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May 27, 2011

VIA HAND DELIVERY

Ms. Cynthia Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Ex Parte No. 705, *Competition in the Railroad Industry*

Dear Ms. Brown,

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the Reply Comments of CSX Transportation, Inc.

Please acknowledge receipt of CSX Transportation, Inc.'s Reply Comments by returning a date-stamped copy with our messenger. Thank you for your assistance in this matter; should you have any questions, please contact the undersigned.

Sincerely,

Paul A. Hemmersbaugh
Counsel to CSX Transportation, Inc.

Enclosures

MAY 27 2011
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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

REPLY COMMENTS OF
CSX TRANSPORTATION, INC.

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Dated: May 27, 2011

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

REPLY COMMENTS OF
CSX TRANSPORTATION, INC.

CSX Transportation, Inc. ("CSXT") respectfully submits these Reply Comments in response to initial comments submitted in this proceeding, in response to the Notice served by the Surface Transportation Board ("STB" or "Board") on January 11, 2011, as modified on February 4, 2011. CSXT joins in the Reply Comments of the Association of American Railroads, and provides these further responses to comments filed by other parties.

INTRODUCTION

Despite the submission of initial comments by nearly 200 parties, none of those proposing regulatory change has established any justification sufficient to change existing rail competition and access regulations and policies, which started with the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") and the Staggers Rail Act of 1980 ("Staggers Act"), and have evolved over the last 30 years to provide a balanced regulatory regime that relies mainly on market forces, with regulatory intervention where necessary. This regulatory revolution is universally acknowledged as one of the most successful regulatory reforms in American history and has resulted in a freight rail transportation system that is the envy of the world. Existing law, rules, and regulations provide ample, accessible remedies for shippers or others who believe they have genuine grievances and concerns. While the various forced access and forced interchange proposals advocated by commenters to this proceeding would have substantial adverse consequences for rail carriers, the freight rail network and rail service, they would afford their advocates few if any sustainable long-term benefits or relief that is not already available under existing law or policy. CSXT urges the Board to reject the efforts of a minority of shippers who seek only to drive down their rail transportation rates through regulatory intervention and radical change to a regulatory system that is working well for the overwhelming majority of shippers and other stakeholders.

As context for its responses to the initial submissions of commenters to the proceeding, CSXT reemphasizes some of the major points from its opening comments about the current state of the rail transportation industry, the important role of the current regulatory structure in maintaining a healthy rail system and the manifold benefits it provides to shippers, the American economy, and the environment: Railroads in the United States today operate in a highly competitive surface transportation market in which motor carriers, water carriers, pipelines, multi-modal transportation and other rail carriers all compete rigorously.[1] The benefits to shippers of that competition and the other regulatory reforms implemented in recent decades by the Interstate Commerce Commission ("ICC") and the Board is illustrated by the 55% decline in rail rates (in real, inflation-adjusted terms) since the Staggers Act passed in 1980.[2] During that same period, rail productivity and rail freight volume have increased by 172% and 100% respectively. Train accident rates have declined 76% and the employee injury rate has

[1] *See* CSXT Opening Comments Sec. II.A.

[2] *Id.*, at 11-12; Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry, Update*, at ES-i (Jan. 2010).

plummeted by 82%.[3] By those and other measures, the transportation market that has evolved under the regulatory system implemented since Staggers is quite competitive and has allowed rail carriers to achieve myriad non-price improvements and efficiencies, which benefit shippers and the public. The proposed regulatory changes and reversals advocated by a few parties to this proceeding could severely undermine that progress with its attendant widespread benefits, and return railroads and their customers to conditions that prevailed in the moribund pre-Staggers Act period. At the same time, such unwarranted and unforeseen changes in rail regulation would harm current and future investments in rail infrastructure, including investments made or planned in reliance on the existing, stable regulatory regime.

When making important economic and investment decisions, rail carriers, their investors, and suppliers rely—as do many shippers—on current law and regulations governing routing, access, interchange and other policies, precisely because they are the law.[4] Current railroad laws, policies, regulations, and standards are the product of congressional consideration, action, and review, extensive regulatory proceedings, and judicial review and approval.[5] Congress further affirmed and ratified the rules, decisions, and policies at issue when it enacted the Interstate Commerce Termination Act ("ICCTA") and intentionally and purposefully left in place existing court decisions and agency rules, policies, and regulations. As a result, the Board does not have the power to materially change the rules, standards and agency and court decisions

[3] *See* CSXT Opening Comments Sec. II.A., at 11.

[4] *Id.*, at Sec. I.A.

[5] *See Cent. Power & Light Co. v. S. Transp. Co.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999); *Intramodal Rail Competition*, 1 I.C.C. 2d 822 (1985) *aff'd sub nom. Baltimore Gas & Elec. Co. v. United* States, 817 F.3d 108 (D.C. Cir. 1987); *Midtec Paper Corp. v. Chicago & Nw. 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).

that Congress has approved through re-enactment of the law without changing those rules, policies, and decisions.[6]

Thus, for example, the Board is generally prohibited by statute from prescribing through routes that would short-haul a carrier.[7] Similarly, binding Supreme Court precedent holds that in evaluating the reasonableness of a through rate, the agency must evaluate the entire through rate and not the rate for a portion or segment.[8] As the Board has recognized, the Supreme Court's *Great Northern*[9] decision and related cases are the foundation of the Bottleneck rule. Unless and until those binding Supreme Court decisions are overturned, the Board lacks the power to overturn the Bottleneck rule. Congress has repeatedly ratified Supreme Court decisions concerning the preceding two requirements by leaving them untouched despite multiple amendments and changes to the governing statute.[10]

Moreover, in the years since ICCTA and the Board's bottleneck decisions, Congress has uniformly rejected every one of at least sixteen separate pieces of legislation seeking to change long standing policies on bottleneck routes, reciprocal switching, terminal access and other forced access and interchange policies.[11] A congressional letter to the Board in this proceeding emphatically reaffirmed that the leaders of the key transportation committees in the U.S. House of Representatives support the current regulatory rules and policies and that "[a]ny policy change

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[6] *See* CSXT Opening Comments, Sec. I.C; *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120 (2000); *see also* Opening Comments of Norfolk Southern at 14-29.

[7] As CSXT and others noted in their initial comments, there are some limited exceptions to this rule. *See* 49 U.S.C. 10705(a)(2); CSXT Opening Comments at Sec. III.

[8] *Id.*, at Sec. III.A.1.

[9] *Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458 (1935) ("*Great Northern*").

[10] *See* CSXT Opening Comments, at Sec. III.A.2.

[11] *See* CSXT Opening Comments, Sec. I.C

made by the STB which restricts the railroads' abilities to invest, grow their networks and meet the nation's freight transportation demands will be opposed by the Committee."[12] Congress has made clear it does not want the Board to change existing law and policy, and the Board lacks authority or reason to contravene that congressional mandate.

Even if the Board had the authority to change the rules and policies under review—which it does not—there is simply no sound reason to do so. The current regulatory regime has been a resounding success and the benefit of healthy railroads to the American economy has been significant. Every $1 of investment in the freight railroads yields a $3 economic benefit. Every $1 billion of rail investment generates 20,000 jobs.[13] The current balanced regulatory system, developed and implemented over the last three decades, has improved the financial performance, health, and viability of rail carriers, a key goal of the Staggers Act.[14] That improvement has allowed railroads to reinvest more than $480 billion in their networks since enactment of the Staggers Act. Those investments, and the additional investments in the form of public-private partnerships, are made in reliance on the current regulatory regime. Changes to established access and routing rules would retroactively thwart investment-backed expectations and strand existing rail assets and investments.

Equally bad, adverse change to the current regulatory regime would stifle future investment at the very moment that policymakers are relying on rail carriers to move more freight in order to reduce the burden on highway infrastructure, mitigate the substantial need for

[12] *See* Letter from Transportation and Infrastructure Committee Chairman John Mica and Ranking Member Nick Rahall and Subcommittee on Railroads, Pipelines & Hazardous Materials Chairman Bill Shuster and Ranking Member Corrine Brown.

[13] *See Ass'n of Am. R.R., America's Freight Railroads: Supporting American Jobs, Moving the American Economy*, at 2 (Mar. 2011), *available at* http://www.aar.org/~/media/aar/communications/railroadsjobs_final%20_3_.ashx (citing U.S. Department of Congress data).

[14] *Id.*, at Sec. II.D.

publicly funded infrastructure improvement through private investment in rail networks and infrastructure, conserve fuel, protect the environment, and support projected growth in the economy and attendant need for greater transportation capacity. [15] Ultimately, the reversal of rail regulatory policies proposed by some commenters would not only be detrimental to carriers, but also to most shippers, their customers, and the general public.

In the end, the shippers who importune the Board to make changes to existing access and routing rules are engaged in thinly veiled attempts to force lower rail rates, by any means available. The Board should recognize these forced access proposals for what they are: an attempt to enlist the government to compel the involuntary use of private property and rail assets by others, in order to effectuate an income and wealth transfer from rail carriers to a selected subset of shippers. What's more, these shippers seek this government-aided transfer of wealth between private businesses without evincing any regard for the substantial and widespread adverse consequences of their confiscatory proposals for the rail transportation system, other shippers, consumers, and the public. Although several shippers use a misreading of a single provision of the Rail Transportation Policy to support their calls for artificial, government-manufactured competition, in reality their proposals would flout two of the most important rail policy goals: to allow "to the maximum extent possible, competition and the demand for services to establish reasonable rates," and "to minimize the need for Federal regulatory control." 49 U.S.C. § 10101.

For these reasons and those set forth below, the Board should reject short-sighted requests for changes that would undermine the existing, successful, and stable regulatory environment.

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[15] *Id.*, at Sec. II.E.

I. RATES AND SERVICE

The complaints and criticisms leveled by those commenters who seek change in existing rail access and competition policies and regulation generally boil down—explicitly or implicitly—to requests for lower rail rates, and in some instances enhanced rail service. *See, e.g.*, Joint Comments of Alliance for Rail Competition, the American Chemistry Council, *et al.* at 6-8, 46-61; Opening Comments of ARC, Montana Wheat and Barley Committee, *et al.* at 2-11; Comments of E.I. du Pont de Nemours and Company at 2, 8-11; Comments of Nat'l Ass'n of Chemical Distributors; Comments of Olin Corp. at 4-6, 18-34; *see generally* Comments of Western Coal Traffic League ("WCTL") and supporting verified statements. At the same time, several commenters opine that even if the Board adopted forced access and forced interchange policies, it would fail to address adequately their primary concern: a desire for lower rail rates. *See, e.g.,* WCTL Comments at 3 ("[E]ven if the Board reversed all of its competitive access decisions . . . . (*e.g.* on bottleneck relief, terminal access/reciprocal switching, etc.), the end result may not produce any meaningful relief for rail customers."); *see also* Joint Comments of OPPD, AES, *et al.* at 24-26 (asking Board to declare "that qualitative market dominance can be present in a concentrated market even if a shipper has access to two railroads . . ."); Initial Comments of Westlake Chemical Corp. at 8.

Thus, it is apparent that, for most of the complaining commenters, this proceeding is an opportunity for them to press other concerns—most prominently rates and service—and advocating radical change to established routing and access rules and laws is of interest only as a potential means to their desired end: forcing lower rail rates and enhanced service. This indirect approach and its attendant adverse consequences are both unwarranted and unnecessary, however, because existing laws, rules, and procedures are available that allow shippers to seek redress for excessive rates or inadequate service directly.

A. Rate Reasonableness Challenges Provide Appropriate and Direct Means for Shippers to Seek Relief from Rates They Believe to be Unreasonable.

Shippers who believe their rail rates are unreasonably high have multiple alternatives for challenging those rates before the Board, including multiple processes for seeking rate reductions, prescriptions, and reparations. *See* 49 U.S.C. §§ 10701, 10704. For rate disputes involving larger amounts, shippers may bring rate challenges before the Board under the Constrained Market Pricing constraints established and developed by the I.C.C. and the Board over the last 25 years. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) ("*Guidelines*"). The Board has heard and decided numerous cases under the *Guidelines* and the Stand Alone Cost ("SAC") constraint, and in many cases complainants have been awarded millions of dollars in rate prescriptions and reparations. Ironically, the two classes of shippers who most aggressively seek forced access and forced interchange in this proceeding—solely served coal and chemical shippers—are those who most frequently avail themselves of the Board's rate reasonableness procedures under the *Guidelines*. Although those shippers have prevailed more often than not in SAC cases, they apparently are not satisfied with the rate levels they are able to achieve through the rate challenge processes prescribed by Congress and the Board. Unable to obtain rates that are as low as they desire under the appropriate established procedures, those same shipper groups are now the chief advocates of forced access, forced interchange, and prescribed routings. Apparently, large, financially healthy shippers believe that such changes to the law and policy reversals may allow them to obtain indirectly what they are unable to get through rate cases or market negotiations—artificially low prices for the rail transportation service they demand. [16]

[16] It is puzzling that some shipper commenters advocate such forced access, while simultaneously stating that they believe it will not achieve their aim of lower rates and better service.

Not only do *Guidelines* cases provide a rigorous and sophisticated methodology for rail shippers to challenge rates, recent changes to SAC procedures have made those cases more streamlined, and less costly to pursue. Following a notice-and-comment rulemaking, the Board adopted significant and substantial changes to the way SAC cases are presented and evaluated in 2006. *See Major Issues in Rail Rate Cases*, STB Ex Parte 657 (Sub-No. 1) (served Oct. 30, 2006) ("*Major Issues*"). Although CSXT and other rail carriers opposed several significant changes made in that case, there can be little dispute that those changes made SAC cases more streamlined and less time-and-resource-consuming. As Board Chairman Elliott has explained to Congress, those major reforms have "streamline[d] the SAC test and produce[d] more accurate results." *The Federal Role in National Rail Policy: Hearing Before the Senate Committee on Commerce, Science & Transportation*, 11th Cong. 12 (Sept. 15, 2010) (Testimony of The Honorable Daniel Elliott III (STB Chairman) ("Elliott Testimony"). Since the promulgation of *Major Issues*, the Board has heard numerous additional SAC cases, including several cases that the Board was able to settle through its enhanced mediation program and efforts. *See id.* at 8, 13.[17] There are several SAC cases presently pending before the Board, including two in which CSXT is the Defendant,[18] an indication that shippers believe such cases are a viable forum to challenge common carrier rates they believe to be unreasonably high.

Responding to concerns that SAC cases were too complex and costly for disputes involving shipments of smaller volumes or involving lower dollar amounts, the Board has also established two alternative approaches for medium and small-sized rate cases. *See Simplified*

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[17] Of course, most movements that would be subject to the Board's jurisdiction are governed instead by private contracts negotiated by the parties. It is only in those situations in which the parties are unable to reach a voluntary agreement on a negotiated private contract that a shipper may consider bringing a rate case.

[18] *Total Petrochemicals USA Inc. v. CSX Transportation, Inc.*, STB Docket No. 42121; *M&G Polymers USA, LLC v. CSX Transportation, Inc.*, STB Docket No. 42123.

Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (served Sept. 5, 2007) ("*Simplified Standards*"). Following a notice-and-comment rulemaking in which numerous parties (including shipper groups and individual shippers) submitted multiple rounds of comments, the Board adopted two new rate case methodologies, Simplified Stand-Alone Cost ("SSAC") and the Three Benchmark approach. *See id.* The SSAC approach is a significantly simplified version of the SAC test, which allows rate cases to be conducted more expeditiously and less expensively. Rate cases brought under the less-precise, streamlined SSAC approach may result in relief of up to $5 million. *Simplified Standards* at 27-28. Finally, for small rate cases, the Board adopted an imprecise average rate comparison methodology referred to as the Three Benchmark method. This crude method proceeds under an even more accelerated schedule (requiring a final decision within 8 months of the filing of the case), and is significantly less costly to litigate. *See* Elliott Testimony at 12.

Since the *Simplified Guidelines* were promulgated in 2007, shippers have brought several cases under the Three Benchmark approach, including three cases involving seven movements against CSXT alone. *See E.I. du Pont de Nemours & Co. v. CSX Transp. Inc*, STB Dkt. Nos. 42099, 42100, 42101. In those cases, the complaining shipper prevailed before the Board and obtained a rate prescription on six of the seven rates it challenged. *See E.I. du Pont de Nemours & Co. v. CSX Transp. Inc.*, STB Dkt. No. 42099 (served June. 30, 2008); *E.I. du Pont de Nemours & Co. v. CSX Transp. Inc.*, STB Dkt. No. 42100 (served June. 30, 2008); *E.I. du Pont de Nemours & Co. v. CSX Transp. Inc.*, STB Dkt. No. 42101 (served June. 30, 2008).[19] The Board also found the challenged rates unreasonable in the other Three Benchmark case litigated to conclusion. *See U.S. Magnesium v. Union Pacific*, STB Dkt. No. 42114 (served Jan. 28,

[19] The parties settled those cases while they were on appeal.

2010). Likely because of a pending STB rulemaking concerning the selection of comparison groups, no new Three Benchmark cases have been filed recently.

Based on experience with the simplified small rate cases approach to date, two salient facts have emerged. *First*, shippers bringing challenges have prevailed on seven of eight, or 87.5% of rate challenges brought under the Three Benchmark methodology. Plainly, this simplified approach has provided an effective tool for shippers seeking to challenge rail rates on smaller shipments. *Second*, the complainants in every one of these cases have been chemical shippers, one of the main groups agitating so strongly for forced access and forced interchange in this proceeding.

More broadly, since the adoption of simplified procedures in 2006 and 2007, the Board has heard at least 20 rate cases, every single one of them brought by a large chemical or coal shipper. Seven of those cases remain pending. Of the thirteen that have reached final resolution, fully twelve (92%) ended in either a settlement or a finding that the challenged rate was unreasonable.[20] Thus experience of rate case complainants in recent years can hardly be characterized as one in which they have been unable to obtain rate reductions (or an acceptable settlement) through the Board's rate reasonableness processes.

Together, the foregoing data further confirm that what complaining coal and chemical shippers are seeking in this proceeding is not fair and reasonable rates commensurate with the value of the rail service they enjoy. They are really seeking lower rates by any means available. The means they seek to use here is the creation of artificial competition through forced access and forced interchange, with government-prescribed terms. Existing rate challenge procedures provide accessible and appropriate means for shippers who believe their rates are too high to

[20] *See* Elliott Testimony at 13 (listing seventeen rate cases). Since Chairman Elliott's testimony, at least three more SAC cases have been filed with the Board. All three of those cases are pending.

seek reductions before an objective neutral agency. The naked desire of some shippers for lower rates is no warrant for government-mandated frustration of reasonable investment-backed expectations by forcing carriers to open their private infrastructure and facilities to their competitors. Congress has established statutory methods for challenging rail rates, and it has ratified the procedures the Board and its predecessor have developed to implement those statutory requirements.

B. Congress and the Board Have Also Established Procedures for Addressing Service Problems and Concerns.

Some commenters apparently believe that forced access and forced interchange would result in rail carriers providing better or more efficient service. As several commenters explained however, as an operational matter, forced access, forced interchange, and shipper-dictated routings would likely result in very substantial service problems and degradation. *See, e.g.,* Comments of Union Pacific Railroad Company, V.S. Lance Fritz, EVP Operations; Opening Comments of Norfolk Southern Railway Company, V.S. Mark Manion, EVP and Chief Operating Officer. Thus, far from improving service, allowing more frequent forced access could actually undermine service, safety, and efficiency of the rail network.

As with rates, the Board already has authority and procedures to address service problems. First, the Board has established a highly successful informal dispute resolution process for shipper-carrier disputes, the Rail Customer and Public Assistance Program ("RCPA"). The RCPA program is free, easily accessible, and can be confidential at a party's request. In each of the last two years, the Board's RCPA team has addressed approximately 1400 inquiries and disputes. *See* Elliott Testimony at 7. As Chairman Elliott described the program to the Senate Commerce Committee:

> All matters are expeditiously handled on an informal basis and involve a wide-range of issues, including rates and other charges;

> car supply, claims for damages,; labor concerns; safety; noise; land disputes; and *many other service-related problems*. Very often, informal resolution allow both sides to walk away satisfied, and obviates the need for litigation before the Board.

Elliott Testimony at 8 (emphasis added). The Board also has several other advisory committees comprised of representatives of rail carriers, customers, and other stakeholders who provide input and advice on a variety of issues, including service-related matters. Moreover, the Board and its staff closely monitor rail industry performance and service, and require reports from Class I carriers concerning their plans for handling peak demands for agriculture, coal, chemicals, and intermodal.

For disputes that cannot be resolved informally, the Board has statutory power to hear unreasonable practices complaints. *See* 49 U.S.C. §§ 10702, 10704. In recent years, the Board has heard unreasonable practices cases concerning a variety of matters, including coal dust, fuel surcharges, routing, demurrage, unit train requirements, hazmat movements, car ownership and equalization charges, and train size rules. As Chairman Elliott stated in testimony to Congress, "the large number of pending [unreasonable practices] complaints indicates an understanding by our stakeholders that the agency is . . . 'open for business' to hear disputes." Elliott Testimony at 14.

Finally, the Board has broad power to address serious service problems under 49 U.S.C. § 11123. Under that statutory authority, the Board may address service problems by directing how a carrier will handle or route its traffic; require joint or common use of rail facilities; prescribe through routes; require rail carriers to operate over the lines of another rail carrier; and take other measures necessary to address service problems. The Board has demonstrated that it is ready, willing, and able to exercise this authority where necessary. *See, e.g., Arkansas Midland R.R. Co., Inc.—Alternative Rail Service—Line Of Caddo Valley R.R. Co.*, STB Fin. Dkt. No. 35416 (served Feb. 11, 2011) (granting a second 120-day extension on an emergency service order allowing Arkansas Midland Railroad to provide service on a 30-mile track of local line operated by Caddo Valley Railroad); *PYCO Indus., Inc.—Alternative Rail Service—South Plains Switching, Ltd. Co.*, STB Fin. Dkt. No. 34802 (served Jan. 26, Feb. 24, and June 21, 2006) (authorizing West Texas and Lubbock Railway to provide emergency rail service to PYCO Industries, Inc. over the rail lines of South Plains Switching, Ltd. Co.); *Arkansas Midland R.R. Co., Inc.–Alternative Rail Service–Line Of Delta Southern R.R., Inc.*, STB Fin. Dkt No. 34479 (served Nov. 1, 2004) (extending an order for alternative rail service allowing Arkansas Midland Railroad to provide service over a Union Pacific-owned line); *Rail Service in the Western United States*, STB Ex Parte 573 (Service Order No. 1518) (Oct. 31, 1997); *id.*, Supplemental Order No. 1 to Service Order No. 1518 (Dec. 4, 1997).

In sum, shippers who believe their rates are unreasonable or their service is inadequate already have ample statutory and regulatory avenues for resolution of their concerns and complaints. Radical new forced access and routing procedures, and their negative consequences for rail carriers, infrastructure investment, the rail network, and most shippers and customers, are not remotely justified as an indirect "remedy" to complaints about rates that are too high or unsatisfactory service. The proposed "cure"—which would circumvent existing procedures and remedies established by Congress and the Board—would be far worse than the purported "disease" of rates that are higher than some shippers would like and service and routing that is sub-optimal for some selected shippers.

II. RAIL CARRIER ROUTING PROTOCOLS

Several commenters complain about carriers' routing protocols and assert that they are inefficient and result in slower service and higher rates than would be necessary if carriers were required to follow more direct routes or routes specified by shippers. These comments demonstrate a basic misunderstanding of modern rail service design. Rail carriers today design their service and routing protocols to maximize efficiency and to minimize overall transit times. Carload traffic must be assembled into blocks and trains in centrally located yards in order to consolidate traffic flows, maximize longhauls, minimize switching and car handlings, and generate numerous other efficiency benefits. Accordingly, the route followed by carload traffic from a particular origin to a particular destination may not travel by the most direct route, but rather follow a route that maximizes overall efficiency and service for the greatest number of customers.

In this respect, rail service design and network operations for carload service are similar to the "hub-and-spoke" operations of air carriers. A person traveling by air from Richmond, Virginia to Miami, Florida would probably prefer to fly straight south from her origin to her destination. However, because there are too few passengers flying from Richmond to Miami to fill a large jet plane, the passenger may be required to first fly north to Newark or Detroit or southwest to Atlanta or Charlotte, where she will be joined by others flying to that central airport from other smaller origins (*e.g.*, Harrisburg, PA, Charleston, WV, Syracuse, NY, Raleigh, NC, and Knoxville, TN). Together, those passengers arriving from various spokes to the Newark, Detroit, Charlotte, or Atlanta hub can make up a full load that allows the air carrier to take advantage of economies of scale in transporting a full planeload of passengers from that hub to Miami. If each of those passengers were to take a direct flight from their origin to Miami, the aggregate costs of those flights, and hence the cost per passenger, would be far greater.[21] The use of the hub and spoke system thus benefits air carriers and their passengers.

[21] In contrast, single air corridors that handle a large volume of passengers, such as between New York City and Chicago, can fill airplanes with passengers from the single origin and destination airports, and do not need to use the hub and spoke system. This is analogous to railroad unit trains, including many coal trains, which move sufficient volume between a single origin and destination that they can move in a single large train that is assembled and

Similarly, rail carriers route individual cars or blocks of cars, which originate at a variety of geographically dispersed locations, to a classification yard, where they can be assembled into full trains and moved efficiently in long hauls. Individual shippers might prefer that their cars be moved by the most direct available rail route from origin to destination, but such routing would increase costs for the rail carrier, reduce system efficiency, and require the shipper to pay higher rates to offset the higher costs of such a less-efficient move.

CSXT has no interest in using circuitous routings that do not enhance efficiency or network efficiency. If a shipper's freight is moved over what appears to the shipper to be an indirect routing, it is because that route of movement is, all factors considered, the best and most efficient route, which maximizes the benefit of the rail system and service to the greatest number of customers. Forced access, or allowing shippers to dictate the route by which a carrier will move its traffic, would seriously undermine rail network efficiency, fluidity, and service, all of which would work to the detriment of the majority of rail shippers.

III. SURFACE TRANSPORTATION COMPETITION IS VIGOROUS AND RAIL CONSOLIDATION HAS ENHANCED THAT COMPETITION.

Contrary to the suggestions of some commenters, consolidation in the rail industry is not a new phenomenon of which the Board is just now taking notice. The Board has in fact carefully evaluated rail industry concentration and its consequences for decades, including its review and approval of the major rail consolidations of the 1980s and 1990s. A decade ago, in *Major Rail Consolidation Procedures*, the Board acknowledged "the declining number of Class I railroads," but determined—after an extensive notice-and-comment rulemaking—that the existing concentration of service by Class I railroads was not caused by rail mergers, but rather had long

loaded at the origin and then moves directly between origin and destination, without the need to gather additional cars from various other origins in classification yards and assemble blocks and trains.

been the market-driven structure of the industry. 5 S.T.B. 539, 546-48 (2001). In issuing its revised merger and consolidation rules, the Board rejected shipper assertions that the industry was "unduly concentrated into the hands of a very small number of Class I carriers." *Id.* at 548. As the Board explained, "even when there was a large number of Class I railroads, the U.S. rail industry was already highly 'concentrated' as compared to most other industries, in the sense that most shippers were served by a single railroad, and only a small percentage were served by two or more railroads. <u>This structure of the rail industry was created by the marketplace, not by recent mergers or by ICC or STB regulation</u>." *Id.* (emphasis added). As the Board further explained, "[r]ail investors generally have not believed that the investment in additional rail lines to create two- or three-railroad service to most locations or shippers would prove sufficiently profitable to warrant the investment." *Id.*

The competitive structure of the rail-to-rail market in which Class I railroads compete today has not changed materially since the Board made this evaluation. There have been no further mergers of Class I carriers in the intervening decade. As there were in 1999, there are currently 7 Class I railroads operating in the United States. The same issues trotted out by shippers in this proceeding were raised by comments in *Major Rail Consolidation Proceedings*, and were thoroughly explored by the Board, and the Board found that the market is not unduly concentrated. That same finding holds true today, and shippers have offered no credible evidence to the contrary.

Moreover, most commenters who complain about insufficient rail transportation competition focus narrowly on rail-to-rail competition. The competitive market in which rail carriers operate today, however, is the surface transportation market, which includes multiple alternative modes of transportation, including over-the-road trucks, barges and ships, pipelines, and multi-modal options like rail-truck transloading. Moreover, it is important to bear in mind that trucks still carry more than two-thirds of all freight traffic in the United States, while rail carriers move approximately 16 percent of that traffic as measured by tonnage. The most recent available study projected that by the year 2022, the percentage of all US freight moved by trucks will increase to 70 percent, while the percentage of traffic moved by rail will decline to 15.3 percent. *See* William B. Cassidy, *U.S. Freight Tonnage to Rise 24 Percent by 2022, ATA Says*, JOURNAL OF COMMERCE at 1 (May 20, 2011) ("The trucking industry continues to dominate the freight transportation industry in terms of both tonnage and revenue."). The same forecast projects that water transportation of freight will grow by approximately 10-12 percent during the same period. *See id.* Thus it appears that, over the next decade, rail carriers will face even greater competition to maintain their share of the freight transportation market.

Putting aside the question of the longstanding "concentrated" structure of the rail industry, since the passage of the Staggers Act of 1980 the Board and the ICC have consistently found that the rail mergers have offered pro-competitive advantages which benefit shippers. As the Board is well aware, each of these merger review proceedings involved extensive, thorough and exhaustive considerations of the competitive concerns raised by the many participating parties. Some shipper commenters in this proceeding now seek to second-guess the judgments made in these thorough, careful proceedings. As discussed below, contrary to the assertions of some commenters, there is no evidence that surface transportation markets are less competitive or offer lesser benefits to shippers and consumers as a result of the major consolidations approved by the Board and the ICC, the most recent of which was approved and consummated more than a decade ago.

In one of the most significant decisions concerning Eastern carriers in recent history, the Board approved the acquisition and division of Conrail by NS and CSXT in 1998. *CSX Corp. & CSX Transp., Inc., Norfolk Southern Corp. & Norfolk Southern Ry. Co.—Control & Operating Leases/Agreements—Conrail Inc. & Consolidated Rail Corp.*, 3 S.T.B. 196 (1998). One of the foremost reasons for the Board's approval of the transaction was its conclusion that the transaction would "result in a pro-competitive restructuring of rail service throughout much of the Eastern United States." *Id.* at 247. The Board further determined that "[b]ecause the transaction as conditioned will result in no instances of significant competitive harm, and will significantly increase competition for many shippers, the clear impact of this transaction is to create a substantial increase in rail-to-rail competition, and not a reduction." *Id.* at 248. The Board pointed to specific public interest benefits including increased competition with motor carrier service; new single-line routes; environmental benefits derived from a reduction in highway traffic; and an infusion of investment in rail infrastructure. The Board found that these benefits, together with cost savings of about $1 billion per year, would lead to savings for shippers. As the Board further confirmed, "the clear trend since 1980 has been that railroad efficiencies achieved through mergers or other means have been largely passed along to shippers in the form of lower rates and improved service." *Id.* at 249.[22]

And Conrail was far from the only significant merger transaction to receive Board approval due to its pro-competitive advantages. The Board has approved numerous major mergers over the last 30 years, finding pro-competitive advantages in all of them. In particular, for years the Board and the ICC have extolled the undeniable benefits of single-line service for

[22] The Board confirmed the pro-competitive nature of mergers and the benefits derived by shippers in noting that "[i]ndeed, our monitoring of rail rates indicates that this downward trend has continued unabated since 1993, a time during which rail service in the West was totally restructured with two major rail mergers." *Id.*

shippers. Single-line service is generally expanded and enhanced by mergers. As the ICC found, "shippers prefer single line or single system service because it improves reliability and transit times, and equipment availability." *Union Pacific Corp, et al.—Control—Missouri Pacific Corp & Missouri Pacific R.R. Co.*, 366 I.C.C. 462, 489 (1982); *see also Burlington Northern, Inc.—Control & Merger—St. Louis-San Francisco Ry. Co.*, 360 ICC 788, 935 (1980) ("The merged company will be able to provide new single-line service, reduced transit times, more efficient and frequent service, and improved car utilization."); *see id.* at 939-40 (finding merger would enhance both intramodal and intermodal competition through single-line service).[23]

More recently the Board has continued to emphasize the benefits of improved single line service, finding that the "chief benefit" of the Canadian National and Illinois Central merger was that it made "possible a new, single-line service alternative for many shippers." *Canadian National Ry. Co. et al.—Control—Illinois Central Corp. et al.*, 4 S.T.B. 122, 142 (1999). Further, in 2003, the Board approved the Dakota, Minnesota & Eastern Railroad ("DM&E") merger with Iowa, Chicago & Eastern Railroad ("IC&E"), finding that "[c]ommon control will also give shippers on both DM&E and IC&E new routing and service options and more efficient and competitive single-system access to significant new markets and gateways." *Dakota,*

[23] In approving the Burlington Northern-Santa Fe merger, the ICC again reaffirmed that single-line service offers significant benefits to shippers:

> Single-line service is important to shipper logistics strategies. Interchange between railroads can be costly. A single-line railroad route is becoming more important for carriers wanting to compete for service-sensitive freight. As a result of the new single-line service capability of the combined BN/Santa Fe, shippers will likely see decreases in working capital requirements as base inventories shrink due to improved transit times, and as safety stocks of inventory are reduced because the combined system can eliminate the uncertainty of interchange."

Burlington Northern Inc. & Burlington Northern R.R. Co.—Control & Merger—Santa Fe Pacific Corp. & The Atchison, Topeka & Santa Fe Ry. Co., 10 I.C.C.2d 661, 741 (1995) ("*BN-SF*").

Minnesota & Eastern R.R. Corp. & Cedar American Rail Holdings, Inc.—Control—Iowa, Chicago & Eastern R.R. Corp., 6 S.T.B. 511, 525 (2003).

Single-line service is not the only benefit shippers derive from mergers. The Board has consistently found that mergers result in improved efficiencies and savings for the railroads which in turn lead to savings and benefits for the shipper, including lower rates, improvements in transit times and service reliability, overall reductions in operating costs and improvements in productivity. As the Board summarized in discussing the merger between Union Pacific and Southern Pacific,

> The efficiency savings of the merger are very substantial, and the clear trend since 1980 has been that when railroads have reduced their costs through mergers or otherwise, those savings have largely been passed on to their shippers in terms of lower rates and improved service. Rail rates have decreased remarkably since 1980, despite the fact that most shippers are served by a single rail carrier, and few are served by three. Because of the several major mergers since that time, and due to the formation of Conrail as the single Class I carrier in the Northeast, large regions of the country are now served by a single major rail carrier or by two such carriers. Even with this structure, rail competition has thrived, and shippers have continued to enjoy increasingly lower rates.

Union Pacific Corp., et al.—Control & Merger—Southern Pacific Rail Corp., et al., 1 S.T.B. 233, 370 (1996) ("*UP-SP*"). The Board recently reiterated its findings that mergers benefit shippers in its approval of the acquisition of the Dakota, Minnesota & Eastern Railway by Canadian Pacific Railway:

> In addition to the benefit to the applicants of being able to compete more efficiently against rail competitors (as well as motor carriage and barge competition), shippers on the CPRC/DM&E/IC&E system should benefit from better equipment coordination and utilization, improved service patterns, enhanced resources for safety upgrades and other operating efficiencies made possible by common control.

Canadian Pacific Ry. Co.—Control—Dakota, Minnesota & Eastern Ry. Corp., STB Docket No. 35081, at 11 (Sept. 30, 2008).

In approving these mergers, the agency has consistently used its conditioning power to address concerns that certain aspects of the merger could negatively impact competition. The Board has "broad conditioning authority to preserve or enhance service and competitive opportunities" when approving mergers. *Conrail*, 3 S.T.B. at 250. The Board has liberally employed this "broad conditioning authority" to preserve and enhance competition in merger cases. In the *Conrail* decision, for example, the Board imposed conditions that ranged from a 5-year oversight period—which mandated quarterly reports from CSXT and NS and an opportunity for all interested shippers to comment—to preservation of reciprocal switching agreements, to the unprecedented creation of "shared asset areas" to preserve competition in major metropolitan areas. *Id.* at 253-55. Conditions imposed upon other major mergers are generally similar—including imposing trackage or other access rights to preserve rail-to-rail competition.[24] *See, e.g.*, *UP-SP*, 1 S.T.B., at 373-74; *BN-SF*, 10 I.C.C.2d at, 761-63.

The Board's conditioning power, along with its imposition of continuing oversight for 5 years following an approved merger and the power to re-open proceedings upon shipper request, provide shippers with significant protections from any potential, unforeseen anti-competitive effects of approved mergers.[25] As the Board later confirmed, these conditions had their intended effect:

[24] The ICC years ago made clear that it would no longer routinely condition rail mergers in an effort to "insulat[e] carriers from certain competitive effects of rail consolidation". Rather "[t]o foster rail competition unencumbered by artificial restraints of burdensome regulations", the agency concluded it would no longer impose so-called "traffic protective conditions" that had previously been imposed routinely on such transactions. *Norfolk and Western Ry. Co. and Baltimore and Ohio R.R. Co.— Control—Detroit, Toledo and Ironton R.R. Co.*, 360 I.C.C. 498, 527 (1979).

[25] Thus, if any shipper or other interested party truly believes it has suffered material harm or unforeseen injury as a result of a merger, it may petition the Board to re-open the merger proceeding to consider that alleged harm.

> Since 1980 at least, we have consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis. The overall result, so far, has been that railroads have continued to face effective competition, either from other railroads or other modes, that has forced them to pass on the preponderance of the significant efficiency gains that they have achieved (through mergers and other means) to the shippers that they serve.

Major Rail Consolidation Procedures, 5 S.T.B., at 548-49 (2001) In *Major Rail Consolidation Procedures,* the Board codified its practice of requiring a five-year formal oversight of approved mergers, thereby offering increased protections for shippers and ensuring that this oversight will consistently be utilized. *Id.* at 547. These powers to condition a merger have consistently been found sufficient to guarantee the pro-competitive nature of mergers.[26] The Board's findings in its merger decisions demonstrate that there is no evidence of anti-competitive effects that would be sufficient to justify a change to the current regulatory scheme. The protections provided to shippers, particularly following the *Major Rail Consolidation Procedures*, are more than sufficient to protect them from the possibility of anti-competitive effects from mergers. Importantly, the Board evaluated the same competitive climate and conditions that exist today when it decided *Major Rail Consolidation Procedures.* At that time, the Board determined that the protections that it instituted were appropriate and sufficient. There has not been a significant change in the competitive marketplace since that decision, and no commenter has demonstrated otherwise. Accordingly, rail carrier consolidations provide no warrant for the forced access and forced interchange proposals put forward by some parties to this proceeding.

[26] *See UP-SP*, 1 S.T.B., at 375 ("[T]he merger as conditioned clearly will be pro-competitive in the sense that it will stimulate price and service competition in markets served by the merged carriers.").

IV. SHIPPER REQUESTS FOR FORCED SWITCHING ARE FLAWED AND BEYOND THE BOARD'S AUTHORITY.

The Joint Comments of the Alliance for Rail Competition, *et al.* ("ARC") regarding reciprocal switching run the gamut from incorrect to illogical. ARC misconstrues the history and current status of reciprocal switching. And, its comments virtually ignore ICCTA, a significant statute in which Congress ratified existing reciprocal switching rules and standards.

A. ARC Does Not Give a Complete Picture of the Staggers Act Legislative History.

Because ARC does not provide a complete legislative history of the "reciprocal" switching provision of the statute, it is important to highlight some of the areas where it failed to present a full picture. The current reciprocal switching provision is found at 49 U.S.C. § 11102[27] and was enacted as part of the de-regulatory Staggers Act of 1980. Some form of "reciprocal" forced switching provision was in nearly every iteration of what eventually became the Staggers Act. However, its form and content changed as rail deregulation moved through Congress. ARC's comments state that the Staggers Act "Conference Committee accepted the slightly broader version of the [forced switching] provision adopted by the House" as compared to the Senate. ARC Comments at 23. But ARC completely ignores the fact that both chambers of Congress passed a significantly curtailed forced switching provision from what was originally proposed. When the Carter Administration first sent rail deregulation legislation to Congress, its forced switching proposal was extremely broad.[28] The plan essentially would have required automatic forced switching without any standard of review or agency approval. Even shippers

[27] The Staggers Act originally placed the reciprocal switching provision at 49 U.S.C. § 11103. The provision was later recodified at 49 U.S.C. § 11102 which is how it will be referenced here.

[28] "A rail carrier providing service within a given Standard Metropolitan Statistical Area (SMSA), as defined by the Department of Commerce, shall provide switching service in a nondiscriminatory manner, at a charge not to exceed the fully-allocated cost of providing such service, to all carriers originating or terminating traffic within that SMSA." S. 796, Sec. 120(c) (96th Cong.); H.R. 4750, Sec. 131(c) (96th Cong.).

understood that the Administration's proposal was too far reaching and radical and endorsed a more restrained version.[29]

As the House and Senate developed their own rail deregulation proposals, they significantly revised the forced switching provision. That more limited version was included in the Staggers Act conference report and was passed into law. The final version allowed the Commission to "require rail carriers to enter into reciprocal agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service."[30]

Thus, the reciprocal switching provision now in the statute is far more limited than originally proposed. As explained by Transportation and Commerce Subcommittee Chairman, and Staggers Act sponsor, Jim Florio, the resulting reciprocal switching section was quite narrow: "I do not expect…these provisions [on reciprocal switching] to dramatically change the railroad map of the United States."[31] Reciprocal switching's path to passage and Chairman Florio's authoritative statement indicate that § 11102 was never designed to have the far-reaching effect some commenters now seek to attribute to it. The Administration's bill did originally propose something approaching forced open switching, but Congress chose to pare it

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[29] *Railroad Transportation Policy Act of 1979 Coal Transportation Amendment: Hearing Before the Senate Comm. on Commerce, Science & Transp.*, 96th Cong., at 165 (Nov. 7, 1979) ("We believe that the amendments in Section 203 of S. 1946 are preferable [to the Administration's proposal] and should be enacted. They respond to one of the principal criticisms of the Administration's bill's provisions: namely, that it provided no reviewing agency to consider whether reciprocal switching…was in the public interest.") (Statement of Thomas Boggs on Behalf of the Committee on Railroad Shippers).

[30] H.R. 7235, Sec. 222 (96th Cong.).

[31] Cong. Rec. H5902-H5903 (June 30, 1980) (Statement of Congressman Florio (Sponsor)).

back. The Board's regulations providing for ordering forced switching under certain conditions are consistent with that legislative intent.[32]

B. The ICC Properly Interpreted the Law as Requiring a Showing of Anti-Competitive Conduct as a Predicate for a Forced Switching Remedy.

The ICC interpreted § 11102 as part of its competitive access rules in *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985). There, the Commission explained that reciprocal switching would only be ordered where such a "prescription is necessary to remedy or to prevent an act contrary to the competition policies of section 11101a, or is otherwise anticompetitive." *Id.* at 830. As ARC acknowledges, the ICC's interpretation was upheld on appeal. *See Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 1 I.C.C.2d 362 (1985) ("*Midtec I*"), *reconsidered*, 3 I.C.C.2d 171 (1986) ("*Midtec II*"), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1516 (DC Cir. 1988) ("[W]e have concluded that the rules are not contrary to the language or the policies of the Staggers Act.") The result was fully consistent with the Staggers Act. In addition to the reasoning of the ICC and DC Circuit, many of the legislation's architects described one of the law's major purposes as protecting shippers from competitive abuses.[33]

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[32] *See* Section B *infra.*

[33] *See, e.g.*, Cong. Rec. H5899 (June 30, 1980) ("H.R. 7235 protects large and small shippers from the potential abuse of market power by a railroad.") (Statement of Congressman Florio (sponsor)); *Railroad Transportation Policy Act of 1979 Coal Transportation Amendment: Hearing Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science & Transp.*, 96th Cong., at 673 (Feb. 18, 1980) ("[T]he bill [prior to passage] accomplishes the first goal of increased rate flexibility, but it falls short of providing adequate protection to captive shippers from railroad abusive pricing as 'what the traffic will bear.'") (Statement by Senator Russell Long, Chairman of the Senate subcommittee of jurisdiction); *Railroad Transportation Policy Act of 1979: Hearings Before the Senate Comm. on Commerce, Science & Transp.*, 96th Cong., at 1 (Nov. 7, 1979) ("[P]rovide the railroads more pricing flexibility while protecting captive shippers.") (Statement of Chairman Cannon); *Id.*, at 85 ("[O]ffering some protection for captive shippers") (Statement of Senator Kassebaum (Manager for the Senate Minority on the legislation and member of the subcommittee of jurisdiction)); Cong. Rec. H5901 (June 30, 1980) ("That policy is a simple one. It requires regulation where it is necessary to prevent an abuse of monopoly power. It discourages needless regulation by relying on the competitive forces of the marketplace.") (Statement of Congressman Madigan (Ranking Member of the House Subcommittee of Jurisdiction)).

Indeed, the requirement of a finding of anticompetitive behavior as a prerequisite for ordering switching is presumably the reason the Board included the topic as part of a proceeding entitled *Competition in the Railroad Industry*. If, as ARC suggests, forced switching will improve competition in some instances, then it is eminently reasonable that a strong showing of some type of anti-competitive behavior be a prerequisite to the ordering of forced switching. If there is no competitive problem, Board intervention would not be necessary or appropriate. Given the deregulatory history and purposes of the 4-R Act, Staggers Act, and ICCTA, intervention is not the default option for the Board.[34] *See, e.g.*, 49 U.S.C. § 10101(2) (policy of the United States is "to minimize the need for federal regulatory control over the rail transportation system . . .").

C. ARC Ignores the Interstate Commerce Commission Termination Act.

ARC's discussion of the Staggers Act and early ICC decisions following it glosses over ICCTA. ARC Comments at 23-29.[35] In fact, many of ARC's arguments have been superseded by the Congressional ratification of *Midtec*.[36] With ICCTA, Congress comprehensively examined the ICC policies, rules, and regulations, including its reciprocal switching decisions. In 1994 the ICC provided a comprehensive report to Congress on all of its regulatory responsibilities, including reciprocal switching. Following receipt of the report, the House

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[34] 604 F.3d 602, 604 (DC Cir. 2010) ("In the Interstate Commerce Commission Termination Act of 1995...Congress carried forward...the deregulation of the railroad industry it has previously endorsed in the Staggers Act and the Railroad Revitalization and Regulatory Reform Act...").

[35] ARC spends more time discussing the single case of *D&H Ry. Co. v. Conrail – Reciprocal Switching Agreement*, 367 I.C.C. 718 (1981) than it does ICCTA, despite its effectively acknowledging that *D&H* was overruled by *Midtec*. ARC Comments at 29.

[36] *See e.g.*, ARC Comments at 24 discussing the Staggers Act legislative intent to allow agency discretion in applying the reciprocal switching rules but not discussing whether such discretion remains following ICCTA; ARC Comments at 26-29 citing the *D&H* decision which makes "abundantly clear that the Board has the authority *now* to change its current rules and precedent," with no acknowledgement of any change brought upon by ICCTA; ARC Comments at 32-34 reviewing the DC Circuit's reasoning for upholding *Midtec* as being based on discretion but failing to acknowledge it predated ICCTA.

Subcommittee on Railroads held hearings on the ICC and what functions should be preserved, terminated, or altered as it sought to reform the agency. *See, e.g.,* Opening Comments of Norfolk Southern at 17-18. During those hearings, Congress heard from many parties regarding the ICC's reciprocal switching rules, including those seeking a change to *Midtec*. Among those participating in the legislative process were the ICC, National Industrial Transportation League, American Short Line Railroad Association, Society of Plastics, U.S. Clay Producers, Chemical Manufacturers Association, and many others. *See id.* at 18; Initial Comments of Canadian Pacific Railway Company at 45. Congress was presented with a significant opportunity to alter *Midtec* legislatively and gave it considerable deliberation. Ultimately, Congress declined to do so and ratified the ICC's *Midtec* interpretation by giving it legislative approval. Where Congress has approved of an agency interpretation by not altering it when considering relevant, related legislation, the agency loses any discretion it had to alter that interpretation. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); Comments of Norfolk Southern at 16; Comments of Canadian Pacific Railway at 43-47.[37]

Additionally, Congress has had many opportunities to alter *Midtec* since ICCTA but has uniformly declined to do so. Over twelve years, sixteen bills have been introduced in the House or Senate that would have altered the standard for forced access. Congress has held multiple hearings dealing with reciprocal switching and related issues. Still, Congress has steadfastly adhered to and ratified the *Midtec* interpretation of the reciprocal switching statutory provision. *See* Opening Comments of Norfolk Southern at 22-28 and Appendix.

[37] *See also United States v. Rutherford*, 442 U.S. 544, 553, n. 10 (1979) ("[O]nce an agency's statutory construction has been fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."); *CBS v. FCC*, 453 US 367, 382 (1981); *North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982); *Morrison-Knudsen Construction. Co. v. Department of Labor*, 461 U.S. 624, 643 (1983); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

What little discussion ARC does give to ICCTA is off the mark. According to ARC, "ICCTA was intended not to make substantive changes to the Interstate Commerce Act." ARC Comments at 40. But ARC significantly understates the impact of ICCTA. The law entirely eliminated the nation's oldest regulatory agency, and terminated or dispersed its powers. It was the product of a high profile legislative effort initiated by efforts to defund the agency,[38] a statutory requirement that the agency submit a complete report on its functions,[39] and was even discussed in the President's State of the Union message.[40] During consideration of ICCTA, Congress closely examined many of the Interstate Commerce Commission's rules and functions and made many far reaching decisions about their fate.[41] The Board maintains a long list of functions that were entirely eliminated by ICCTA such as overseeing certain rail tariffs, enforcing intermodal ownership restrictions, and setting special rate standards for recyclables.[42] Many of the altered functions also fell outside of the rail context but still had a significant effect on the law. Moreover, to the extent that ARC is correct that ICCTA was not intended to make substantive changes to the provisions it did not abolish, it further proves the point that Congress ratified existing substantive law concerning reciprocal switching when it enacted ICCTA.

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[38] H. AMDT. 645, *Rep. Kasich Amendment to the Department of Transportation & Related Agencies Appropriations Act* (June 16, 1994) (Amendment defunding the ICC).

[39] P.L. 103-311, § 209.

[40] Clinton, Bill. *Address Before a Joint Session of Congress on the State of the Union* (Jan. 24, 1995), *available at* http://www.gpo.gov/fdsys/pkg/PPP-1995-book1/pdf/PPP-1995-book1-doc-pg75.pdf (highlighting an effort to eliminate "programs we do not need, like the Interstate Commerce Commission…").

[41] S. Rept. 104-176, at 2 ("The bill also significantly reduces regulation of surface transportation industries in this country. It sorts through the panoply of laws currently administered by the ICC and repeals and modernizes those that have become outdated.").

[42] *ICC Termination Act of 1995*, Eliminated Functions and Provisions *available at* http://www.stb.dot.gov/stb/docs/From_Whos_Who_-_Eliminated_Functions.pdf.

D. ARC's Comparison to the Board's Treatment of Product and Geographic Competition Evidence is Inapposite.

ARC attempts to use the completely separate policy issue of "product and geographic competition" to refute the argument that ICCTA ratified *Midtec.* ARC Comments at 40-41. But ARC's argument is flawed. Product and geographic competition, sometimes referred to as "indirect competition," were a permissible consideration in the ICC's determination of whether a carrier had market dominance over the transportation covered by a challenged rail rate. *Assoc. of Am. R.R. v. Surface Transp. Board,* 237 F.3d 676, 677 (DC Cir. 2001). The Board's predecessor agency adopted indirect competition as a factor in market dominance inquiries in 1981. *Id.* at 678. Following ICCTA, the Board eliminated product and geographic competition evidence from the market dominance test. *Id.* at 678-79; *Assoc. of Am. R.R. v. Surface Transp. Board,* 306 F.3d 1108, 1109-10 (DC Cir. 2002). The new interpretation was later upheld on appeal. *Id.*[43]

ARC argues that the Board has broad discretion to alter its reciprocal switching provisions that predate ICCTA and tries to draw a parallel to product and geographic competition. But the Board's decision to alter the use of product and geographic competition was not the result of an exercise of pre-ICCTA discretionary power. In fact, exactly the opposite is true. The Board's decision to eliminate product and geographic competition was a direct response to authority and direction established by ICCTA, and not an action undertaken by the agency in spite of Congress.

[43] Of course, in the real world marketplace, product and geographic competition continue to act as significant constraints on railroad pricing.

In ICCTA, Congress amended the national rail transportation policy by mandating "expeditious handling and resolution of all proceedings."[44] ICCTA also required the Board to "establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates. The procedures shall include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings."[45] The time allowed for Board deliberations in rate reasonableness cases was also reduced to six to nine months after the close of the record.[46] *Market Dominance Determinations—Product & Geographic Competition*, 3 S.T.B. 937, 942 (1998). As a result of these Congressional instructions, the Board revisited product and geographic competition. In that proceeding, shippers, including some aligned with ARC, argued that consideration of product and geographic competition frustrated Congress' goal of rapid rate relief. *Id.* at 943-44 ("Consideration of product and geographic competition issues, shippers charge...has chilled pursuit of rate relief as envisioned by Congress.").[47] The Board acted to prohibit the use of product and geographic competition evidence in rate cases in response to congressional direction to expedite and streamline rate cases and procedures, established by ICCTA. In contrast, ICCTA contains no congressional command for the Board to revisit its reciprocal switching rules. Thus, the post-ICCTA elimination of product and geographic competition evidence in rate cases provides no precedent for ARC's request that the Board change reciprocal switching standards established by the ICC, affirmed in *Midtec*, and ratified by Congress in ICCTA.

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[44] 49 U.S.C. § 10101(15).

[45] 49 U.S.C. § 10704(d).

[46] 49 U.S.C. § 10704(c).

[47] By eliminating product and geographic competition evidence, the Board effectively expanded the universe of movements that are potentially subject to its rate reasonableness jurisdiction.

E. The Board's Past Proceedings Did Not Discuss Agency Authority.

In 1998, the Board reviewed competitive access issues at the request of Congress. *Review of Rail Access and Competition Issues*, Ex Parte No. 575. ARC apparently interprets the Board's lack of discussion of forced switching standards and regulations as a tacit indication that the Board has the authority to change those regulations and standards without congressional approval. The argument is puzzling—if the Board was certain in 1998 that it had the legal authority to act without even seeking comment or discussing of the issue, why would the Board seek substantive comment on the question in 2011?

Oddly, ARC points to a "December 1998 letter to Congress" to argue that the STB has not said it lacks authority to "reopen its competitive access rules" and therefore it does have the authority to act without Congressional action. Comments of ARC at 35 & n.82. In the first instance, an agency has neither the responsibility nor the ability to announce everything it lacks authority to do, as any government agency lacks authority to do many things. More specifically, the referenced letter appears to be a December 21, 1998 letter from then-Board Chairman Linda Morgan to Senators McCain and Hutchison of the Commerce, Science, and Transportation Committee. Although the letter does not directly discuss the Board's authority to alter *Midtec*, it does note that competitive access is an issue "more appropriately resolved by Congress." Letter from Chairman Linda Morgan to Senators McCain & Hutchison, Dec. 21, 1998. Although ignored by ARC in its comments, Chairman Morgan subsequently testified before Congress that "Board decisions changing its [competitive access] rules . . . <u>would not be consistent with existing law</u>, and would be difficult to defend in court." *Railroad Shipper Concerns: Hearing Before the Subcomm. on Surface Transp. & Merchant Marine of the Senate Comm. on Commerce, Science, & Transp.*, 107th Cong., at 10 (July 31, 2002) (emphasis added). It is disingenuous to rely on a letter from Chairman Morgan that is silent on the issue of Board authority when her subsequent clear testimony at a more recent hearing directly stated that the Board lacked that authority. More broadly, ARC is obviously overstating the importance of the Board's silence in Ex Parte 575 if the current Board has felt the need to seek comment on its authority to alter *Midtec.*

F. ARC's References to Capacity Shortages are Illogical.

Some of ARC's other statements in support of altering the reciprocal switching rules also border on the illogical. In seeking to justify forced access on demand, ARC cites capacity concerns. ARC Comments at 36-38. ARC is correct that "density on the U.S. rail system has increased very substantially since passage of the Staggers Act." *Id.* at 36. But ARC's proffered "solution" would aggravate the very problem it seeks to resolve. ARC's proposal is to add more trains to existing rail lines as shippers demand access. ARC fails to acknowledge that this would very likely further constrain capacity and add to congestion, because it would add more traffic and impede carriers' ability to manage their networks. To the extent true reciprocal switching could possibly be useful in managing capacity issues in some instances, carriers are currently free to voluntarily enter reciprocal switching agreements for that purpose.

A more sensible solution to capacity constraints, and one embraced by a broad range of experts and stakeholders, is increased investment in capacity. *See, e.g.*, Initial Comments of Canadian Pacific Railway at 36-37 *citing, inter alia,* the RAND Corporation, Government Accountability Office, and the American Society of Civil Engineers. But forced access through reciprocal switching will simply undermine the incentives for rail carriers to make those needed investments. Opening Comments of CSXT at 19-21. A multitude of commenters expressed this exact concern in their initial comments, and opposed changes to forced access rules.[48]

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[48] *See, e.g.,* Letter of Alabama Port Authority; Letter of All South Warehouse D/C, Inc.; Letter of Altoona-Blair County Development Corp.; Letter of Associated Asphalt; Letter of Associated Terminals; Letter of Beasley Forest

G. Even if the Board Erroneously Determined it Had the Requisite Authority, Significant Additional Rulemaking Proceedings Would Be Required.

Should the Board determine that it does have the authority to alter its reciprocal switching interpretation, despite the legislative history and Congressional ratification indicting otherwise, then separate notice-and-comment rulemaking(s) would be required. The rulemaking would have to determine whether or not a change in the existing reciprocal switching rules is actually necessary, an inquiry not answered solely by determining that the authority to alter the rule exists. ARC correctly states that "[a]dministrative agencies are permitted to change their policies and reverse prior conclusions as long as the statute permits such discretion and as long as the agencies explain themselves adequately." ARC Comments at 39-40. Again, assuming, solely

Products, Inc.; Letter of Berk Economic Partnership; Letter of Big River Industries, Inc.; Letter of Broward County, Port Everglades Department; Letter of Bucks County, PA Transportation Management Association; Letter of Bulk Service; Letter of Cagle's Inc.; Letter of Capital Cargo, Inc.; Letter of Cherokee County Development Board; Letter of Circle S Ranch; Letter of Columbus Regional Airport Authority; Letter of Cornerstone Systems; Letter of the Columbus Region; Letter of Custom Freight Sales, Inc.; Letter of Decatur and Macon County Economic Development Corp.; Letter of D&I, LLC; Letter of FGDI; Letter of Florida Department of Transportation; Letter of Franklin County Area Development Corporation; Letter of FreightCar America, Inc.; Letter of Georgia Ports Authority; Letter of Grand Worldwide Logistics Corp.; Letter of Grant County Economic Growth Council; Letter of Great River.Economic Development Corporation; Letter of Greater Hazleton Area of Northeast Pennsylvania; Letter of Hamptons Road Economic Development Alliance Letter of Hanjin Shipping Company, LTD; Letter of Hapag-Llyod (America) Inc.; Letter of Harnett County Economic Development Commission; Letter of Harrison County Economic Development Commission; Letter of Hartwell Warehouse, Inc.; Letter of Hub Group, Inc.; Letter of Independent Dispatch, Inc.; Letter of Interdom Partners, Ltd.; Letter of International Chemical Company; Letter of Interstate Commodities, Inc.; Letter of Jackson County Economic Development Authority; Letter of Jacksonville Port Authority; Letter of Jacksonville Regional Chamber of Commerce; Letter of James River Coal Company; Letter of JIMCO; Letter of Joint Industrial Development Authority; Letter of Judge Organization; Letter of KC SmartPort; Letter of Kentucky Transportation Cabinet; Letter of Miami County Economic Development Authority; Letter of Monroe County Industrial Development Corp.; Letter of the Port of Miami; Letter of Mulch Manufacturing, Inc.; Letter of the Mobile Area Chamber of Commerce; Letter of Murex N.A., LTD.; Letter of New Castle-Henry County Economic Development Corporation; Letter of the New River Valley Economic Development Alliance; Letter of Ohio Department of Development; Letter of OOCL (USA) Inc.; Letter of the Chairmen of the Pennsylvania Senate Transportation Committee; Letter of Putnam County Development Authority; Letter of ReTrans Precision Logistics; Letter of Roanoke Regional Chamber of Commerce; Letter of Robindale Energy Services; Letter of Rosboro, LLC; Letter of Shenandoah Valley Partnership; Letter of S.M.A.R.T. Regional Rail Transit; Letter of South Carolina State Ports Authority; Letter of Southern Tier Economic Growth, Inc.; Letter of Southwestern Michigan Economic Growth Alliance; Letter of St. Louis Regional Chamber & Growth Association; Letter of Steuben County Industrial Development Agency; Letter of Sunrise Cooperative; Letter of Sysco Corporation; Letter of Team Lorain County; Letter of Teco Coal Corporation; Letter of TopFlight Grain Coop.; Letter of Upstate SC Alliance; Letter of Virginia's Gateway Region Economic Development Organization; Letter of Wabtec Corp.; Letter of the Warren County Board of Commissioners; Letter of the Warren County Office of Economic Development; Letter of the Warren County Local Economic Development Organization; Letter of the Waterfront Coalition; Letter of Werner Enterprises.

for the sake of discussion, that the statute would permit such a change, then ARC has still failed to offer sufficient reasons the Board could articulate to make a change. As ARC concedes, the Board currently has the authority to order reciprocal switching but no shipper has even sought it for fifteen years. ARC Comments at 32. This hardly seems to demonstrate either a clamor for forced switching or a perception that it would address any burning concern on the part of shippers. If the Board were to consider revising the *Midtec* standards, it would need considerably more evidence as to what justifies a radical change in a rule that has worked successfully for thirty years.[49]

Similarly, a full notice-and-comment rulemaking would be necessary to establish new standards for ordering forced switching if the Board were to disregard congressional ratification and alter the *Midtec* standard. If the Board eliminated the current regulatory standard, the statutory language of "practicable and in the public interest" would be an empty vessel the Board would be required to define. In ARC's words, "the wording of [the law] gives no indication...as to how the reciprocal switching provision is to be construed...The matter is up to the agency's discretion." ARC Comments at 25. The Board would need to develop a record and interpret the statute's terms or else it would be impossible for shippers, carriers, or other stakeholders to know the governing standards.

If the Board were to make forced switching more readily available, it would also need to develop standards and a methodology for calculating just compensation to the burdened carrier for such forced used of its property. *See* Comments of CSXT at 53-55.

Any rulemaking proceeding to alter *Midtec* would require careful review by the Board of myriad issues, including how to protect smaller rail carriers. The Staggers Act conference report

[49] It is imperative for the Board to bear in mind that the current forced switching provision has been in effect during a period of *declining* rail rates for shippers. *See, e.g.,* Comments of Canadian Pacific Railway at 3, 12-15.

included language that "reciprocal switching provisions should not be used to allow Class I carriers to force their way into traffic originating or terminating on a Class III carrier."[50] Some commenters also expressed a similar concern. *See, e.g.*, Comments of the American Short Line and Regional Railroad Association at 17-18 ("Permitting the Class I railroads to 'cherry-pick' the small railroads' largest customers, through the artifice of reciprocal switching...would wholly undermine the small railroads' ability to serve the balance of their customers."); Comments of Four Rivers Transportation at 11-13 ("Four Rivers believes that any adjustment of current policies...would do nothing but encourage larger carriers to try and wrest the more profitable traffic from smaller railroads."). The Board would need to address these and a number of other new issues in separate proceedings in the event that it were to determine—erroneously—that it has the legal authority to alter *Midtec*.

V. RESPONSES TO SPECIFIC COMMENTS CONCERNING CSXT

Below, CSXT briefly responds to a few specific comments regarding CSXT. Other comments about CSXT are discussed in the attached Verified Statements of William Clement, Dean Piacente, and Henry Rupert.

A. Comments of Chemical Shippers

In their initial comments, some chemical shippers assert that they are being forced to relocate their facilities abroad because of burdensome rail rates. This baseless and wholly unsubstantiated claim ignores current market realities that indicate quite the opposite—chemicals manufacturers are in fact expanding their facilities and production capacity within the United States. *See, e.g.*, *"M&G to Build World-Scale PET and PTA Facility on U.S. Gulf Coast,"* World News and Views (May 11, 2011) (America's largest producer of PET announced plan to

[50] H.R. Rep. No. 96-1430, at 116-117 (1980).

build large new manufacturing facility in U.S., giving M&G "by far the most competitive cost base not only in the Americas, but globally."). Even if chemicals manufacturers were moving their facilities abroad, rail rates could hardly be the reason. Rail rates constitute a small fraction of the delivered price of the commodities sold by complaining chemical shippers. *See* V.S. of D. Piacente, at 4 (noting that rail rates constitute "less than three percent of the delivered price of anhydrous ammonia and phosphates"). It is highly unlikely that such transportation costs, making up such a small portion of the market price of a product would force a chemicals manufacturer to move production facilities out of the United States.

By contrast, one of the most significant costs for many chemicals manufacturers is the cost of natural gas, a primary feedstock for many chemicals and plastics. *See id.* at 5-6. In the early 2000s, U.S. natural gas prices were very high, which caused manufacturers significant hardship, and led to plant shutdowns and a reduced production in the United States. *See, e.g.*, *"Rising Gas Prices Fuel Industry Action"* CHEMICAL WEEK (July 16, 2003) ("High natural gas prices have caused a huge headache for U.S. chemical makers, devastating profits, curtailing exports and operating rates, and forcing plant shutdowns."). The high costs of natural gas at the time threatened the industry, leading the CEO of Dow Chemical to assert that "[i]t took half of a century for the U.S. chemical industry to build its processes, markets, and customer base. [. . .] Skyrocketing energy and feedstock costs in the U.S. have taken them away virtually overnight." *Id.* (citing comments of William Stavropoulos, Chairman and CEO of Dow Chemical).

Recently, however, the cost of natural gas in the U.S. has plummeted due to the discovery of new unconventional natural gas sources—natural gas extracted from shale rock. This discovery and new methods of extraction, along with other factors, have dramatically boosted the supply of natural gas in the United States, thereby lowering prices. *See* Lindsey Bewley, *Petrochemicals*, CHEMICAL WEEK MAGAZINE (Mar. 18, 2011). The substantially increased natural gas production and supply in the U.S. has provided "a significant feedstock cost advantage for U.S. petrochemical manufacturers." *Id.*[51] This advantage has benefitted chemical manufacturers across the United States. Numerous chemicals manufacturers are announcing the expansion of facilities within the country to take advantage of low feedstock costs. In particular, Chevron Phillips Chemical has announced that it is "finalizing [its] evaluation of potential sites" for the construction of an ethane cracker that would seize upon the advantages from shale gas feedstocks in the U.S. Gulf Coast region. *Chevron Phillips Chemical Announces Study to Develop World-Scale Ethane Cracker on the U.S. Gulf Coast* (Mar. 28, 2011).[52] Chevron COO Tim Taylor states that the company "intend[s] to expedite our development decisions to capitalize on the advantaged feedstock position that shale gas resources could bring to the chemical industry in the U.S." *Id.* Similarly, Commenter Westlake Chemical Corporation recently announced that it is expanding its ethylene capacity at its Lake Charles, LA facility and is considering upgrading facilities at Calvert City, KY "in order to capitalize on new low cost ethane and other 'light' feedstocks being developed in North America." *Westlake Announces Ethylene Capacity Expansion Plans* (Apr. 4, 2011).[53] Dow Chemicals has announced plans to increase its facilities in the U.S. to take advantage of "the improved outlook for U.S. natural gas supply from shale bring[ing] the prospect of competitively priced ethane and propane feedstocks to Dow—and the promise of new manufacturing jobs to America." *Dow to boost ethylene and*

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[51] In the article, Jim Gallogly, CEO of LyondellBasell explains the benefit that competitively priced natural gas is providing to the chemicals market: "The access to price-advantaged natural gas liquids in the U.S. has been a great boost for the domestic industry, differentiates the region from most other ethylene producers and provides an energy advantage in other chemicals for U.S.-based industries. We believe that abundant shale gas is a sustainable advantage in the near- and mid-term." *Id.*

[52] http://www.cpchem.com/en-us/news/Pages/StudytoDevelopEthaneCracker.aspx

[53] http://www.westlake.com/fw/main/default.asp?DocID=68&reqid=1546634

propylene production, Plastics News Report (Apr. 21, 2011).[54] LyondellBasell is also considering expansions of its ethylene production in the United States by debottlenecking its crackers at Channelview and La Porte, Texas. *See LyondellBasell mulls ethylene expansions, new cracker*, ICIS news (May 2, 2011).[55]

These widespread expansions within the United States clearly demonstrate that, contrary to the assertions made in their opening comments, chemicals shippers are expanding their capacity and solidifying their ties to the United States. Plainly, rail transportation rates are not materially harming chemical companies' bottom lines and are not driving them off-shore as they claim. To the contrary, the financial outlook of chemicals companies in the U.S. is blossoming in large part because of favorable feedstock and input prices, including "[t]he ethane advantage [which] drove strong U.S. margins in the ethylene chain, a shift toward lighter steamcracking feedstocks, and a surge in exports." Bewley, *Petrochemicals*, *supra.*

B. Comments of the Maryland Department of Transportation

Another commenter, the Maryland Department of Transportation ("MDOT"), uses this proceeding to request that the Board commence a separate proceeding to investigate "issues related to ensuring the availability of competitive rail service to publicly owned or publicly managed port facilities." Initial Comments of Maryland Department of Transportation, at 4. As the commenter recognizes, this request is outside the scope of the issues that the Board is considering in this proceeding. *See id.* If the MDOT wishes to formally request such a proceeding, it should do so in the proper manner and forum.

[54] http://plasticsnews.com/headlines2.html?id=21771.

[55] http://www.icis.com/Articles/2011/05/02/9456185/lyondellbasell-mulls- ethylene-expansions-new-cracker.html.

More recently MDOT appears to have reconsidered its views. In a recent op-ed published in the Baltimore Sun, MDOT Secretary Beverley K. Swaim-Staley, expressed strong support for a new CSXT intermodal transfer facility currently being planned for a site south of Baltimore City. *See* V.S. of W. Clement, Appendix A. Secretary Swaim-Staley announced that MDOT is working closely with CSXT to build an intermodal transfer facility south of Baltimore which will provide double-stacking capabilities to the rail network in the state. MDOT supports this new intermodal facility, "without [which], [Maryland's] economic landscape would change dramatically. Existing businesses will be cut off from national and international customers. New business and jobs will simply avoid coming to Maryland. In the end, Maryland residents would pay more at the cash register as the cost of consumer products climbed." *Id.* The new facility will heighten the competitiveness of the Port of Baltimore, which competes with other east coast ports that are already offering double-stack rail access. *Id.* This partnership between CSXT and MDOT demonstrates that CSXT is committed to assisting Maryland "to improve its infrastructure to meet current and future demands in order to remain a strong economic competitor with other states." *Id.*

Even more recently, Maryland Port Administration Executive Director Jim White stated in an interview that CSXT's National Gateway project and its plans to build an intermodal terminal near Baltimore "hold the key" to opening new markets and opportunities for the movement of "discretionary cargo" through the Port of Baltimore. *See Baltimore's Jim White Says Port Targeting Discretionary Cargo*, THE JOURNAL OF COMMERCE, Daily Newswire (May 24, 2011) ("[E]xtensions to CSX's National Gateway intermodal project are moving ahead, position Baltimore to better compete with other East Coast Ports.").[56] The commitment of

[56] For the video interview, *see* http://www.joc.com/portsterminals/baltimore%E2%80%99s-jim-white-says-port-targeting-discretionary-cargo.

MDOT and that Maryland Port Administration to partnering with CSXT on this significant project is somewhat inconsistent with MDOT's port lawyers' advocacy of the convening of a proceeding to address forced access to rail lines serving publicly managed facilities. As the more recent comments cited above indicate, CSXT is working with MDOT on a project that, should it reach fruition, would substantially benefit the Port of Baltimore and its ability to compete with other Eastern ports.

C. Comments of the North Carolina Department of Transportation

The North Carolina Department of Transportation ("NCDOT") filed initial comments alleging that CSXT and NS have "de-marketed" intermodal service in the state, specifically in the city of Charlotte. *See* Initial Comments of North Carolina Department of Transportation, at 4. As CSXT Vice President-Intermodal Marketing William Clement explains in his Verified Statement, CSXT has continued to grow its intermodal business in Charlotte. *See* V.S. of W. Clement at 1-2. Indeed, intermodal revenue from loadings originated and terminated at Charlotte has grown at a combined annual growth rate of 3% since 2005, significantly above the 1% drop in combined annual growth rate across North America. *Id.* at 2. CSXT is investing millions of dollars in its National Gateway project, which includes North Carolina. One of the focuses of this investment is the Charlotte terminal, whose capacity CSXT is tripling, thereby generating more jobs and boosting the Charlotte economy. *Id.* CSXT is devoting extensive resources to its Charlotte terminal and has every intention of continuing to make investments in its infrastructure there.

NCDOT expresses further concern over intermodal service to and from the Port of Wilmington. As one of the smaller ports on the east coast, Wilmington has not generated sufficient volume to support intermodal service. *See id.* CSXT provides daily carload rail service to the Port of Wilmington and handled 8,681 carloads either destined to or originating at the Port in 2010. *Id.* at 4. CSXT would happily supply intermodal service to the port if there were sufficient traffic to demand such service. To date, however, the Port of Wilmington has not generated a sufficient volume of traffic to support intermodal service. *Id.* at 2. NCDOT advocates that the Board impose forced access to the Port of Wilmington across CSXT lines. However, as Mr. Clement notes in his Verified Statement, "forced access by a competitor will not make a movement that lacks the necessary traffic density for CSXT into a profitable move for someone else." *Id.*

As a small port with limited maritime access due to a shallow basin and a lack of large land markets nearby, Wilmington suffers from competitive disadvantages. *Id.* at 3. Nevertheless, CSXT has demonstrated a commitment to assisting Wilmington in improving its competitive opportunities, by investing in infrastructure to create double-stack opportunities at the port and by providing "tactical train service" in Wilmington when called upon to do so. *Id.* at 4. The Port of Wilmington is well run, and CSXT would welcome opportunities to increase service to the Port of Wilmington as demand requires.

CONCLUSION

There is no sound basis in law or policy for the Board to undertake to change existing rail competition and access policies. Current rules and policy—painstakingly developed over a long period of time—are working as Congress intended. The Board should conclude this proceeding without taking any further action.

Respectfully submitted,

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Dated: May 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of May 2011, I caused copies of the foregoing Reply Comments of CSX Transportation, Inc. to be served by first-class mail or more expeditious means on all Parties of Record in STB Ex Parte No. 705.

Eva Mozena Brandon

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 705

COMPETITION IN THE RAIL INDUSTRY

VERIFIED STATEMENT OF WILLIAM CLEMENT
ON BEHALF OF
CSX TRANSPORTATION, INC.

I. MY BACKGROUND

My name is William Clement. I am vice president intermodal marketing for CSX Transportation, Inc. ("CSXT"). I have worked in the intermodal freight and logistics business for 21 years. In my current position I am responsible for all intermodal sales and marketing at CSXT.

II. INTRODUCTION

This verified statement will address comments of the North Carolina Department of Transportation and the Maryland Department of Transportation. I have long felt that CSXT has a strong and positive working relationship with those two states' transportation departments, and with the Port of Baltimore, Maryland and the Port of Wilmington, North Carolina.

III. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

NC DOT states that CSXT and NS have "'de-marketed' intermodal services in Charlotte." While I cannot speak for Norfolk Southern, I can assure the STB that CSXT has worked hard – and successfully – to grow our intermodal business to and from Charlotte. The numbers speak for themselves:

Today, CSXT offers daily intermodal service between Charlotte and 7 cities on our network and to/from 28 west coast destinations/origins served by western connections. Since 2005 CSXT has grown its total intermodal revenue loadings originated and terminated at its Charlotte terminal at a 3% combined annual growth rate (CAGR), significantly higher than the 1% drop in CAGR for intermodal loadings across North America over the same time period.

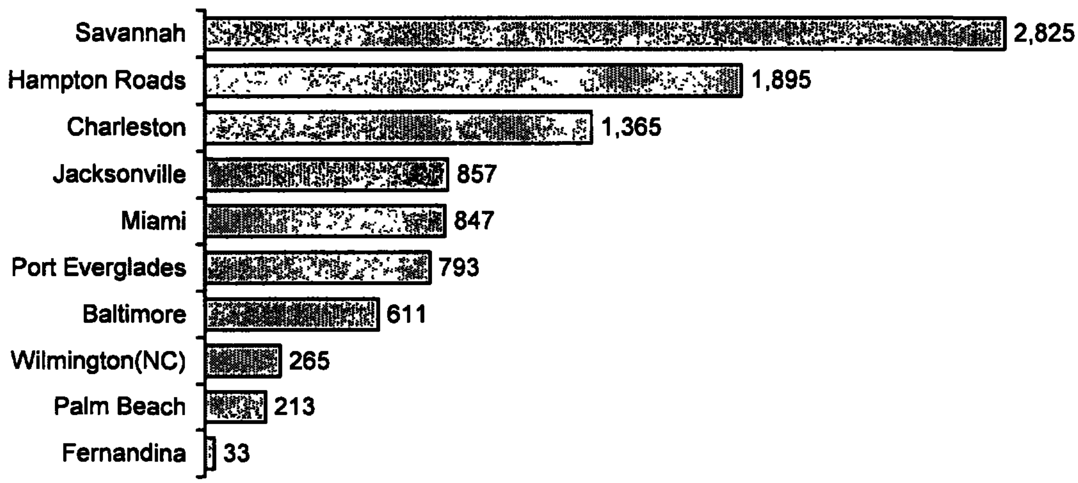
Charlotte is linked to the CSXT network via lines to the east and west; north and south. Lines through the state of North Carolina include crucial links in CSXT's National Gateway project. And, as the NCDOT itself notes in its comments, CSXT is investing a total of $30 million (including a $4 million federal grant) to triple the capacity of its terminal in Charlotte. I believe these efforts have led (and will continue to lead) to more – not fewer – jobs in Charlotte.

This is hardly "de-marketing".

Rather, NC DOT's basic concern over CSXT intermodal service is that CSXT does not currently offer intermodal train service to and from the Port of Wilmington. This is certainly true today. The reason is that there simply is not sufficient intermodal volume to or from the Port of Wilmington in any lane to support intermodal train service. Intermodal service can compete only if it handles intermodal business in substantial volumes in "lanes". That means running a train from an origin to a destination with only a very limited number of stops to drop off traffic enroute. Without density, it is hard to make an intermodal move competitive. Forced access by a competitor will not make a movement that lacks the necessary traffic density for CSXT into a profitable move for someone else.

The Port of Wilmington is well run and professionally managed. Nonetheless, it suffers from several competitive disadvantages. Wilmington is one of the smaller southeast ports. The chart below shows the traffic volumes enjoyed by some of its larger competitors. As can be seen, Charleston, Hampton Roads and Savannah volumes dwarf those of Wilmington.

Top 10 Southeast Ports (Thousand TEUs)



1. Wilmington's anchorage/turning basin depth is just 42 ft. M.L.L.W. This limits the size of vessels that can call at that port, and thus limits volumes. No port can afford to pay to deepen its own channel at its own expense. Every port relies on state and federal funding to dredge. (This of course contrasts with the railroad industry, which relies almost exclusively on its own private funding for infrastructure maintenance and improvements.)
2. Most major ports have the advantage of a large local market, which gives an advantage in vessel ports of call. (Savannah and Charleston are exceptions, due largely to their proximity to the Atlanta market.)

Despite disadvantages like these, the Port of Wilmington is committed to growth, and has ambitious plans for the future. CSXT, the Port and the State DOT have teamed up to construct a double stack intermodal route available to use in their marketing efforts to attract more ocean carriers to call at the port. For that reason, the State and the Port did invest a total of $73,000 in increasing clearances of two highway bridges to clear the line between Wilmington and Pembroke (about 75-80 miles). CSXT funded another $79, 300 although there was no immediate double stack opportunity. To support the state's marketing efforts, CSXT has made that line a part of its National Gateway project. Further, when occasional opportunities have arisen, CSXT has successfully pursued tactical train service opportunities to Wilmington. For example, when YML had an imbalance in empty refrigerated containers on the east coast, CSXT assembled and operated unit trains to reposition the empty equipment from Portsmouth and Stackbridge, MA to Wilmington.

CSXT would welcome an opportunity to establish profitable regularly scheduled intermodal train service to and from the Port of Wilmington. To do so would require first and foremost, sufficient density in that lane on a routine basis. This traffic simply does not exist today.

Finally, I do want to observe that CSXT enjoys a good relationship with the NC DOT and is presently working on numerous projects throughout the state that enhance North Carolina's transportation system and economic competitiveness. And, CSXT provides carload rail service on a daily basis to and from the port of Wilmington. Indeed, CSXT handled 8,681 carloads to and from the port in 2010. This includes commodities such as nitrogen fertilizers, textile chemicals, and wood pulp.

IV. MARYLAND DEPARTMENT OF TRANSPORTATION

Maryland's comments do not clearly state the interest they are promoting other than to suggest a separate proceeding to investigate the same issues that the Board is investigating in this proceeding. No explanation is given why this proceeding is not a sufficient opportunity to voice its views to the Board. MDOT merely suggests that whatever the forced access standard might end up being, it should be more liberal for publicly-owned—or privately-owned and publicly-managed—facilities. Why a double standard ought to be applied, and why a private, for-profit facility that is only "publicly managed" should be subject to different economic principles is unstated.

MDOT's position is a bit puzzling. Unlike most east coast ports, the Port of Baltimore is served by both Norfolk Southern and CSXT—a fact that is left unstated in MDOT's comments. While it is true that double stack clearance is not available over CSXT due to the limited clearance of the Howard Street Tunnel, CSXT is working with the State of Maryland to locate a new intermodal facility (at CSXT expense) south of the tunnel. This new facility will enable CSXT to provide double stack service in and out of the Baltimore area to points both west and south upon the completion of the National Gateway. This is an initiative that will benefit the Baltimore area economy, and help its port compete more effectively. It is hardly the action of an entrenched carrier that in MDOT's words, "enjoys monopolistic pricing powers." MDOT at p. 3.

Indeed, MDOT has been supportive of CSXT's efforts in developing this new facility, and we much appreciate the pro-growth attitude of MDOT's team. As noted in a recent opinion piece in the Baltimore Sun by MDOT's Secretary, " Without such a facility, our economic landscape would change dramatically. Existing businesses will be cut off from national and international customers. New business and jobs will simply avoid coming to Maryland. In the end, Maryland residents would pay more at the cash register as the cost of consumer products climbed." See Appendix A for Full Text of Article.

Certainly, the Port of Baltimore seems to be thriving. According to an interview of Executive Director James J. White, the port recently set a new 12 month record for container traffic. *See*, Appendix B, *Port of Baltimore is poised to compete, chief says*, BALTIMORE SUN (Apr. 25, 2011).

MDOT seems to take no position on whether rail facilities it owns (the Canton Railroad and the Maryland and Delaware Railroad) should be opened up to forced access at federally-prescribed prices. Although its Canton railroad connects to both Norfolk Southern and CSXT, its customers are all sole-served by the Canton. The Maryland and Delaware Railroad's customers also appear to be all sole-served.

Neither the Port of Baltimore nor the Port of Wilmington has offered any commercial or economic support for any of the forced access proposals now being urged on the Board. I would ask the Board to accept their two comments as expressions of concern reflecting the critical importance of a financially viable rail network to support the long term transportation needs of their facilities. CSXT has worked, and will continue to work, with these ports to seek new opportunities to grow their business, create jobs, and take full advantage of the benefits freight rail has to offer.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 24th day of May, 2011.

William C. Clement

William C. Clement

CLEMENT APPENDIX A

Container transfer facility key to Md. economy
Public will have opportunity for input in site selection

By Beverley K. Swaim-Staley
6:00 a.m. EDT, April 25, 2011

Located in the heart of the Mid-Atlantic region, Maryland plays a vital role in moving freight throughout the Eastern seaboard and the Midwest. Each year, the business of moving freight by rail in Maryland supports 1,600 local jobs and generates more than $110 million in wages However, the freight business is changing, and it is important that Maryland keep pace. The most dynamic change is toward "double-stacking," where two cargo containers, stacked one on top of the other, are placed on a single rail car for shipment over long distances. The movement to double-stack requires a higher clearance for overhead structures, and that is where Maryland needs to improve its infrastructure to meet current and future demands in order to remain a strong economic competitor with other states.

This is particularly true for the Port of Baltimore which must now compete for cargo with other ports offering the double-stack rail access that steamship lines seek. Working with CSX Transportation, Maryland is exploring the potential of creating an intermodal transfer facility south of Baltimore City. An intermodal facility is where containers are interchanged between trucks and trains to maximize efficiency. By placing this facility south of Baltimore, CSX will ultimately be able to move double-stack containers along its rail network to and from Midwestern markets, creating real economic advantages for the region.

Without such a facility, our economic landscape would change dramatically. Existing businesses will be cut off from national and international customers. New business and jobs will simply avoid coming to Maryland. In the end, Maryland residents would pay more at the cash register as the cost of consumer products climbed.

The intermodal transfer facility will be an important part of the National Gateway project in Maryland. The National Gateway Initiative is a public-private partnership among the federal government, six states, the District of Columbia and CSX to jointly fund height clearance and related-rail projects which will create a double-stack freight network, connecting East Coast and Midwest markets. It will help deliver more than $2 billion in public benefits to Maryland and the Baltimore region, including $450 million in reduced logistics costs for shippers; $87 million in savings from reduced wear and tear on highways; $121 million in savings from fewer highway accidents; and $50 million in savings from reduced congestion.

As Maryland and its local communities continue their effort to protect their natural resources and environment, this facility can be an important step toward limiting the use of fossil fuels — decreasing CO_2 emissions by 2.5 million tons.

APPENDIX A

As a small and compact state, Maryland's strength has always been the vastness of its connections not the vastness of its land. Today, the challenge is to continue to make those connections while being sensitive to our vital communities.

CSX has embarked on an effort to identify candidate sites for a new intermodal facility with the assistance of the Maryland Department of Transportation. Both organizations are committed to an open, rigorous and transparent process where multiple alternatives will be evaluated with no preference for one site over another This process will be governed by the National Environmental Policy Act (NEPA), a federal law that requires extensive study of and public comment on a wide variety of issues. These include environmental and economic impacts, as well as impacts on neighboring communities.

Throughout this process, residents and businesses in communities located near the candidate sites will have multiple opportunities to obtain information on the proposals, offer ideas, comment and voice any objections they may have. Community participation is welcome and encouraged throughout this study process as citizen feedback will play a vital role in identifying the best alternative for an initiative that is so important to the future of Maryland's economy.

To date, four candidate locations have been identified along the I-95 corridor in Anne Arundel, Howard and Prince George's counties. A dozen sites were evaluated initially and measured against five basic criteria that are necessary for such a facility in this region. The site must be south of the Howard Street tunnel that does not provide the necessary clearance for double-stack, contain at least 70 contiguous acres of usable land, be able to accommodate the rectangular shape necessary for intermodal operations, be within close proximity to a major highway and be located adjacent to the CSX mainline (Camden Line). Four candidate sites met this "first cut" criteria. Now, those four sites will undergo rigorous study and evaluation under the federal NEPA process.

Throughout this process, the Maryland Department of Transportation and CSX will maintain open lines of communication to keep communities and interested stakeholders informed of its progress. Citizens are urged to play an active role as the process moves forward Workshops are being held in communities near the candidate sites and formal public hearings will be held as the NEPA process moves forward. For information on the workshops and to follow the evaluation process, visit http://www.intermodal.maryland.gov. By working together, considering all the facts and developing solutions, Marylanders can meet the challenge of identifying an appropriate site for this intermodal facility that means jobs and a stronger economy for our state.

Beverley K. Swaim-Staley is secretary of the Maryland Department of Transportation. Her email is secretary@mdot.state.md.us.

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http://www.baltimoresun.com/news/opinion/readersrespond/bs-ed-container-transfer-20110425,0,2665169.story

APPENDIX A

CLEMENT APPENDIX B

LIGHT FOR ALL
THE BALTIMORE SUN | ARTICLE COLLECTIONS

Port of Baltimore is poised to compete, chief says

White says Baltimore will be ready for bigger-is-better market

April 25, 2011|By Michael Dresser, The Baltimore Sun

The port of Baltimore is well-poised to compete in an international maritime industry in which the ships and the facilities that handle them just keep getting bigger, its chief executive said Monday.

In a wide-ranging interview in his World Trade Center office overlooking the Inner Harbor, the Maryland Port Administration's executive director, James J. White, appraised Baltimore's strengths and weaknesses as it goes head-to-head with rival ports on the East Coast.

White said Baltimore's business is rebounding well after taking a beating during the recession. The port handled 32.8 million tons in 2010 after dropping to 22.4 million tons in 2009.

"We had a rebuilding year, but we're still focused on market share and gaining market share," White said.

The port chief said he expects the port's competitiveness to be bolstered next year when it opens a 50-foot-deep berth with four new, long-reaching cargo cranes at Seagirt Marine Terminal.

The berth and cranes are part of a 50-year, public-private partnership formed in 2009 between the state and Ports America Chesapeake. That deal is expected to allow the port of Baltimore to welcome the larger ships that will begin passing through the Panama Canal after a widening project there is completed in 2014.

White said that when the canal project is finished, Baltimore will be one of only two East Coast ports equipped to load and off-load the larger containerships that will then be able to travel directly between Asia and the East Coast.

The other is arch rival Norfolk, Va. But all of the others, including the giant port of New York and New Jersey, are constrained by physical limitations that will delay for years their ability to handle the largest ships, White said.

Shipping is an industry in which size increasingly matters, White said. About eight years ago, he said, few in the industry foresaw a day when ships would be able to handle more than 6,000 to 7,000 container units — a widely used industry standard based on the size of the metal containers in which many goods are shipped.

APPENDIX B

Now, he said, the port is seeing ships that handle loads of more than 8,000 units. A trade publication has reported that the Maersk shipping line has ordered 10 ships with the capacity to haul 18,000 units each.

White said he doesn't expect to see such behemoths showing up in Baltimore, but he said the new Seagirt terminal will be able to unload ships arriving with about 14,000 container units.

The port of New York and New Jersey, he said, will face years of competitive disadvantage because many of the larger ships will be unable to pass under the Bayonne Bridge. Baltimore faces no such issues.

White said he does not expect ships to keep getting heavier and sitting lower in the water because few ports would be able to accommodate them.

"I think that the ship owners are aware they should stop at that 50-foot depth because dredging is so much more challenging and more expensive year after year," he said. "We're pushing the limits right now."

The port of Baltimore is served by a 50-foot channel.

White acknowledged, however, that Baltimore will continue to face some of the same disadvantages it has long grappled with: its relative distance from the open sea, a lack of available land for terminal facilities and a notorious rail bottleneck — the Howard Street Tunnel — that doesn't permit double-stacking of containers on freight trains.

Those factors have constrained the state's ability to develop Baltimore as a port through which shippers choose to bring cargo destined for markets in the deep interior of the country, White said. At the same time, the port has set a new 12-month record for container traffic.

"What drives that is local consumption," White said.

But Baltimore's consumption is considerable: White said the corridor between Washington and Philadelphia contains 14 million people. Norfolk, despite its easy ocean access and double-stack freight train capabilities, can't match Baltimore's local market, he said. In addition, the markets in the near Midwest can easily be reached by truck from the port of Baltimore, he said.

Another area in which Baltimore's local market is an advantage is the cruise business, White said.

The port chief said that the business is thriving, with most cruise ships leaving with a full house. White said that other cruise lines are interested in tapping into the Baltimore market, but that the South Locust Point cruise terminal is at capacity, especially on weekends.

michael.dresser@baltsun.com

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 705

COMPETITION IN THE RAIL INDUSTRY

VERIFIED STATEMENT OF DEAN PIACENTE
ON BEHALF OF
CSX TRANSPORTATION, INC.

I. MY BACKGROUND

My name is Dean Piacente, and I am Vice President - Chemicals and Fertilizer Marketing for CSX Transportation, Inc ("CSXT"), a position I have held since 2004, and have worked in the rail industry for 24 years. As Vice President of Chemicals and Fertilizer Marketing, I am responsible for all sales and marketing of most chemical products, including phosphates and fertilizers. I am submitting this Verified Statement in response to several customer assertions made about CSXT in initial comments filed in this proceeding.

II. RESPONSE TO COMMENTS OF CF INDUSTRIES, INC.

I have reviewed the comments filed by CF Industries, Inc. ("CF") in this proceeding. The CF comments, in particular, are among the most noteworthy that I have reviewed and warrant a detailed response. CF is one of our best customers, and we hold their organization in great regard. However, I must take exception to several arguments and assertions made in CF's initial comments.

First, CF refers to its Plant City phosphate production facility in Central Florida. This facility, served by CSXT, is only 33 miles by highway from the port of Tampa. CF states:

> Plant City's phosphate production requires anhydrous ammonia. Plant City's full requirements for anhydrous ammonia (389,000 tons per year or 4,900 carloads) are shipped 27 miles by rail from CF's Tampa terminal to Plant City. Shifting this volume to truck is impractical and Plant City does not have access to barge transportation.

CF Comments at 3.

CF's comments imply that its Plant City facility is "captive" to rail. This is simply untrue. In fact, CF's own website states that the Plant City facility "receives...ammonia and sulfur via rail and truck from its Port of Tampa operations." *See* http://www.cfindustries.com/plants_plant-city-phosphate-complex.html.

Previously, the Anhydrous Ammonia used at Plant City was shipped by rail from Louisiana. Then, CF bought its facility at the Port of Tampa and began bringing Ammonia to the Port by barge and vessel, transferring it to storage tanks and delivering to the plant by rail. Although CF could deliver ammonia to the plant via truck, it has chosen to move via CSXT rail. Ammonia has long moved via truck in this area. Indeed, at CF's Port of Tampa ammonia facility, there are four truck load outs. These load outs can load up to 128 trucks in a 24-hour period. Operating 24X7 year round, CF could move up to 2800 tons a day—over one million tons a year—by truck if it chose to do so. Thus, CF could satisfy the entire needs of its Plant City facility by using trucks from its own proprietary ammonia tank terminal.

Without revealing CF's customer, I can state that CSXT understands that CF trucks about 100,000 tons of ammonia per year to a customer from its Port of Tampa terminal. The distance to this destination is over five times the distance from the Tampa terminal to the Plant City facility that is presented in CF's comments as "captive" to rail. Moreover, truck is not only a competitive option for moving ammonia over short distances, but it is also a competitive alternative for longer hauls. Indeed, at a February 2008 conference hosted by The Fertilizer

Institute in Orlando, Florida, truck was promoted by Grammer Industries LLC as a competitive option for moving ammonia over longer hauls. A Grammer Industries promotional display entitled "Are High Transportation Cost De-Railing Your NH3 [i.e., ammonia] Budget" said "Truck can be competitive with Rail Transportation up to 1000 miles" and included a map—which practically overlays the entire CSX network—with three arches depicting the long haul options for moving ammonia by truck from the three ammonia origin points depicted as stars on the map (Tampa, FL, Pascagoula, MS, and Donaldsonville, LA). *See* Appendix A (TFI Conference Pictures) and Appendix B (Grammer Logistics undated promotional letter).

CSXT believes that approximately 45% of CF's finished phosphate production moves by truck from its Plant City facility to the port of Tampa where it is then transported by barge along the northeast coast of the Gulf of Mexico to New Orleans where it connects to the Mississippi River, and then moves up-river by barge to various destinations in the South and Midwest. Of the finished phosphate that moves out of Plant City by rail, virtually 100% is truck competitive.

In the Central Florida "Bone Valley", dual purpose trucks dominate bulk transportation. These trucks are designed to handle sulphur movements to the several fertilizer plants in the area and to handle finished phosphate fertilizer on the outbound move. Today, CSXT estimates that CF's Plant City facility receives between 400,000 and 500,000 tons of sulfur per year via truck. Further, CSXT estimates that between 500,000 and 800,000 tons of finished phosphate fertilizer moves via truck from Plant City to the port in Tampa. By contrast, the tonnage of finished phosphate fertilizer that moves by rail is one-third to one-fourth of the volume that moves by truck.

Finally, CF states that:

> CF's inland plants, despite the presence of a local truck market, are highly dependent on rail to service their facilities. In 2010, 85% of

> what was shipped from the Yazoo City, Mississippi plant, and over 75% of what was shipped from the Verdigris, Oklahoma plant was by rail.

CF Comments at 3. What is unsaid is that the Yazoo City plant is located on the Yazoo River and CF ships a significant portion of its outbound finished product by barge. Similarly, the Verdigris plant is located on the Arkansas River and ships outbound shipments by barge.

CF portrays its position as "captive" and complains that its rates have increased "beyond any cost measure index." Yet, in the phosphate business, it is well recognized that market-based pricing of phosphate-based fertilizers is subject to wide fluctuations in demand, and that prices rise and fall as demand rises and falls—not necessarily as production costs go up and down. Moreover, freight rail rates on some rail moves make up less than three percent of the delivered price of anhydrous ammonia and phosphates. Whereas freight rail prices are in the dollars per ton range, the prices of anhydrous ammonia and phosphates regularly fluctuate by hundreds of dollars per ton and are the primary driver in the profitability of the business of CF and other shippers of those commodities.

CSXT strives to provide CF with a transportation value package that charges fairly for the value of the service we provide. We continually strive to improve service and to deliver the transportation CF needs. The value we offer CF includes the safety and security of a dedicated daily just-in-time unit train that does not stop once it leaves the origin until it is placed at destination. We offer significant financial responsibility with our insurance coverage and a safety record that CF tells us is the primary reason they voluntarily choose our services. The fact that prices may exceed a 180 R/VC jurisdictional threshold does not in any way imply that CSXT does not face competition every day for CF's business. In fact, during our contract negotiations, CF repeatedly cited its truck options as part of its pricing negotiations.

III. RESPONSE TO COMMENTS OF M&G POLYMERS, INC.

I have reviewed the comments filed by M&G Polymers, Inc. ("M&G") in this proceeding. The M&G comments make several in accurate or exaggerated allegations about CSXT.

First, M&G contends that rail rates "have curtailed West Virginia's economic growth" and "are a major impediment to M&G's ability to grow its [PET] business." M&G Comments at 3.

M&G's assertion that rail rates have "curtailed West Virginia's economic growth" ignores the many other factors affecting M&G's commercial viability to grow its business. While M&G complains of the economic burdens of the rail costs to ship PET, CSXT's tariff rate constitutes approximately two to three percent of the total delivered market price of PET, which is currently selling for approximately $1.00 per pound, or about $190,000 per rail car, according to Chemical Market Associates, Inc. ("CMAI"). CSXT believes that two to three percent of the total delivered price is hardly significant enough to curtail a shipper's—let alone an entire state's—economic growth.

Second, M&G asserts that CSXT's rail rates have hurt the domestic PET business because of the number of PET producers that CSXT serves. M&G states:

> The PET business is particularly hamstrung because a single railroad, CSXT, serves the vast majority of the PET producers in the U.S. There is no market for PET transportation if it is dominated by one railroad.

M&G Comments at 4.

M&G's claims are inconsistent with the realities of a marketplace in which M&G and its customers have a variety of transportation alternatives to CSXT's rail transportation service. While it is true that CSXT serves many of the PET producers in the United States, CSXT serves only a small portion of the actual PET consumers. Those consumers are able to receive PET in a variety of modes from a variety of sources. With respect to alternative transportation modes, PET, which generally takes a plastic pellet form, is highly amenable to truck direct and truck/rail transload alternatives. With respect to source competition, each receiver of PET has several potential producers, domestic and foreign, to choose from, some served by CSXT and some served by other railroads. Yet, M&G portrays its position as "captive" to CSXT and complains that CSXT is hurting the domestic PET business. The reality is that what has hurt the PET business most is excessive plant and production expansions and the resulting overcapacity the industry has experienced over the course of the past seven years, overcapacity that has constrained PET prices.

Third, M&G contends rail rates are "pushing PET production away from the U.S." and that "M&G's experience over the past several years reveals the harm incurred by domestic production from the lack of competition in the rail industry." M&G Comments at 8. Based on my knowledge of the PET industry, there are many more significant costs and factors affecting PET siting and production decisions, such as the cost of raw materials, electricity, labor, other process inputs, and any of numerous other costs and factors unrelated to CSXT's rail transportation rates. Indeed, oil and natural gas are primary feedstocks for a majority of chemicals and plastics, including PET, and fluctuations in the price of these raw materials will inevitably impact productions costs. To illustrate this point, the combined cost of purified terephthalic acid ("PTA") and mono ethylene glycol ("MEG"), the two primary raw materials used to make PET, was up "roughly 32 cents per pound" between July 2010 and April 2011, according to CMAI. Converted to a rail car equivalent basis, this represents an increase in cost of over $60,000. This change in PET input costs is over ten times the average rail freight rate it pays to CSXT.

In addition to the increased production costs of PET, another factor contributing to the PET growth slowdown in the United States is that plastic bottle makers have changed their processes to use less PET in their bottles. This change in manufacturing of plastic bottles is driven by environmental concerns, consumer preferences and material cost controls, none of which has anything to do with CSXT's rail transportation rates.

Despite these challenges, the domestic PET industry appears to be healthy. In fact, M&G recently announced that it is building a new world-scale PET plant that will expand their U.S. PET presence by 1 million metric tons per year. Specifically, Marco Ghisolfi, CEO of M&G's Business Unit said:

> As a result of demand growth fully recovering in 2010 and of several plants in North America having closed or been sold over the past few years, the industry supply / demand balance has now been restored, creating room in the market for our new plant.

Fourth, M&G asserts that after CSXT lost some non-M&G business to NS from M&G's Canadian supplier, "CSXT told the Canadian supplier that its captive M&G traffic rates would increase to make up for the lost revenue." M&G Comments at 5. Without revealing the name of CSXT's customer, I can state that CSXT has not lost business from M&G's Canadian supplier and to the best of my knowledge, CSXT has never made such a statement to the customer.

Finally, M&G makes several allegations regarding CSXT's routing protocols and pricing. M&G states that "CSXT's irrational pricing curtails M&G's ability to use the closest connection points to NS." Additionally, M&G complains that CSXT is "curtailing competition by making it fourteen times more expensive (per mile) for M&G to convey traffic to the competition at the nearest location." M&G Comments at 6. M&G specifically alleges that CSXT engages in "irrational pricing" because CSXT interchanges product originating at Apple Grove, West Virginia to NS in Cincinnati rather than at Point Pleasant or Kenova, West Virginia. M&G Comments at 5 – 6.

While it is true that CSXT's Rule 11 tariff rates are higher from Apple Grove to Point Pleasant, WV and Kenova, WV than the tariff rate to Cincinnati, M&G ignores the operational inefficiencies of the nearby NS interchange locations and the economic incentives for shippers to use the primary CSXT – NS interchange locations.

M&G's concern with CSXT's interchange locations suggest that M&G believes CSXT's rates should be linear, based solely on route miles without regard for other commercial, operational, and service design factors. CSXT has worked with its connecting carriers to identify the most efficient locations for interchanging traffic. For interline movements, CSXT develops routing protocols on a bilateral basis with other carriers to maximize operational efficiency and service to our customers. This practice concentrates traffic in trains on the most logical and efficient corridors, and optimizes overall transit times based upon train schedules.

IV. RESPONSE TO COMMENTS OF DUPONT

DuPont alleges that railroads have not been negotiating contracts in good faith. DuPont specifically claims that railroad market power is shown through railroad negotiation tactics, and alleges that "[w]here contract negotiations used to be true negotiations, today, rates are often presented as 'take it or leave it' offers." DuPont Comments at 8.

While I cannot speak on behalf of the other railroads, DuPont's suggestion that CSXT's negotiations with DuPont were in bad faith is simply untrue. For many years, CSXT moved DuPont's traffic—covering hundreds of origin destination pairs and numerous commodities—pursuant to a series of long-term "legacy" contracts. It is true that when CSXT began negotiating new contracts to replace the expiring long-term legacy contract, DuPont resisted price increases and changes to other contract terms that CSXT proposed in order to bring their contract rates up to current market levels. Customers with the buying power of DuPont have many intra- and intermodal choices, which provides them with a great deal of leverage at the negotiating table. For this reason, the contract negotiations with DuPont were conducted over a series of negotiations. CSXT and its customers negotiate over rates and various other terms, and a large percentage of our customers enter into mutually agreeable contracts for rail freight service. The fact is, CSXT offers a significant value to the chemical industry in the form of capacity, safety, and financial responsibility should an incident occur. We do this in the context of fair economic bargaining, whereby our customers voluntarily choose our service through contract commitments.

CSXT has found that customers who have benefitted from very favorable rates and terms for many years can have some very unreasonable expectations when those contracts expire. Today, CSXT is generally reluctant to enter into long-term contracts with our chemical customers. Rather, today, CSXT negotiates mostly one-year contracts. These "shorter-term contracts" are much simpler and contain favorable rates and terms for both CSXT and our customers. CSXT used to begin re-negotiations for its long-term contracts 12-18 months in advance of the contract expiration, but this amount of lead-time is not necessary when re-negotiating shorter-term contracts. CSXT's current practice for re-negotiating our shorter-term contracts is to submit a proposal to a customer approximately 30 – 60 days before the customer's current contract expires.

As the public hazards inherent in transporting large quantities of TIH chemicals have become fully appreciated in our nation, I have become increasingly troubled by the distribution decisions made by the manufacturers of these commodities. For example, DuPont decided to locate a titanium tetrachloride ("$TiCL_4$"), a TIH commodity, production facility in Tennessee. $TiCL_4$ must be shipped from DuPont's Tennessee plant to a customer as far away as Utah – a distance of more than 1,900 miles. We believe DuPont's decision to locate the $TiCL_4$ plant in Tennessee versus Utah (where the product is used) was driven by the favorable economics of constructing such a plant next to an existing titanium dioxide plant it operates in Tennessee. The Utah customer also receives a great deal of non-hazardous raw material from the region thereby minimizing transportation costs of that material. Therefore, it is clear that the locations of these two plants were driven by economics and not for the sake of public safety. Ironically DuPont claims in this proceeding that railroads are using inefficient routing protocols to "increase the length of" their hauls, and argues that "shippers are bearing the costs of inefficiencies in the railroads' routing." DuPont Comments at 5.

As a common carrier obligated by law to transport TIH materials upon reasonable request, CSXT's primary concerns associated with moving TIH materials are the inherent risks to our company, our employees and the general public, especially movements occurring over long distances and through densely populated areas.

V. RESPONSE TO COMMENTS OF PPG INDUSTRIES, INC.

PPG Industries, Inc. ("PPG") states that "[a]s a result of the railroads' aggressive position on handling TIH productions and the lack of competition involved with a substantial portion of PPG's rail shipments, PPG has seen the cost per ton to ship chlorine throughout its system increase over 100% (excluding mileage income since 2004." PPG Comments at 3.

PPG complains that its plant in Natrium, WV "is captive to one railroad (CSXT) while PPG's facility in Lake Charles, LA has access to three railroads". PPG contends that the "cost per ton for shipments of chlorine from Natrium, WV, were" substantially higher "than those from Lake Charles, LA in 2004" and that gap widened in 2010. PPG Comments at 4.

Although PPG portrays its Natrium, WV plant as "captive" to rail, PPG is well aware that barge transportation of chlorine is a viable alternative to rail at PPG's Natrium, WV facility. Indeed, PPG's website states "PPG pioneered barge shipments of chlorine and currently has barges of 1100-ton capacity. Shipping points are Lake Charles and Natrium." *See* http://www.ppg.com/chemicals/chloralkali/products/Documents/English/Chlorine.pdf. In fact, the Board, in the DuPont small shipment rate case against CSXT, found that there was "effective intermodal competition in the form of barge transportation for chlorine movements originating at PPG's Natrium, WV plant" and dismissed the movement from the case for lack of market dominance.

The transportation of TIH materials is uniquely risky and imposes extraordinary and significant costs on railroads. Most notably, railroads face the risk of potentially huge financial liability with each movement of TIH. In addition to the liability costs, there are the substantial additional costs of complying with government-mandated procedures for TIH transportation, including the costs of routing and handling requirements, and implementing positive train control. CSXT estimates that it will be required to spend $1.2 billion over the next five years to comply with the Federal Railroad Administration's positive train control requirements, which are largely driven by TIH shipments on our railroad. In contrast, CSXT's revenues for moving PTC-triggering TIH shipments are only about $100 million per year, or approximately 8 percent of the costs of installing PTC. Yet, PPG's complaint about the cost of transporting Chlorine (a TIH commodity) via rail completely ignores these extraordinary risks and significant costs inherent in transporting Chlorine.

Shipping chlorine and other TIH commodities by rail is a choice that PPG and other shippers make because of the safety and financial responsibility that CSXT offers. Chlorine poses significant risks and hazards against which CSXT is not fully insured. We do not believe our TIH transportation prices today are remotely compensatory for the risk we face in hauling these ultra hazardous commodities. The reality is that we purchase significant liability insurance and yet we still subject our company to a risk of ruinous liability should a catastrophic incident involving TIH materials occur, especially if one were to occur in a highly populated area.

VI. RESPONSE TO COMMENTS OF OCCIDENTAL CHEMICAL CORPORATION

The comments submitted by Occidental Chemical Corporation "OxyChem" complain that a "[routing] protocol dictates shipments between UP served Southern Louisiana origins and New Jersey CSXT served destinations be interchange[d] at Salem" is unreasonable. OxyChem Comments at 4.. OxyChem alleges that the "freight could route via New Orleans, eliminating 494 unnecessary miles." *Id.* OxyChem has incorrectly identified this movement as a UP – CSXT movement. CSXT has not identified any OxyChem shipments from Louisiana to New Jersey that are interchanged with the UP at Salem, and CSXT is not a participating carrier in the movement that OxyChem cites as an example of an allegedly unreasonable protocol. OxyChem has mistakenly identified CSXT as a participating carrier in this interline movement.

Moreover, as I indicated above, concerns regarding CSXT's interchange locations suggest that shippers believe rail rates should be linear, based on miles without regard to other commercial or operational factors. Many complaining chemical shippers seem to ignore the extensive government-mandated safety and security operating requirements imposed on railroads for TIH shipments. For example, CSXT is required to transport TIH shipments on routes that pose the least overall safety and security risk. These federal regulatory requirements—which result from our having to transport TIH traffic that makes up less than 1% of our total annual traffic—greatly complicate the routing of TIH shipments on our network. In fact, complying with these government-mandated operating requirements is likely preventing us from shipping TIH commodities in the most efficient manner. However, in an effort to meet these requirements, CSXT has worked with its connecting carriers to identify the most efficient locations for interchanging traffic that meet the federal requirements. This practice concentrates traffic in trains on the most appropriate corridors, makes the most efficient use of available terminal capacity, and optimizes transit times based upon train schedules.

VERIFICATION

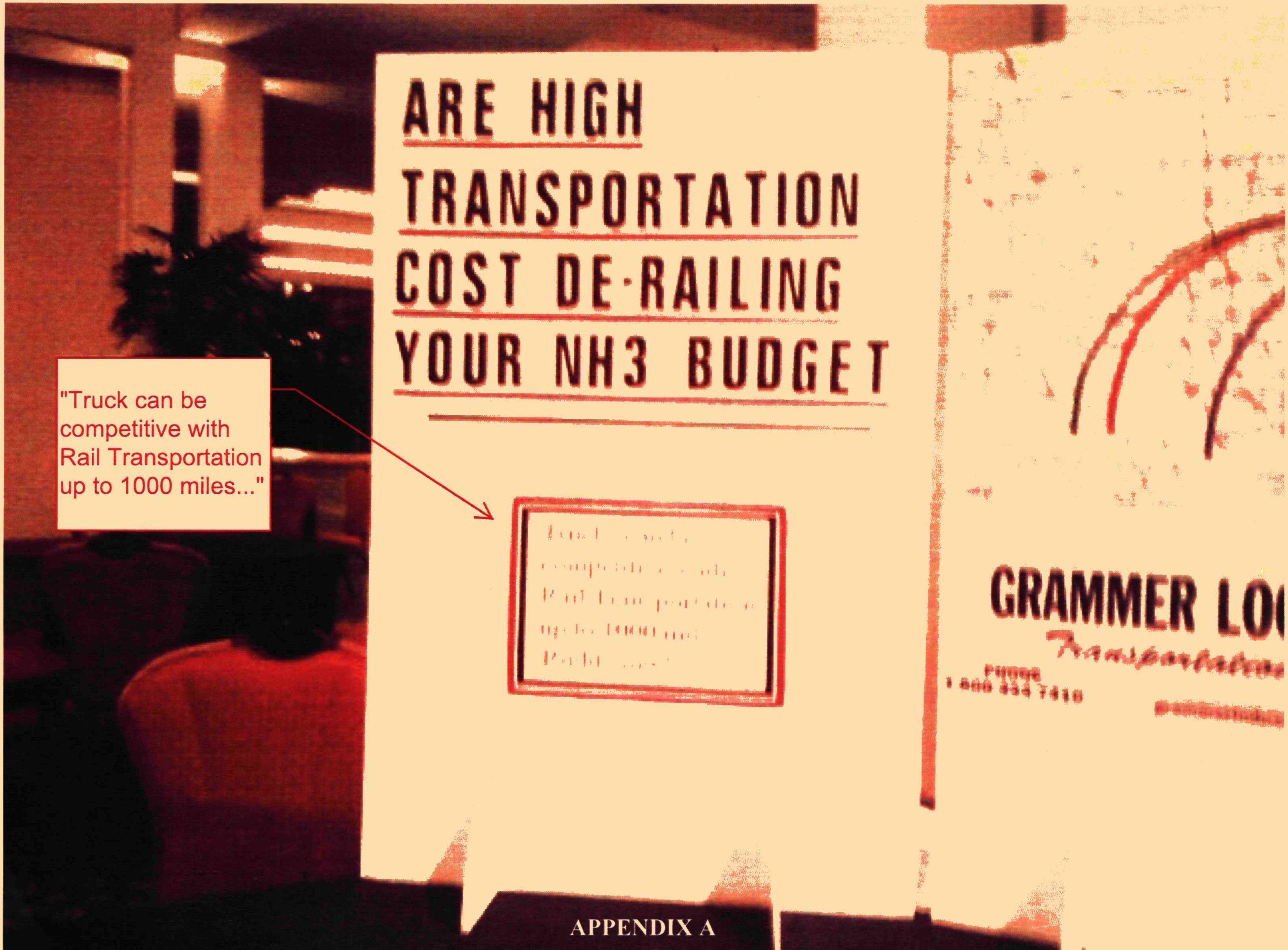
I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 26th day of May, 2011.

Dean Piacente

Dean M. Piacente

PIACENTE APPENDIX A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APPENDIX A

PIACENTE APPENDIX B

Grammer
Logistics, LLC
18375 East 345 South
Grammer, Indiana 47236

Dear Future Customer

Rail transportation rates for anhydrous ammonia are on the rise. Are you prepared with an alternative source when rail rates exceed your planned budget?

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If you're moving NH3 in volume give Grammer a call. We may give you the competitive pricing edge you need.

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Ron Bowen
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APPENDIX B

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 705

COMPETITION IN THE RAIL INDUSTRY

VERIFIED STATEMENT OF HENRY RUPERT
ON BEHALF OF
CSX TRANSPORTATION, INC.

I. MY BACKGROUND

My name is Henry Rupert. I am Assistant Vice President Coal Marketing for CSX Transportation, Inc. ("CSXT"). I have worked in the railroad industry for 23 years. I am submitting this verified statement to address the Joint Initial Comments by the Omaha Public Power District. AES, *et al.* group (including AES) and by the Alliance for Rail Competition and others ("Interested Parties") that specifically address CSXT.

II. AES SOMERSET

It is true that CSXT had delivery difficulties at the AES Somerset plant in the winter of 2010-2011. Particularly severe winter storms affected all modes of surface transportation, and railroads were no exception. Despite difficulties in operations and the fact that AES Somerset coal inventories were low, the AES Somerset plant continued to generate power throughout the winter.

That is not to minimize the transportation service concerns voiced by AES Somerset. CSXT strives to provide the best possible service even in the worst conditions. We understand that our customers rely on us and we pride ourselves in providing reliable, cost effective transportation. During the winter of 2010/2011, CSXT did everything in its power to meet AES's needs. Our efforts during this challenging time were made all the more challenging by the fact that AES substantially increased its orders for service over the prior year.

AES uses its own fleet of cars, with two sets operating on CSXT. During this past winter, due to AES low inventories, CSXT loaded additional trains of CSXT-owned coal hoppers for AES service, diverting them from other service. As a result, CSXT was able to load more trains for AES in 2010-2011 than it had in the winter of 2009-2010.

Year	Month and Trains Loaded							
2009-10	December	6	January	9	February	6	March	5
2010-11	December	8	January	12	February	8	March	12

AES suggests that some sort of forced access of another carrier to the Somerset plant would have alleviated the coal supply problems it experienced last winter. I note, however, that AES complains of Norfolk Southern service in the same region in the same time period. The simple truth is that service to AES Somerset would not have improved by attempting to add a second railroad's trains to the snow-constrained CSXT operations in western New York in the middle of winter. Indeed, none of the forced access proposals that have been presented to the STB in this proceeding would have improved coal supply for AES.

Finally, although it does not single out CSXT, AES asserts that rail rates to its plants have been "well in excess of 180% of the railroads' variable costs of providing service and the rail transportation costs have threatened the long term viability of these plants." *See* Joint Initial Comments of OPPD, AES Corp., et al at 10 (filed April 12, 2011). I can only say that all AES rates with CSXT were fairly negotiated and embodied into transportation contracts. Moreover, in our last contract negotiation, AES threatened to construct a barge un-loader and to take its entire AES Somerset plant's requirements by water. The parties eventually were able to negotiate and enter a new rail transportation contract. The agreed-upon rates seemed to be satisfactory to both parties when they signed the contract.

III. NRG POWER MARKETING

The "Interested Parties" make much of the coal rate case brought by NRG Power Marketing ("NRG") against CSXT before the STB in May 2010. NRG is not one of the "Interested Parties", and none of the "Interested Parties" was involved in that rate case, so they have no basis to opine or "presume" anything about the confidential resolution of that case. If anything, the NRG case proves that market forces and the current balanced regulatory system work very well. The parties reached a mutually acceptable contract with the assistance of STB mediation.

From CSXT's perspective, the fact that the parties were able to reach a private contractual agreement demonstrates that market forces and the negotiations of two large companies can and do lead to mutually satisfactory outcomes. And, even assuming for the sake of discussion that the contract between NRG and CSXT would not have been reached—or would not have been reached as expeditiously—without the backdrop of the STB's rate regulation procedures, the resulting negotiated settlement would be further proof that the current balanced regulatory system works.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 24th day of May, 2011.

Henry T. Rupert