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Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
October 26, 2016
Part of
Public Record

Re: Docket No. EP 711 (Sub-No. 1)

Dear Ms. Brown:

Enclosed for filing in the referenced proceeding are the Opening Comments of Kansas City Power & Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company d/b/a WE Energies.

Thank you for your attention to this matter.

Sincerely,



Kelvin J. Dowd
An Attorney for
Kansas City Power & Light Company,
Seminole Electric Cooperative, Inc., and
Wisconsin Electric Power Company
d/b/a We Energies

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Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RECIPROCAL SWITCHING

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) **Docket No. EP 711 (Sub-No. 1)**
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**OPENING COMMENTS OF
KANSAS CITY POWER & LIGHT COMPANY,
SEMINOLE ELECTRIC COOPERATIVE, INC., AND
WISCONSIN ELECTRIC POWER COMPANY d/b/a WE ENERGIES**

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d/b/a We Energies

Dated: October 26, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**OPENING COMMENTS OF
KANSAS CITY POWER & LIGHT COMPANY,
SEMINOLE ELECTRIC COOPERATIVE, INC., AND
WISCONSIN ELECTRIC POWER COMPANY d/b/a WE ENERGIES**

Kansas City Power & Light Company, Seminole Electric Cooperative, Inc. and Wisconsin Electric Power Company, d/b/a We Energies (collectively “Joint Coal Shippers”), hereby submit their Opening Comments in response to the Notice of Proposed Rulemaking (“NPR”) issued in this proceeding by the Surface Transportation Board (“STB”) or (“Board”) on July 27, 2016. In the NPR, which was preceded by the development of an extensive record, including oral hearings, in Docket STB No. EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules (“EP 711”)*,¹ the Board proposed new rules for application to requests for pro-competitive reciprocal switching relief under 49 U.S.C. §11102(c)(1).

¹ Joint Coal Shippers were active participants in the *EP 711* proceeding. In that docket, they also were joined by Entergy Arkansas, Inc., which has elected not to become a party to the instant proceeding.

The Joint Coal Shippers' principal concern with respect to the issues addressed by the Board in *EP 711* centered on ensuring that whatever action might be taken by the agency to liberalize the evidentiary standards for relief under 49 U.S.C. §11102(c)(1), there should be no change in the standards and principles applicable to determinations of market dominance under 49 U.S.C. §10707 in cases brought by captive shippers seeking the prescription of maximum reasonable rates under 49 U.S.C. §§10701(d) and 10704. In their Opening and Reply Submissions submitted on March 1, 2013 and May 30, 2013, respectively, the Joint Coal Shippers explained why the potentially enhanced availability of a reciprocal switching option could not be determinative on the issue of market dominance in the context of a maximum rate proceeding, and why any outcome in *EP 711* that left doubt on this issue would be injurious to the regulatory protections afforded captive shippers under the governing statute.²

In the NPR, the Board briefly addressed the question of the potential impact of liberalized reciprocal switching rules on Section 10707 market dominance determinations:

There is no need to issue a blanket rule that the existence of a reciprocal switching order would (or would not) preclude a finding of market dominance in rate cases. Instead, a reciprocal switching prescription should be treated in the same way as any other transportation alternative that would be assessed in our market dominance inquiry . . . In evaluating market dominance in rate reasonableness cases, we

² See, e.g., NPR at 23.

propose to continue to analyze whether or not a transportation alternative provides effective competition, including an alternative provided under a reciprocal switching order.

NPR at 23. The Joint Coal Shippers respectfully submit that any final rules adopted in this proceeding should more firmly and precisely prescribe strict limits on when and how the availability of reciprocal switching relief under Section 11102(c)(1) might be considered in evaluating market dominance under Section 10707. As explained in greater detail in these Comments, in any final rule the Board should:

1. Affirm that the availability of a Section 11102(c)(1) reciprocal switching order does not preclude a finding of market dominance under Section 10707 for traffic potentially eligible to utilize the order.
2. Affirm that claims that a reciprocal switching order *could* be available in a given circumstance will not be considered at all in evaluating market dominance, and that only evidence of an actual order that is in place and applies to the traffic at issue will be admitted.
3. Affirm that the existence of an actual, applicable order would only establish that alternative rail service may be physically possible, and that a full, qualitative evaluation of whether *effective* transportation competition was available still must be undertaken.

IDENTITY AND INTEREST

Each of the Joint Coal Shippers operates a coal-fired generating facility that is captive to a single rail carrier. The facilities are located generally within about 30 miles of a working interchange between each company's serving railroad and another carrier. The original National Industrial Transportation League ("NITL") petition seeking reform of the Board's reciprocal switching rules proposed that the agency presume that a shipper's facility located within 30 miles of an interchange was eligible for a switching order. The NPR did not include this presumption, proposing instead that eligibility be determined on a "case-by-case basis." NPR at 21. Nevertheless, the Board also invited comments on how it should define the term "reasonable distance" for purposes of satisfying its newly liberalized standard for switching relief, "in an effort to provide guidelines to parties that may seek switching" *Id.* Given the obvious flexibility at this stage with respect to the scope of the proposed new switching rules, the Joint Coal Shippers have a continuing, legitimate interest in the matters at issue in this proceeding.

1. Kansas City Power & Light Company ("KCPL")

The KCPL Iatan Generating Station near Sadler, Missouri relies on the delivery of nearly 6,000,000 tons of Powder River Basin coal annually, all of which is (and historically has been) transported by the BNSF Railway Company ("BNSF"). BNSF is the only transporter capable of delivering Iatan's coal fuel requirements, which currently are shipped under a contract. However, the mines from which Iatan's coal originates also are served by the Union Pacific Railroad ("UP"), which has trackage

extending east to Kansas City, where a hypothetical interchange with BNSF is possible. The Iatan Station is 34.2 miles from this potential interchange.³

2. Seminole Electric Cooperative, Inc. (“SECI”)

SECI is one of the largest non-profit generation and transmission cooperatives in the United States, and is headquartered in Tampa, Florida. It is organized under the Rural Electric Cooperative Law of Florida (Fla. Stat. §725), for the purpose of supplying wholesale electric power reliably and at the lowest feasible cost to its nine (9) non-profit rural distribution cooperative members. Together with its member cooperatives, SECI serves approximately 735,000 metered customers in 42 of Florida’s 67 counties. The 1,300 megawatt, coal-fired Seminole Generating Station (“SGS”), near Palatka, Florida, is SECI’s principal generating asset. SGS is served exclusively by CSX Transportation, Inc. (“CSXT”), and the level of rates assessed by CSXT on this captive movement in the past has been the subject of litigation before the Board under the *Coal Rate Guidelines*.⁴ However, CSXT has the capability of interchanging trains with Norfolk Southern Railway Company (“NS”) at Jacksonville, Florida, which is little more than 50 rail route miles from SGS.

³ KCPL is a member of the Western Coal Traffic League, which separately is submitting comments in this proceeding as well.

⁴ STB Docket No. NOR 42110, *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, Complaint filed Oct. 3, 2008. SECI and CSXT ultimately reached a settlement resolving the rate dispute, and the proceeding was terminated on September 27, 2010.

3. Wisconsin Electric Power Company d/b/a We Energies (“We Energies”)

We Energies operates several coal-fired electric generating stations in Wisconsin, including the Oak Creek complex at Oak Creek, Wisconsin (“Oak Creek”). Oak Creek has a total electric generating capacity of 2,368 megawatts, and consists of four generating units that burn western coal produced at mines in the Powder River Basin, and two units, known as the Elm Road units, that burn eastern coal from southern Pennsylvania. The four older units burn approximately 3.0 million tons of western coal annually, and the Elm Road units can burn 2.5 to 3.0 million tons of eastern coal annually, depending on the delivered price of the coal.

Oak Creek is served exclusively by UP. Powder River Basin coal is transported to the plant in UP single-line service, and eastern coal is transported to the plant in joint NS-UP service. However, We Energies’ Oak Creek complex is located less than 15 rail miles from a connection between UP and Canadian Pacific Railroad Company (“CP”) at Milwaukee, Wisconsin. Rail system maps indicate that UP and CP can interchange trains at Milwaukee, and that CP interchanges trains both with BNSF (which can originate Powder River Basin coal) and with NS, in the vicinity of Chicago.

BACKGROUND

Responding to a July 7, 2011 petition submitted by NITL in the wake of a general proceeding to examine the state of competition in the U.S. railroad

transportation industry,⁵ the Board opened the *EP 711* docket to consider NITL's proposal to modify the agency's standards concerning mandatory competitive switching relief under Section 11102(c).⁶ After outlining the principal elements of NITL's proposal, the Board invited interested parties to provide information relating to:

(1) the impact [of the NITL proposal] on rates and service for shippers that would qualify under the competitive switching proposal; (2) the impact on rates and service for captive shippers that would not qualify under the proposal...; (3) the impact on the railroad industry, including its financial condition, and network efficiencies or inefficiencies (including the potential for increased traffic); and (4) an access pricing proposal.

July 2012 Decision, slip op. at 2. The Board also invited interested parties to submit "other appropriate information and recommendations" in response to the Decision. *Id.*, slip op. at 11.

In their Opening Submission in *EP 711* filed on March 1, 2013, the Joint Coal Shippers did not take a formal position on the merits of the NITL proposal. Rather, they focused their attention on references in the Board's *July 2012 Decision* to the potential impact of the NITL proposal on determinations of market dominance under Section 10707, and the continued availability of maximum rate regulation on captive traffic, such as the Board's observation that "[u]nder this [NITL] proposal . . . there may be no market dominance, and hence the Board may not regulate the reasonableness of

⁵ *Competition in the Railroad Industry*, Ex Parte No. 705 (STB Served Jan. 11, 2011).

⁶ *EP 711*, STB served July 25, 2012 ("*July 2012 Decision*").

those rates.” *July 2012 Decision*, slip op. at 6. The Joint Coal Shippers explained how the Board’s extensive market dominance jurisprudence made clear that there mere *existence* of a potential transportation alternative is not sufficient to establish the availability of *effective* competition within the meaning of the statute, and showed that any expansion of a Section 11102(c) reciprocal switching remedy that led to a departure from a fact-based, case-by-case analysis of market dominance would have a significant, adverse impact on the rights of captive shippers.⁷ The Joint Coal Shippers reaffirmed these positions – and noted the concurrences of a number of other parties that addressed the issue – in their Reply Submission.⁸

In the NPR, the Board noted that one railroad commenter did appear to share the Joint Coal Shippers’ position that whatever action the Board might take with respect to a Section 11102(c) switching remedy, there should be no change in the agency’s approach to qualitative market dominance determinations.⁹ As the Board also observed, however, both the Association of American Railroads (“AAR”) and BNSF argued the opposite: that the availability of liberalized switching relief “would create an

⁷ See *EP 711*, “Opening Submission of Entergy Arkansas, Inc., Kansas City Power & Light Company, Seminole Electric Cooperative, Inc. and Wisconsin Electric Power Company d/b/a We Energies,” Mar. 1, 2013 at 8-13.

⁸ *EP 711*, “Reply Submission of Entergy Arkansas, Inc., Kansas City Power & Light Company, Seminole Electric Cooperative, Inc. and Wisconsin Electric Power Company d/b/a We Energies,” May 30, 2013 at 2-8.

⁹ NPR at 23.

effective competitive alternative that would preclude a finding of market dominance under the statute.”¹⁰ The Board then set out its proposed resolution:

There is no need to issue a blanket rule that the existence of a reciprocal switching order would (or would not) preclude a finding of market dominance in rate cases. Instead, a reciprocal switching prescription should be treated in the same way as any other transportation alternative that would be assessed in our market dominance inquiry. AAR and BNSF provide no support for their claims that reciprocal switching would automatically be a source of *effective* competition. The Board has held that even where feasible transportation alternatives are shown to exist, those alternatives may not provide effective competition. *E.g., M&G Polymers USA, LLC v. CSX Transp., Inc.*, NOR 42123, slip op. at 2 (STB served Sept. 27, 2012) (citing *Mkt. Dominance Determinations & Consideration of Prod. Competition*, 365 I.C.C. 118, 129 (1981)). In evaluating market dominance in rate reasonableness cases, we propose to continue to analyze whether or not a transportation alternative provides effective competition, including an alternative provided under a reciprocal switching order.¹¹

ARGUMENT

The Joint Coal Shippers support the Board’s ruling regarding the role that a reciprocal switching order under the modified rules proposed in the NPR might play in a Section 10707 market dominance determination, made in the context of a maximum reasonable rate proceeding. Given that the Board’s statement is part of a proposed rule and is summary in nature, however, the Joint Coal Shippers herein explain the sound

¹⁰ *Id.*, citing BNSF Reply at 8.

¹¹ NPR at 23.

basis for the Board's principal conclusion, and offer additional comments regarding the proper manner in which the proposed rule should be applied.

1. Any Final Rule Should Affirm That the Availability of a Switching Order Under Section 11102(c) Does Not Preclude a Subsequent Finding of Market Dominance

The law is clear that simply having access to a potential transportation alternative is far from sufficient to demonstrate a lack of railroad market dominance; the critical showing is proof of an *effective constraint* on the incumbent railroad's pricing power. *West Tex. Util. Co. v. Burlington N. R.R.*, 1 S.T.B. 638, 646 (1996), *aff'd. sub nom. Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997). *See also, Metro. Ed. Co. v. Consolidated Rail Corp.*, 5 I.C.C. 2d 385, 410 (1989). Indeed, "[e]ven where an alternative mode or modes of transportation *exists*, a complainant can establish market dominance by demonstrating that the alternative modes of transportation are not effectively constraining the carrier's ability to increase the rates of the issue traffic." *E.I. Dupont De Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42101, slip op. at 2 (STB served June 30, 2008) (emphasis supplied) (citing *Mkt. Dominance Determinations*, 365 I.C.C. at 129. *See also M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. NOR 42133, slip op. at 2 (STB served Sept. 27, 2012). It logically follows that there can be no lawful presumption against market dominance simply arising from the availability of reciprocal switching relief under Section

11102(c)(1).¹² The Board properly recognized this in the NPR,¹³ and it should be affirmed unequivocally in any final rule.

In the NPR, the Board also proposed to apply the market dominance standards and principles developed in maximum rate litigation in evaluating the “competition prong” of its new competitive switching analysis.¹⁴ The Joint Coal Shippers acknowledge that evidence relevant to that evaluation also could be relevant to a subsequent Section 10707 qualitative market dominance determination in a maximum rate proceeding initiated by a captive shipper served by the same incumbent railroad. However, the Board’s final rule should make clear that unless the strict prerequisites for a ruling of collateral estoppel are satisfied,¹⁵ (1) findings regarding the presence of intermodal or intramodal competition in the context of a Section 11102(c)(1) switching proceeding; would have no binding or preclusive effect on a market dominance determination against a shipper complainant in a separate Section 10701 rate

¹² As the Joint Coal Shippers pointed out in *EP 711*, there are no published decisions in the history of maximum rate litigation before the STB or the Interstate Commerce Commission wherein the agency found market dominance to be absent due to the shipper’s ability to seek competitive access relief under Section 11102, or its predecessor statute. See *EP 711*, Opening Submission, *supra* at 9.

¹³ NPR at 23.

¹⁴ *Id.* at 22.

¹⁵ These include requirements that the matter(s) at issue in the second action must have been fully litigated and actually and necessarily decided in the first action, and that the party against whom estoppel is asserted must have been an active litigant on the same issue in the first action. *Jack Faucett Assocs. v. Am. Telephone & Telegraph*, 744 F.2d 118, 125 (D.C. Cir. 1984) *cert. denied*, 469 U.S. 1196 (1985). See also, *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77 (1984); *Bhd. of Locomotive Eng’rs, Et. Al. v. CSX Transportation, Inc., Et Al.*, 9 I.C.C. 2d 713, 722-23 (1993).

proceeding, and (2) the award of a Section 11102(c)(1) switching order would not give rise to any presumption that “effective competition” under Section 10707 had been established for traffic subject to the order.

2. Only Evidence of an Actual Section 11102(c)(1) Switching Order That Applies to the Issue Traffic Should Be Admissible in Determining Market Dominance Under Section 10707

In the NPR, the Board referred to the potential role that a “reciprocal switching prescription” could play in a Section 10707 market dominance determination.¹⁶ The clear implication was that only an actual order granting switching relief under Section 11102(c)(1) could be considered as evidence in the market dominance inquiry. The Joint Coal Shippers support this standard, and request that in any final rule the Board explicitly provide that railroad claims or purported evidence related to the alleged *availability* of a switching order will be inadmissible on the question of qualitative market dominance in a Section 10701 maximum rate proceeding.

On several past occasions where utility coal shippers have sought rate relief under the *Coal Rate Guidelines*, the Board has evaluated railroad claims that a complainant’s traffic was not subject to market dominance, not because of the existence of an actual alternative transportation system, but based on the argument that the shipper could *create* a competitive alternative, usually through extraordinary capital investment in new transportation infrastructure. The Board quite correctly has closely and skeptically scrutinized such claims, given their highly speculative nature, and invariably

¹⁶ NPR at 23.

has rejected them. *See, e.g., Tex. Muni. Pwr. Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573, 582-84 (2003); *West Tex. Util. Co.*, 1 S.T.B. at 650-51. In all recent cases wherein the Board has found the absence of market dominance for some portion of the issue traffic, alternative transportation systems already were in place, and actually had been or were capable of being used by the complainant. *See, e.g., Total Petrochems. & Refining USA, Inc. v. CSX Transp. Inc.*, STB Docket No. NOR 42121 (STB served May 31, 2013); *M&G Polymers USA, LLC, supra*.

A claim that a complaining shipper could avoid market dominance by successfully litigating a case under Section 11102(c)(1), where the shipper had not actually done so, would be even more speculative and assumption-dependent than any of the “build-in” theories advanced cases like *Tex. Muni. Pwr.* or *West Tex. Util. Co.* Virtually every element of such a case – including the operational practicality of the switching arrangement under proposed 49 C.F.R. Part 1145.2 and the level of compensation to be paid to the switching carrier pursuant to 49 U.S.C. §11102(c)(1) – would be purely hypothetical, and the Board effectively would be called upon to issue an advisory opinion without an evidentiary hearing and an actual, developed record. The Board’s market dominance jurisprudence makes clear that determinations under Section 10707 are to be made on the basis of specific and credible evidence of actual, effective competition.¹⁷ To even entertain a claim that the potential “availability” of a Section

¹⁷ *See, e.g., DuPont, supra* at 5-20; *M&G Polymers, supra*, at 11-63; *Consumers Energy Co. v. CSX Transp., Inc.*, STB Docket No. NOR 42142 (STB served July 15, 2015) (Board order specifically instructing parties as to the organization and required content of evidence relevant to market dominance).

11102(c)(1) switching order could support a finding of an absence of market dominance would violate this rule, as there could be no actual evidence to evaluate under Section 11102(c)(1) where no claim for relief thereunder had been pursued by the complaining shipper. Any final Board rule in this proceeding should plainly provide that only evidence of an actual, existing switching order that (1) encompasses the traffic at issue; (2) can effectively and efficiently meet the needs of that traffic (considering the logistics and frequency of switching that would be required and the time needed to complete the switching); and (3) includes all of the terms and conditions that govern the service, including compensation levels, would be admissible on the question of qualitative market dominance in connection with a maximum rate proceeding covering that traffic.

**3. A Reciprocal Switching Order Only Means
That an Alternative May Be Physically Possible**

As noted *supra*, in the NPR the Board rejected arguments advanced by the AAR and BNSF that the availability of reciprocal switching should be considered proof of the presence of “effective competition,” proposing instead that a switching order “should be treated in the same way as any other transportation alternative that would be assessed in our market dominance inquiry.” NPR at 23. The Board did not elaborate in the NPR on how such an order should be “assessed,” beyond observing the established principle that even where a feasible transportation alternative exists, that alternative may not in fact represent effective competition under the governing statute. *Id.*, citing *M&G Polymers USA, LLC* at 2 and *Mkt. Dominance Determinations*, 365 I.C.C. at 129.

The Joint Coal Shippers submit that in any final rule, the Board should make clear that *at most*, an actually issued and effective Section 11102(c)(1) switching order that applies to traffic subject to the maximum rate complaint¹⁸ would establish only that alternative transportation service may be physically available, and nothing more. It still would be necessary for the Board to conduct a comprehensive and thorough evaluation of the potential alternative, to determine whether that alternative is “sufficiently competitive . . . to bring market discipline to [a railroad’s] pricing.” *West Tex. Util. Co.*, 1 S.T.B. at 645, quoting *Metro. Edison Co.*, 5 I.C.C. 2d at 410. *Inter alia*, this would include consideration of specific evidence respecting the following:

a. Operational Feasibility

The switching service available under the Section 11102(c)(1) order must offer an efficient alternative to the service provided by the incumbent carrier *to the complainant*. The Board’s market dominance jurisprudence requires a showing that a proposed alternative exerts pressure on the incumbent “to perform up to standards and at reasonable prices, or lose desirable business.” *Mkt. Dominance Determinations & Consideration of Prod. Competition*, 365 I.C.C. at 129, *aff’d sub nom. W. Coal Traffic League v. United States*, 179 F.2d 772 (5th Cir. 1983) (en banc). As the Board has held repeatedly, “[e]ven where feasible transportation alternatives are shown to exist, those alternatives may not provide ‘effective competition.’” *E.I. DuPont DeNemours & Co. v.*

¹⁸ As discussed *supra*, if there is no actual order issued and in effect that applies to the issue traffic, any proffered “evidence” of the alleged availability of reciprocal switching relief should be inadmissible entirely.

Norfolk S. Ry. Co., NOR 42125 (STB served Mar. 24, 2014) at 17. Thus, for example, service under a Section 11102(c) reciprocal switching order granted at the request of a carload shipper of chemical products may be wholly inadequate from an operational standpoint to satisfy a nearby utility coal shipper’s need for repetitive unit train service. Before directed switching under Section 11102(c)(1) could be considered to represent an “effective” alternative, the Board would have to find that such service is at least the operational equivalent of the service to which a challenged rate applies.

b. Interchange Efficiency

As described in the NPR, a key factor in the determination whether a reciprocal switching arrangement should be prescribed – whether under the “public interest” standard or the “competitive rail service” criterion – is the requirement that a “working interchange” between the Class I carrier serving the petitioning party and another Class I railroad exists, or can be established “within a reasonable distance of the facilities of the party seeking switching.” NPR at 41-42. The text of the NPR explains that a “working interchange” either is one that actually exists and is handling the exchange of cars between Class I railroads, or one that could become operational without the need for new infrastructure construction. *Id.* at 21. In the context of a Section 10707 market dominance determination, these limitations highlight the importance of a careful analysis of whether interchange facilities that would be adequate to address the competitive needs of the shipper that successfully petitioned for switching relief, could provide effective, competitive alternative service for a *different* shipper

transporting other commodities and/or requiring a different type of rail service (e.g. trainload vs. carload).

Additionally, as the NPR makes clear, to be “workable” an interchange must be capable of handling the transfer of a shipper’s traffic between the Class I railroads “without the need for construction” *Id.* It follows logically that if existing infrastructure is adequate to enable a “working” interchange to be established for a petitioning carload shipper, but could not handle longer unit trains without the construction of additional trackage, then there would be no “working” interchange available for the latter traffic, such that a switching order granted to the petitioner could not represent a source of “effective competition” for the unit train shipper. *See Ariz. Pub. Serv. Co. v. United States*, 742 F.2d 644, 650-51 (D.C. Cir. 1984); *McCarty Farms, Inc. v. Burlington N. Inc.*, 3 I.C.C. 2d 823, 832 (1987). The Joint Coal Shippers endorse this principle.

c. Divertible Traffic

While the Board and its predecessor have ruled that it is not always necessary that a captive shipper be able to divert 100% of its traffic away from its serving carrier in order to benefit from “effective competition,”¹⁹ precedent holds that unless the shipper can deprive the carrier of enough traffic to actually pressure it “to

¹⁹ *See, e.g., Salt River Project v. United States*, 762 F.2d 1053, 1057 (D.C. Cir. 1985); *DuPont, supra* at 17; *FMC Wyo. Corp. v. Union Pacific R.R.*, 4 S.T.B. 699, 712 (2000). Notably, however, where the potential source of competition required the investment of significant capital for the construction of new infrastructure, the Board has evaluated its feasibility based on the assumption that 100% of the issue traffic would have to be divertible. *See Tex. Muni. Pwr.*, 6 S.T.B. at 584.

perform up to standards and at reasonable prices,”²⁰ qualitative market dominance will be found. In any complaint proceeding brought under Section 10701(d) wherein a Section 11102(c)(1) switching order was invoked as evidence of the availability of “effective competition,” the Board would need to find that the existing or usable “working interchange,” as defined and limited in the NPR,²¹ was capable of handling a sufficient share of the complaining shipper’s traffic to threaten the defendant with a loss of revenue great enough to cause it to maintain rates for the complainant’s traffic at reasonable levels.

d. Cost of Reciprocal Switching

It is well-established that even where an actual, operationally feasible transportation alternative is present, if the cost to the shipper of accessing a potential alternative transporter is at a level that still allows the incumbent to engage in monopoly pricing, “effective competition” within the meaning of Section 10707 does not exist.²²

As the Board observed in 2013 in the *Total* proceeding:

[A]t some point even a monopolist could price its services so high that patently ridiculous transportation alternatives would eventually serve to constrain rates.

Total Petrochems., *supra* at 16. Similarly, the Board has recognized that “effective competition” cannot be inferred simply by showing that the cost of using a prospective alternative is close to the challenged rate:

²⁰ *DuPont*, *supra* at 17.

²¹ NPR at 21.

²² *See DuPont*, *supra* at 17.

[T]he mere fact that a rail carrier prices its services right at the threshold where, if slightly higher, it might begin to lose traffic to an alternative does not indicate whether that alternative is constraining rates effectively.

M&G Polymers, supra at 13. *See also, Total Petrochems, supra* at 17; *FMC Wyo.*, 4 S.T.B. at 718. And in order to evaluate the economic feasibility of an alleged transportation alternative, evidence must be presented regarding the actual cost of that alternative, including the rate(s) that the erstwhile competitor would charge. *See Tex. Muni. Pwr.*, 6 S.T.B. at 584 (“With no assurance of rate reductions sufficient to reduce [TMPA’s] overall transportation cost . . . we cannot conclude that the build-out option . . . provides sufficient competitive pressure to effectively discipline BNSF’s rate.”)

The foregoing principles must be applied in full to any claim that a directed switching order issued under Section 11102(c)(1) negates a finding of market dominance under Section 10707 for a rate complainant whose traffic arguably is covered by the order.

The NPR sets out two (2) approaches to a Board determination of the price that would be set for the provision of mandatory switching (in the event that the involved carriers cannot agree), and solicits comments on alternative methodologies. NPR at 25-26. However the Board ultimately resolves this issue, in any market dominance litigation where a switching order is invoked, the foregoing precedents require that evidence also be presented showing the rate that the “competing” Class I carrier would charge for service from the shipment’s origin(s) to the designated

interchange. If no such evidence is available, the inquiry whether the switching order facilities “effective competition” should be at the end. *Tex. Muni. Pwr.*, 6 S.T.B. at 584.

If an operationally feasible switching arrangement that could provide a Section 10701 complainant with a *bona fide* alternative to meet its transportation needs was available, and if both the “access price” for switching service²³ and the alternative Class I carrier’s origin-interchange rate were established, the Board still would have to determine whether the total cost of the alleged alternative was low enough “to bring market discipline to [the incumbent railroad’s] pricing.” *West Tex. Util.*, 1 S.T.B. at 645; *Metro. Ed. Co.*, 5 I.C.C. 2d at 410. In addition to probing for any verifiable evidence of an actual rate response from the incumbent carrier to the prospective competitive “threat,” the Board’s current market dominance jurisprudence would call for application of its Limit Price Test. That gauge purports to measure the effectiveness of an alleged alternative by looking to the relationship between the revenue-variable cost ratio of the alternative’s price relative to the incumbent carrier’s variable cost (the “limit price ratio”), and the incumbent’s Revenue Shortfall Allocation Methodology (RSAM) percentage.²⁴ If the limit price ratio exceeds the RSAM, then the test indicates that the proposed alternative “cannot exert competitive pressure sufficient to constrain rates effectively.”²⁵ The Board has rejected railroad challenges to the use of the test on a number of grounds, and it now appears to be an established component of the Board’s

²³ NPR at 24.

²⁴ *DuPont*, *supra* at 20-21; *M&G Polymers*, *supra* at 3-4.

²⁵ *DuPont*, *supra* at 20-21.

market dominance analytical framework.²⁶ See *DuPont, supra* at 19-21; *Total Petrochems., supra* at 21-26.

In the context of evaluating the competitive effectiveness of an existing Section 11102(c)(1) switching order, the Limit Price Test would compare the incumbent carrier's RSAM to the ratio of the prospective origin carrier's rate²⁷ plus the prescribed switching access fee, to the incumbent carrier's movement variable cost (the "limit price"). If the latter exceeds the former, then according to the Board's view, "there would be a preliminary conclusion that the alternative cannot exert competitive pressure sufficient to effectively constrain the rate at issue." *DuPont, supra* at 19.

CONCLUSION

The Joint Coal Shippers support the Board's proposed approach to the hypothetical relationship between a Section 11102(c)(1) switching order and the determination of market dominance in a maximum rate complaint action under Section 10701(d), as summarized in the NPR,²⁸ and urge the Board to expand and supplement that summary in any final rule, through adoption of the points and principles set forth in these Opening Comments.

²⁶ The Joint Coal Shippers do not endorse the test, or necessarily subscribe to the Board's views regarding the test's consistency with the governing statute. However, since the Board has made clear its intent to use the test in evaluating market dominance in individual cases, the Joint Coal Shippers address it here.

²⁷ As noted *supra*, if such a rate has not been quoted or otherwise is not available, the inquiry would be at an end and the switching "alternative" would be found to be infeasible as a competitive constraint. *Tex. Muni. Pwr.*, 6 S.T.B. at 684.

²⁸ NPR at 23.

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