STB Service Order No. 1518 (Sub-No. 1), Joint Petition for a Further Service Order, decided July 30, 1998, which is available via the Board's website at [http://www.stb.dot.gov/boundvolumes3.nsf/b466c97893ec3be08525680b006041bd/5d4eb7676890769385256b610080969a/\\$FILE/Volume3-20.pdf](http://www.stb.dot.gov/boundvolumes3.nsf/b466c97893ec3be08525680b006041bd/5d4eb7676890769385256b610080969a/$FILE/Volume3-20.pdf).

in the Class I rail industry, particularly the supracompetitive earnings, inefficient routings, and service instabilities exhibited by the four mega-carriers.

The Board and ICC historically have restricted competitive access options so tightly that they essentially are never used, but the changing circumstances of the industry and new information regarding its performance now call for an increase in reliance on market forces. It is time for the Board to unlock the door, and begin to make room for objective criteria, like the NITL Proposal, under which at least limited reliance can be placed on market forces to protect against the harms associated with supracompetitive earnings, inefficient routings, and service irregularities that have been observed.

AECC urges the Board to continue the development of the NITL Proposal, including establishment of a process for assessing possible additional “triggers” for competitive access relief, and refinements in the compensation formula to be used for unit trains.

Respectfully submitted,



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Corporation

Dated: May 30, 2013

Certificate of Service

I hereby certify that this 30th day of May, 2013, I caused this document to be served, electronically or by first class mail, on all Parties of Record on the Board's Service List for this docket.


Eric Von Salzen