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**VIA E-FILING**

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

Re: STB Docket No. EP 711
Petition For Rulemaking To Adopt Revised Competitive Switching Rules

Dear Ms. Brown:

In accordance with the Notice served on July 25, 2012 and the decision issued on October 25, 2012, both issued in the above-referenced proceeding, enclosed are the "Opening Comments And Evidence Of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

Enclosures

cc: Warren K. Erdman
W. James Wochner
David C. Reeves

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB DOCKET NO. EP 711

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# PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES

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# OPENING COMMENTS AND EVIDENCE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

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Attorneys For The Kansas City Southern Railway Company

Dated: March 1, 2013

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## INTRODUCTION

In a Notice issued by the Surface Transportation Board ("STB" or "Board") on July 25, 2012, the Board invited interested parties to submit comments and empirical evidence on a proposal by the National Industrial Transportation League ("NITL") to have the Board, through government regulation, establish numerous conclusive presumptions regarding the market power of a railroad serving a shipper facility. If the railroad's service to that shipper fell within those conclusive presumptions, the shipper would be entitled to require the serving railroad to "switch" the shipper's traffic at unspecified rates to the nearest actual or potential working interchange with another railroad, as long as that working interchange was within 30 miles of the shipper facility. The serving railroad would be required to provide this "switch" to the other railroad notwithstanding that the serving carrier could deliver the shipper's traffic to/from origin/destination via its own lines or via a voluntarily negotiated interline agreement (i.e., joint service via two railroads) and notwithstanding the operational and service concerns that would impact the rail network. The switch would be required even in the absence of any finding that the rate being charged by the incumbent carrier was unreasonable. The purpose of the NITL proposal is to ensure reasonable rail rates by increasing rail-to-rail competition. Notice at 6.

The Kansas City Southern Railway Company ("KCS" or "Kansas City Southern") hereby provides these Opening Comments and Evidence. The Board should reject the NITL proposal for four reasons. First, the proposal is another attempt by certain shippers to resolve complaints about the level of rail rates. KCS believes that there should be effective regulatory relief available for shippers who are being charged unreasonable rates. The solution, however, is not to impose a heavily regulated switching regime that has significant unintended consequences, but rather, to continue this Board's long standing and largely successful efforts to develop ways in which shippers can cost effectively and efficiently challenge the level of rail rates. Second, the proposal fosters significant unintended consequences, creating operational inefficiencies on the incumbent railroad and throughout the rail network, increasing government regulatory involvement, and raising litigation costs. The proposal also could potentially result in the lessening of competition as smaller railroads, especially those that depend upon interline traffic, are unable to obtain sufficient revenues to obtain revenue adequacy. Third, even if the Board is inclined to adopt the proposal, it does not have the legal authority to undertake most aspects of the proposal and cannot do so without Congressional changes to the statute. Finally, the proposal is bad policy as it runs counter to current antitrust policy and prior Interstate Commerce Commission ("ICC") findings with respect to the use of conclusive presumptions.

## I. THE PROPOSAL IS UNNECESSARY TO RESOLVE THE SHIPPERS' CONCERNS

### A. The Shipper's Concerns Are Really About Regulating Rates, Not About Allowing Rail To Rail Competition To Set The Rates

The genesis of this proceeding began in 2011, when the Board held a hearing to consider the state of competition in the railroad industry and what steps, if any, it should take to resolve shipper concerns about increasing rail rates. See Competition in the Railroad Industry, Docket No. EP 705. While some commenters focused on the Board's authority to direct switching under 49 U.S.C. § 11102(c) as a means to provide more rail-to-rail competition, the vast majority of commenters did not suggest that the solution to their concerns lay in increasing the number of railroads serving their particular facility(ies), but rather, the almost unanimous complaint was that rail rates were too high and that there was not an effective regulatory remedy to challenge those rates. Most shipper commenters did not support mandatory switching or competitive access proposals; rather, most wanted a more effective rate complaint system.

An example of the majority of views is Occidental Chemical Corporation ("Oxychem"). Oxychem, in its post hearing supplemental testimony, focused almost entirely on rail rates, not access to more carriers. According to Oxychem, in 2009, it had to shut down operations on its polyvinyl chloride production in Louisville, which was open to reciprocal switching on one end, because of high rates. See EP 705, Oxychem Supplemental Testimony. Oxychem testified that during the 2-3 years prior to closing the Louisville plant, rail rates increased by 25%. In 2008, Oxychem shut down its Muscle Shoals chlor-alkali manufacturing operations. In announcing that closure, the company stated "rapidly escalating rail transportation costs" was a factor. Id. Oxychem testified that "rail freight rates are material and directly impact our ability to compete nationally and globally." Id. Oxychem's testimony is illustrative of the fact that the real concern is not about increasing the number of rail-to-rail competitors[1] at a given facility, but rather about finding a way to effectively challenge rail rates; however that is accomplished.

The Consumers United for Rail Equity ("CURE") also expressed discontent, not about the need to promote rail to rail competition by increasing the number of railroads at a singly served facility, but rather about the lack of an effective means by which to challenge rates, and the costs and inefficiencies of the existing rate methodologies, arguing it was time for Board to identify a rate reasonableness standard that can be applied more easily. See EP 705, Initial Comments of Consumers United for Rail Equity at 15. In fact, when given the choice between remedies they would like the Board to pursue, CURE responded to a question posed by Commissioner Begeman at the June 22, 2011, where she asked whether the shipper community would rather have increased access to competition or an improved rate regulation process, that in its opinion, the most important "fix" was to fix the rate complaint process – not increasing the number of railroads via enhanced access. It recommended a change in the current rate regulatory program (removing small rate case relief caps) and a clarifying statement by the Board regarding one aspect of that program (changing the market dominance test). See EP 705, Supplemental Comments of Consumers United for Rail Equity at 1. Thus, CURE, will also supporting enhanced access, believed the Board should find ways to improve the rate complaint regulatory process. EP 705, Supplemental Comments of the Interested Parties at 6-7.

The EP 705 Opening Comments of the Fertilizer Institute also expressed concern about increasing rail rates and the need to have an effective means by which to challenge those rates. It

[1] It is important to note that the Oxychem facility was already open to reciprocal switching – the very same remedy NITL's proposal now seeks to impose on the entire industry. Yet, notwithstanding the ability to use another carrier via reciprocal switching, Oxychem still claimed that its rail rates were too high. This just goes to show that the existence of rail-to-rail competition is not the panacea the Petition would like this Board to believe.

noted that phosphate shippers have experienced rate increases of 60% and "rail rates rose ten times faster than the rate of inflation." EP 705, Opening Comments of the Fertilizer Institute at 3. The Fertilizer Institute noted that rates were increasing for both shippers served by more than one railroad, and the so-called captive shippers. Id. In contrast to what the NITL proposal suggests, and what the Board is now considering, the Fertilizer Institute also suggested that increasing access was of limited value. See EP 705, Opening Comments of the Fertilizer Institute at 10.

M&G Polymers USA, LLC complained not about the need to increase the number of rail competitors at its facility, but rather that rail rates were increasing to unreasonable levels. Indeed, M&G noted that even where there were two railroads, rates still increased because, in their view, the railroads' refused to compete. See EP 705, M&G Notice of Intent to Participate. It appears that M&G, like others, was not saying that it lacked competitive options, but rather it was being subjected to high rates. Further, M&G claimed that the expense and time required to obtain a lawful rate before the Board limited the utility of the remedy. See EP 705, Opening Comments of M&G Polymers USA, LLC at 9.

Most of the Initial Comments of Total Petrochemicals ("TP") were devoted to allegations of railroad pricing power, non-competitive pricing behaviors and duopolistic pricing behavior, and the consequent need to reform rate case methodologies. See EP 705, Opening Testimony of Total Petrochemicals USA, Inc. at Pages 1-5. TP argued that Board action is necessary to "control runaway rail rates," because even where a shipper possesses alternative options, competition as it exists is insufficient to allow the marketplace to dictate rates.[2]

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[2] Several large shippers and some shipper groups commented that rail rates were increasing even at competitively served locations as well as at singly served (so-called "captive" locations), which shows that such rate increases were not the result of the unlawful exercise of market

The fact that shippers are really interested in rate relief, not enhanced rail to rail competition, was further evidenced by comments of the Alliance for Rail Competition ("ARC"). As the supplemental testimony of ARC states, shippers "are more likely to benefit from increased protection against unreasonable rail rates and charges and unreasonable railroad practices than from increased competitive remedies such as improved access, increased switching, reopening of the Bottleneck Decisions,[3] or actions on paper barriers." See EP 705, ARC Supplemental Testimony at 2. In response to Commissioner Mulvey's question in the June 22, 2011 hearing about what can the Board do to address shipper concerns, ARC offered "The Board should consider ways to reduce existing barriers in law and policy to relief from unreasonable rates and charges, and relief from unreasonable rail practices." Id. It did not name forced competitive switching as a preferred alternative.

Ameren's testimony echoed the same sentiment. Ameren's opening comments were almost exclusively about rates, and the need to revise rate methodologies. Ameren offered that competition was sometimes insufficient even when the shipper had access to two carriers; "from 2004 to 2011, Ameren issued bids for rail rate quotes for eleven competitive rail-served plants. Not a single one of these plants changed carriers as a result of these requests for new rates."[4] See EP 705, Opening Testimony of Ameren Corporation at 4. Ameren recommended that the Board revise rate methodologies: (1) the STB should move to interpret the statute that if any rate

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power, but rather the result of other market based factors. It also shows that one cannot assume that simply adding another railroad to a singly served location would automatically result in lower rates.

[3] Central Power & Light Co. v. Southern Pacific et al., 1 S.T.B. 1059 (1996) (Bottleneck I), clarified, 2 S.T.B. 235 (1997) (Bottleneck II), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999)("Bottleneck Decisions").

[4] Of course while Ameren equates this to mean the two railroads are not competing, there is another explanation: perhaps the reason why the incumbent railroad has the traffic in the first instance is because it is the low cost competitor.

exceeds 180% R/VC, that rate *prima facie* demonstrates that there is a clear lack of effective competition, and can be challenged under the STB rate guidelines[5]; and (2) the bar for revenue adequacy is currently set too high to provide meaningful guidance to rail rate issues. Id at 6. Interestingly, Ameren's opening comments don't address mandatory switching regimes such as those proposed by NITL.

All of the shippers in EP 705 had one thing in common: they wanted rate relief and/or a revision in the existing rate complaint methodologies in order to make it easier for them to obtain rate reductions. The shippers' comments demonstrated that what was of the most value to them was the Board's continued focus on changes to the rate relief process. NITL's proposal would have the Board ignore these calls for changes in the rate complaint process in favor of a mandatory switching regime based upon arbitrary unsubstantiated presumptions.

As KCS has said many times before, the Board should respond to these concerns and focus its energy on the rate complaint processes rather than pursue untested and unsupported mandatory switching remedies. Shippers in EP 705 repeatedly complained about rate levels, repeatedly called for changes to the rate complaint process, and repeatedly said that access to multiple carriers did not resolve their rate concerns. The appropriate response to these concerns is not to create a new regulatory switching regime based on faulty premises that threatens to disrupt the nation's rail transportation system; rather, the Board should continue to explore means to make the rate complaint process fair, accurate, expeditious and less costly. Indeed, the fact that there have been no Simplified SAC cases as yet which have required final resolution by the Board is a sign that the Board's most recent rate case revisions are working, encouraging settlements of rate complaints.

[5] Such relief would, however, be prohibited by 49 U.S.C. §10707(d)(2).

B. The Premises Underlying The NITL Proposal Have Not Been Sufficiently Established So As To Warrant Consideration Of The Proposal At This Time

NITL's proposal is premised on the unsubstantiated assertion that creating government mandated rail-to-rail competition will result in better service and lower rates, but, in a network industry characterized by high capital investment and differing route structures, this assertion is not necessarily correct. The NITL Petition contains no empirical data to support its premise, nor has the Board undertaken such a study. Indeed, if one reads the EP 705 comments of those shippers who today have dual rail service, the Board cannot reach the conclusion that adoption of the NITL proposal will automatically result in lower rates or better service.

For example, a number of shippers in the EP 705 proceeding argued that rail to rail competition, even as it exists at dual served facilities, was insufficient to provide shippers with what they viewed as competitive rates. In their view, the rates were still going up, even at such dual served facilities. See EP 705, Reply Comments of Consumers United for Rail Equity at 3; and the Oral Argument Exhibits of Omaha Public Power District ("OPPD"), The AES Corporation, Oklahoma Gas & Electric Company, and Colorado Springs Utilities ("CSU") Supplemental Testimony at 8. ("OPPD Joint Commenters"). OPPD argued that the presence of rail-to-rail competition at a given facility is insufficient to allow the free marketplace to determine rates.[6] Likewise, CSU testified that while it has access to both UP and BNSF, CSU found that BNSF lacked any interest in competing with UP for CSU's contract upon renewal in

[6] As an example, OPPD claimed that at one of their facilities, there is physical access to two carriers, UP and BNSF, but the two carriers still do not necessarily compete with one another. It claimed that when OPPD's contract with UP came up for renewal in 2008, BNSF refused to make a meaningful opportunity to compete for its business. See EP 705, Oral Argument Exhibits of Supplemental Testimony of Omaha Public Power District, The AES Corporation, Oklahoma Gas & Electric Company, and Colorado Springs Utilities, at 3. Interestingly, this statement demonstrates that even in the presence of two-carrier competition, shippers are still unhappy because of what they perceive as high rail rates.

2010. *Id.* The National Rural Electric Cooperative Association indicated that its members reported that rail-to-rail competition has ceased, "even in many situations where a rail customer has direct, physical access to two rail carriers." See EP 705, June 22, 2011 Hearing Testimony of Glenn English, Chairman, Consumers United for Rail Equity, CEO, National Rural Electric Cooperative Association at 2. ARC noted that even where shippers have access to two carriers, "many railroads that could provide effective competition decline to do so." See EP 705, Supplemental Testimony of ARC at 1. Total Petrochemicals USA, Inc. argued that "Class I railroads have shown [a] reluctance to compete directly for business where their own Class I competition has a foothold." See EP 705, Opening Testimony of Total Petrochemicals USA, *Inc.* at 5.

Clearly, the presence of multiple carriers does not satisfy many shippers because their concerns have little to do with the presence of competing carriers, but rather are driven by shippers' discontent with rates. These shippers believe that rates are going up, even at dual served facilities, because railroads are not competing for their business or that rail mergers have given the railroads too much market power. Furthermore, the NITL Petition is void of any empirical data to demonstrate the extent to which its proposal would actually achieve the results it presumes will be achieved. It has not shown how many locations impacted by the proposal are locations where the serving carrier is exercising undue market power so as to warrant imposition of Section 11102(c) nor has it shown that granting relief at those locations would be both practicable and in the public interest, as required by the statute. The NITL Petition does not demonstrate that increasing the number of carriers serving a certain shippers' location will actually result in better rates and service so as to provide a policy justification for their proposal, nor has it presented any empirical data for the assertion that rate increases are indicative of market power. In fact, what empirical data there is says precisely the opposite. According to the Board commissioned Christensen Study,[7] "[t]he increases in RPTM [rail prices per ton –mile] observed in the later years of our current analysis thus appear to reflect cost increases rather than an increased exercise of market power by the railroads."[8]

If, as noted above, the majority of the concerns are about increasing rail rates and the shippers' belief that those increases are a result of the exercise of undue market power, which is contrary to the findings of the Christensen Study, then NITL should prove its assertions before the Board embarks on a proposal to fundamentally restructure the rail industry.

Without any empirical data to back up its underlying assumptions, it does not appear that the NITL proposal is really aimed at simply increasing rail-to-rail competition at so-called "captive" facilities and then allowing those two carriers to freely compete for that shipper's business in the marketplace. Instead, the proposal appears to be about enacting rules which would come close to allowing all shippers served by one carrier to become automatically entitled to relief under section 11102(c), a concept rejected as inconsistent with the Rail Transportation Policy ("RTP") 49 U.S.C. §10101.[9] This would be the worst type of regulatory interference and will result in significant unintended consequences, is not consistent with the statute, and is contrary to existing antitrust policy.

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[7] An Update To The Study Of Competition In The U.S. Freight Railroad Industry, Final Report, Laurits R. Christensen Associates, Inc., Madison, WI, January 2010, Prepared for The Surface Transportation Board, Washington D.C.

[8] Id at 5-20.

[9] Vista Chemical v. The Atchison, Topeka and Santa Fe Railway Company, 5 I.C.C. 2d 331, slip op. at 339 (STB served Feb. 6, 1989). ("Vista Chemical")

C. The Solution To The Shippers' Concerns Lies In Continuing To Reform The Rate Complaint Process

Based on the comments in EP 705, it appears that the real goal of the shippers is to have their concerns about rates and the ability to challenge rates resolved. That being the case, the Board should focus its resources on increasing shippers' access to rate complaint processes and at lower litigation costs rather than restructuring the entire regulatory structure in a manner not allowed by law through an unproven and untested proposal.

Reforming the rate complaint process to the extent necessary can be easily accomplished and without significant unintended consequences. The Board already has well established standards for assessing the reasonableness of rates, but where those standards have been found to be inadequate, the Board has not been hesitant to change them. The Board has made many changes to these processes over the years to accommodate the concerns of shippers. While those changes apparently have not fully satisfied shippers, these changes have undoubtedly reduced the cost and complexity of rate reasonableness cases.

While shippers may still feel the Board has not done enough, when one examines the numerous decisions made by both the ICC and the STB over the years with respect to rate issues, the pattern indicates that far from being unresponsive to shipper concerns, the agency has continually responded with changes favored by shippers. These changes have resulted in significant improvements in the ability of shippers to challenge rates and otherwise use the regulatory process to prevent railroads from abusing whatever market power they possess.

One of the first major adjustments after the adoption of the Coal Rate Guidelines[10] involved whether to adopt a productivity adjustment to the rail cost adjustment factor ("RCAF").

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[10] Coal Rate Guidelines--Nationwide, 1 I.C.C.2d 520 (1985), aff'd, *Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3rd Cir. 1987)("Coal Rate Guidelines").

After years of experience with the index and several attempts by the shipper community and by Congress to require a productivity adjustment, the Commission agreed in 1989 to the shippers' requests, and adopted procedures requiring the adjustment of the quarterly index for a measure of productivity.[11] Neither the railroads nor the shippers were entirely satisfied, but significant movement toward the shipper position had occurred.

This pattern of some shippers asking for the Board to respond to perceived inequities in the regulatory process and the Board responding to those claims by making continual changes to address the concerns has happened time and time again, with the pace of such responses picking up substantially over the past few years. In 1998, the Board responded to concerns that the complexities of meeting the market dominance test were making rate complaints too expensive and too time-consuming. The Board responded by modifying its market dominance rules to eliminate the railroads' ability to use evidence relating to product and geographic competition to rebut any market dominance claims. Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937, remanded sub nom. Assn. of American Railroads v. STB, 237 F.3d 676 (D.C. Cir. 2001).

In 2003, the Board initiated and concluded yet another proceeding[12] to streamline the process for resolving stand alone cost ("SAC") cases brought under the Coal Rate Guidelines standard. The Board proposed, and eventually adopted several measures to reduce the costs and complexities. In 2005, the Board issued its decision in Major Issues in Rail Rate Cases, Docket No. EP 657 (Sub-No. 1) (STB served October 30, 2006) where it adopted several procedural and substantive changes to the SAC test, almost all of which were recommended by the shippers.

[11] Railroad Cost Recovery Procedures-Productivity Adjustment, 5 I.C.C.2d 434 (1989), aff'd sub nom. Edison Electric Institute, et al. v. ICC, 969 F.2d 1221 (D.C. Cir. 1992).

[12] Procedures To Expedite Resolution Of Rail Rate Challenges To Be Considered Under The Stand Alone Cost Methodology, Docket No. EP 638 (STB served April 3, 2003).

The goal was to make it faster, easier, and less costly for a shipper to bring a rate complaint. In 2007, the Board adopted Simplified Standards for Rail Rate Cases ("Simplified Standards"), Docket No. EP 646 (Sub-No. 1) (STB served September 5, 2007), which established new simplified methodologies for assessing the reasonableness of rates involving small shipments and small shippers. In that proceeding, the Board largely adopted proposals favored by the shippers. More recently, the Board has continued to propose making changes to how it undertakes its market dominance analysis,[13] how it calculates URCS,[14] and making numerous changes to Simplified Standards, including raising the relief caps.[15] All of these changes are aimed at lowering litigation costs, improving the accuracy of the rate complaint process or improving shippers' access to the rate complaint processes.

Even without the most recently proposed changes in effect, shippers have benefited tremendously from the numerous changes. Since adoption of Simplified Standards, chemical shippers have prevailed on seven of eight, or 87.5%, of the rate challenges brought under the 3-B methodology. More broadly, since the adoption of Simplified Standards, the STB has heard at least 20 rate cases, every single one of them brought by a large chemical or coal shipper. Of the cases that have reached final resolution, 92% ended in either a settlement or a finding that the challenged rate was unreasonable. Based upon this record, one can only conclude that existing rate challenge procedures are providing accessible and appropriate avenues of relief for shippers who believe their rates are too high. The Board can, has, and will respond to shippers' concerns.

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[13] M&G Polymers USA, LLC v. CSX Transp., Inc., Docket No. NOR 42123 (STB served Sept. 27, 2012).

[14] Review of the General Purpose Costing System, Docket No. EP 431 (Sub-No. 4) (STB served Feb. 4, 2013).

[15] Rate Regulation Reforms, Docket No. EP 715 (STB served July 25, 2012).

The point in discussing the numerous proceedings attempting to address shipper concerns is to provide some historical context to the existing proceeding. The issues raised in this proceeding have been dealt with for over 25 years. The ICC and the Board, especially, have consistently responded to shipper concerns regarding the complaint process. As noted, even as recently as July of last year, the Board has taken significant steps to expedite rail rate cases by streamlining and simplifying the complaint process as never before. Likewise, the Board has adopted procedures and processes to deal with service and other complaints and to facilitate better communication between the railroads and shippers. In making these changes, the Board has been careful to accommodate shipper concerns without jeopardizing the fundamental structure and financial health of the freight rail industry. It should continue with such a balanced approach and resist the siren calls for an "easy fix" that has no factual predicate underlying its premises and will result in operational inefficiencies, increased litigation, and enhanced government oversight and regulation, and potential unintended competitive consequences on railroads that heavily depend on interline shipments.

## II. THE PROPOSAL CREATES SIGNIFICANT UNINTENDED CONSEQUENCES

### A. The Proposal Creates Operational Inefficiencies

The Board has requested information about whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations. The Board wants to know whether potential operating inefficiencies would occur that could offset the benefits of the proposal and impede the fluidity of the rail network. AAR's comments, especially the verified statement of Mr. Rennicke, address these issues, and KCS joins in those comments. The simple answer is: yes, the NITL's essentially one-size-fits-all proposal will create significant operating inefficiencies and could impede the fluidity of the network. The accompanying verified statement of Gregory Walling, Assistant Vice President, International Network Planning, for KCS, provides 2 examples of what KCS believes would be many, many inefficiencies the NITL proposal could create.

Railroad terminal operations typically involve a high amount of carrier-to-carrier interaction, switching activity, and close coordination, including the blocking and regular exchange of cars from one carrier to another. It is true that reciprocal switching within a terminal area can actually reduce the need for additional railroad infrastructure within an already complex terminal network because it allows multiple carriers to avoid having to build redundant infrastructure to serve the shippers within that terminal. As a result of decades of operational experience and numerous rail mergers over the past few decades or so, rail carriers have been able to minimize costs and promote operational fluidity to the fullest extent possible through coordinating operations in such terminals and through well-established interchanges.[16] The NITL proposal threatens to undo this progress.

NITL's proposal essentially demands an expansive short-haul service regime, threatening to undo years of industry effort to promote the efficient movement of interline traffic at well-established interchange points. NITL's proposal assumes that by getting the Board to force currently-serving carriers to short-haul themselves and interchange traffic at any relatively nearby active or potential interchange point will work to the shippers' financial advantage. But

[16] Cf. Terminal Performance Standards Governing the Transportation of Nonperishable Commodities, 364 I.C.C. 166 (1980) (the ICC rescinded a proposal to implement new rules to govern terminal operations, concluding that if the rules were put into effect, "they will discourage blocking and the making up of trainload and unit-train movements, and hamper efficient system operations. Also, they fail to recognize wide variations in operating conditions and traffic volumes among different terminals. Their imposition would . . . deprive railroad[s] . . . of the necessary flexibility to meet changing conditions. The proposed standards would also be extremely costly to implement, and, by diverting funds and personnel, would impede individual carrier initiatives to improve their terminal service").

such a forced switching regime may not result in significant cost savings at all. More likely the proposal will result in increased administrative, operating, and handling costs occasioned by the forced short-haul, multi-carrier operation. For example, as shown in Mr. Walling's statement, applying NITL's proposal to KCS's interchange with the Union Pacific Railroad Company ("UP") at Sallisaw, Oklahoma could impair operations on both carriers' main lines, require construction of additional infrastructure in a physically-constrained space, require taxiing crews dozens of miles to make each interchange, and cause other inefficiencies. As a consequence, a forced switching regime, will increase railroad operating costs, will likely result in increased origin-destination transit times, and will therefore result in increased transportation costs that may eliminate much, if not all of the rate savings that a shipper might hope to gain via access to another rail carrier.

These conclusions are supported in the Rennicke verified statement attached to AAR's comments. As Mr. Rennicke explains, the proposal would add time, resources and effort and could lead to congestion, consume capacity in yards, and require additional infrastructure improvements that may or may not be needed. The inevitable result of the added complexity and reduced predictability of traffic flows would be to make rail service less reliable and to increase the risk of congestion or service failure.

Other exercises of NITL's proposal could create other types of network inefficiencies, such as additional miles of operation and additional switching. As explained in Mr. Walling's verified statement, the potential forced interchange with UP with respect to KCS's existing service to West Monroe area carload shipper(s) demonstrates the principle that NITL's proposal will destroy efficiencies already created while at the same time creating new operating problems and complexities.

B. <u>The Proposal Actually Increases The Potential For Government Intervention and Increased Litigation Costs</u>

According to the Board, an "additional benefit of NITL's proposal is that it would reduce governmental intervention by limiting regulation to the access price and relying on demand and the marketplace to set rates and judge the service provided by the railroads." Notice at 6. The Board assumes this result without any underlying factual analysis. Rather than reducing the Board's role in rate and service issues, the proposal will dramatically increase the Board's role. This is because there are many terms in the proposal, many of which flow from the statute itself, which are undefined and vague. Even the Board recognizes this when it says "NITL's proposal does not provide enough information for the Board to determine fully its effect on qualifying shippers" (Notice at 7) and that "we need more precise information." Notice at 8.

While the Board has requested the parties to provide the missing information, as AAR has stated, and KCS fully concurs, one cannot accurately respond to the Board's requests or fully estimate the financial impacts or operational disruptions that NITL's proposal would cause until NITL or the Board clearly defines when and how the proposal is actually intended to apply. There are just too many undefined terms.

In addition, unless the multitude of inadequately defined terms of NITL's proposal are specifically defined and narrowed, as was done in all post-Staggers Act and post-ICCTA cases involving application of Section 11102(c), the parties will be forced to litigate over each and every one of them, resulting in more litigation, not less. A simple review of the numerous vague terms, each of which would be subject to extensive debate and litigation between the parties, illustrates this point.

- Does the phrase "shipper (or group of shippers) served by a single Class I rail carrier" mean one particular facility at a specific location? What if that shipper has more than one facility at that location, do you look at the facilities as a group or each individual facility?

What if the location is served by a Class I and a shortline, does that facility still qualify as being served by a single Class I rail carrier? What if the shipper facility is open to reciprocal switch to another Class I already, does that disqualify the facility even though the shipper may not like the existing reciprocal switch charge?

- How and on what basis is a "group of shippers" determined or defined so as to qualify for the proposal? Do all shippers in the "group" have to be at the same facility or in the same terminal area? What if only some of the "group of shippers" meets the various tests, but others do not, does that still mean the entire group is entitled to avail itself of the rule?

- If the R/VC ratio for one product at a particular shipper facility is over 240% or meets the 75% market share test, is reciprocal switching available on all commodities shipped to/from that location?

- Does the 75% presumption apply regardless of price level or availability of other modes of transportation? In other words, the railroad may have 75% of the traffic because it was the lowest priced transportation option even though other options were available. Is the 75% calculated on looking at the rail market share for all inbound and outbound commodities or the total transportation market share, including those that move by other modes? If the 75% test is met, however that test is determined, but the R/VC ratio is less than 180, does the proposal still apply? Does it include contract traffic? What about exempt commodities?

- How is the 75% eligibility determined when the railroad may be transporting more than the individual movement at issue? What if the carrier has a 75% market share and is carrying more than one commodity for that particular shipper but only one of the commodities it is transporting meets the R/VC test or the 75% test? [17]

- Once a shipper facility or certain traffic qualifies for competitive switching under the rules, does the remedy last forever? Does the remedy go away if the R/VC ratio drops to less than 240% or the rail market share drops below 75%?

- What happens if a shipper qualifies because of the R/VC test (but the rail market share is below 75%), and as a result of the access, the R/VC ratio drops to below 240%, but because of lower rail rates, rail has become the most cost effective means of transportation so as to increase the rail market shares above 75%, does the shipper still

[17] Take a simple example: suppose Shipper A generated a 78% rail traffic share on shipments to Receiver Y and a 65% rail share on its shipments to Receiver Z; meanwhile, Shipper B generated a 95% rail share on its shipments to Receiver Z and only a 72% share on its shipments to Receiver Y. Shippers A and B file a joint compulsory switching petition under the proposed NITL rule, alleging (accurately) that the incumbent railroad accounts for over 75% of their aggregate shipments to Receivers Y and Z. Would all the A and B shipments to either Y or Z be eligible for compulsory switching under the proposed NITL rule? Or only the A to Y shipments and the B to Z shipments?

qualify for access (but now under the 75% rule) even though rail's market share was not the result of market power?

- What is the definition of a terminal? Does the shipper facility have to be within a terminal? Will the parties be allowed to challenge application of the rule since the existence of a terminal requires a fact-specific inquiry and is not defined by regulation or statute.

- Since under the statute the railroads are first free to negotiate and agree to the appropriate switching charge, i.e. the "access charge," could the shippers challenge that rate? If the railroads were unable to agree to such a charge or the charge was challenged by the shippers, what methodology would apply to calculate the proposed access charge? Would that charge include a contribution to lost profit? If so, how would that be determined?

- Who would be responsible for paying the labor protection costs under 11102(c)(2)? Would this be included in the access charge? Which labor protective conditions would apply? Would the unions have standing to intervene or challenged application of the rule so as to avoid labor impacts?

Each and every one of these issues is unaddressed by the proposal, and each are fact specific and subject to interpretation, debate, and litigation.[18] Case history, both at the STB and in general antitrust prudence, suggests that the Board was overly optimistic when it believed the proposal would reduce governmental intervention. The history suggests that, when the incumbent railroad has been faced with a request by either a shipper or a competing railroad for access under Section 11102, the result has been a significant amount of litigation over the applicability and implementation of any remedy.[19]

[18] Indeed, KCS believes that it is impossible to undertake an accurate empirical analysis of the financial impacts of the proposal, the extent of system disruptions the proposal would cause, or determine the extent of indirect harms to other parties, especially other shippers, that would be caused by a few shippers' decisions to reroute traffic from current routes without such terms being clearly defined or without making various assumptions about what the various terms mean. While AAR has attempted to address the Board's requests for empirical data, and KCS supports those comments, even AAR's evidence is based upon making certain assumptions regarding the applicability of NITL's proposal which assumptions cannot be verified.

[19] See Pyco Industries, Inc. – Alternative Rail Service—South Plains Switching, LTD. Co., et al., Docket No. FD 34889 (STB served January 11, 2008); Denver Rock Island Railroad –

This will be especially true with respect to the so-called "access price." The NITL Petition does not offer any guidance on what pricing methodology the Board should employ for any compulsory switching that it might authorize under the NITL rulemaking proposal. The NITL Petition simply urges "thc Board to set, via rulemaking, the methodology for compensation that it would use if the carriers cannot agree." NITL Pet. 62. The Board offers no guidance or proposals either. Absent such a standard, it is impossible to determine what, if any, traffic would be affected by NITL's proposal.

What this means is that, there will first be many areas where Board involvement will be required. First whether the shipper meets the criteria , especially given the vagueness of the various presumptions as discussed above, and then, assuming those issues are resolved, the Board will very often still have to conduct a hard-fought rate proceeding over what the railroad that is providing the reciprocal switch is permitted to charge. The net result will not be the creation of a realistically "competitive" market for origin-to-destination traffic. Rather, the net result will simply be an invitation for the STB to create a new, more complex "regulatory" regime in which (i) litigation over whether conditions justifying application of the proposal have been met in the first instance; followed by (ii) detailed rate-making litigation over what exactly the reluctant operator of the origin-to-interchange segment has to be paid. Thus, acceptance of the NITL proposal by the Board would seem very likely to create a full employment program for private lawyers, accountants, and economists, while draining STB staff resources.

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Alternative Rail Service – Lines of Kansas Southwestern Railway, L.L.C., 4 S.T.B. 264 (STB served June 16, 1999).

### C. The Proposal Could Be Subject To Manipulation By Interline Carriers And Could Result In Less Carrier Choices, Not More

As an initial matter, it is unclear whether the proposal is intended to apply to interline routes or just to single-line routes. In the Notice, the Board speaks about, and assumes, that the proposal is talking about providing competitive alternatives to the existing "single-line" rate being offered by the incumbent carrier. In the background Section, where the Board is explaining the concept, the Board states:

> [r]eciprocal switching, or as it is more generally termed "competitive switching" because it is not always a reciprocal arrangement between carriers, thus enables the competing railroad to offer its own <u>single-line rate</u>, even though it cannot physically serve the shipper's facility, to compete with the incumbent's <u>single-line rate</u>.

Notice at 3 (emphasis supplied). Likewise, the Board's schematic illustrating the basic objective of NITL's proposal is premised on the incumbent railroad serving both the origin and destination in single-line service.

KCS believes that, if NITL's proposal were to be implemented (which it should not be), it would be both appropriate and legally sufficient to limit the proposal to single-line service and not apply the proposal to rates and service involving joint-line service. Applying the NITL proposal to interline (joint-line) movements creates several issues: (1) the non-incumbent railroad will have the incentive and the ability to manipulate the joint rate (or its division requirement) so as to move the shipment on its own line regardless of whether the incumbent railroad is exercising undue market power; (2) the proposal could be invoked against an interline partner even though that railroad's share of the overall interline rate would be below the 240 R/VC threshold and it is not the railroad exercising any undue market power; and (3) carriers who have a significant amount of interline traffic are at risk of having profitable traffic "skimmed" away by the carrier with the larger geographic scope, which could lead to less competition rather than more.

The ability for one railroad to capture the "monopoly rent" doesn't normally exist in the interline context. In those contexts, oftentimes the shipper has a choice of different routes, different interchange points, and even the choice to use different interline carriers at either origin or destination. This significantly reduces the market power of either the originating or terminating railroad in the context of an interline movement. As partial evidence of this phenomenon is the fact that of the 49 rate cases since ICCTA, only a handful involved joint-line rates. The simple truth is that the NITL proposal is not needed to remedy alleged market power in the context of an interline movement.

Furthermore, applying the NITL proposal to joint-line rates involving interline partners could lead to the perverse consequence of less competition, not more, as the carrier with the bargaining leverage and broader geographic scope either consciously manipulates its division requirements so as to invoke the access provisions or is already charging a high division so the access remedy applies. As noted above, the proposal could force those carriers who rely upon a significant amount of interline traffic to continually be short-hauled; depriving them of much needed long-haul revenues. Obviously, the more interchange/interline traffic one has, the more vulnerable one is to being short hauled, i.e. having to give up your traffic at the nearest interchange point to the larger competing railroad.

Even NITL's Petition recognized that smaller carriers who depend upon interline traffic simply do not have the same market power as the larger carriers by excluding Class II and III railroads from the reach of its proposal noting that:

> The League believes that, due to their size and reach, in general Class I railroads have market power; while the much smaller Class II and III railroads generally do

> not. The Board is not required to regulate Class II and III railroads in the same way as Class I carriers, and the Board has frequently distinguished between the classes of carriers in a variety of settings. The League believes that it is appropriate at this time and in this setting for the Board to distinguish between Class I versus Class II and III carriers with respect to competitive switching.

NITL Pet. at 40. Likewise, the Board itself has recognized that smaller carriers, whose traffic is mostly interline traffic, do not possess the same market power as the larger Class I carriers and should not be treated the same with respect to numerous regulatory treatments, including the rate complaint processes.[20]

Left in the regulatory void are those smaller Class I carriers, who share many of the characteristics of the Class II's and III's, but nonetheless are treated the same under the NITL Proposal as the four largest Class I carriers. KCS, for example, simply does not have the same geographic reach as the four large carriers – its average length of haul is significantly shorter, it does not serve multiple plant locations of the same shipper to the same extent as other larger carriers, and it is heavily dependent upon interline traffic. For example, the vast majority of the traffic transported by the four largest Class I carriers (on average, 72% or more)[21] is handled in single-line service. In contrast, only 12.3% of KCS's traffic is single line traffic. This is similar to the Class II and Class III railroads that both originate and terminate about 14% of their

[20] See, e.g., Simplified Standards For Rail Rate Cases, Docket No. EP 646 (Sub-No. 1) (STB served Sept. 5, 2007); See generally, Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, Docket No. EP 575, Docket No. EP 575 (Sub-No. 1) (STB served October 30, 2007) (discussing at great length the distinctions between larger and smaller railroads, and the public benefits delivered by smaller carriers); and Tom Murray, "A Different Way to Run a Railroad: Regional Versus Network Carriers," J. of Transp. Law, Logistics and Policy (Vol. 71, No. 3, Spring 2004).

[21] 2011 Freight Commodity Statistics (FCS). The FCS has traffic for all the Class I carriers broken down by local, forwarded, received, and bridged. "Local" traffic constitutes "single-line" traffic. For 2011, the percentage of local, or single-line traffic, was as follows: BNSF (73.9%); CN (U.S. Ops)(52.5%); CP (U.S. Ops)(10.2%); CSX (83.0%); KCS (U.S. Ops)(12.3%); NS (70.6%); and UP (61.0%).

traffic.[22] Like those carriers, the vast majority of KCS's traffic – approximately 88% - KCS either receives from, or delivers to, other carriers. As a result, KCS, like other carriers where the majority of their traffic is interline traffic, is, in many respects, as dependent upon the larger carriers as are the shippers and the shortline industry. Consequently, KCS has not been the subject of any formal rate or service complaint at the ICC or the STB in over 25 years.

As a result of the differences in size, scope, and market power of rail carriers, the Board and NITL have recognized that Class II and III carriers should not be subject to having their local shippers opened to access under the NITL proposal. There is a rational basis for excluding such carriers where 86% of their traffic is interline traffic. But there is no rational basis for applying the proposal to carriers who share the very same characteristics as Class II's and III's, i.e. lack of market power, heavily dependent upon interline traffic, not the subject of rate complaints, simply because these carriers' revenues happen to fall above an artificially created Class I classification threshold test.

If the proposal applies to all Class I traffic, including interline traffic, there is a risk that those carriers who are heavily dependent upon interline traffic will be disproportionately impacted. These carriers simply do not have the geographic size and scope to obtain as many access opportunities as the other carriers will have to obtain against them. The result could be that the smaller, interline-dependent carriers will have their most profitable traffic cherry-picked out from under them with little or no opportunity to recover that lost revenue through competition with larger carriers at other points. These carriers will find themselves being short-hauled more and more, depriving them of the revenue necessary to maintain the rest of their

[22] Source of Data: ASLRRA, *Facts & Figures*, 2009; 2011 ASLRRA Biennial Survey; ASLRRA 2011 Special Survey for EP 705. 2010 data represents carloads handled by 536 small railroads.

network and weakening their ability to be competitive forces. This weakening could result in less competition, not more -- resulting in the precise opposite effect of what the Board (and shippers) would desire.

As a result, the Board must be mindful that the NITL proposal, if applied to interline traffic, could have different impacts on some carriers as opposed to others. While KCS does not believe that the NITL proposal is needed and joins in the comments of the AAR that the NITL proposal likely would be destructive to rail system efficiency, KCS also wishes to remind the Board and the shipping community that the consequences of subjecting all rail carriers to identical new radical regulatory treatment would not be the same. Applying the NITL proposal to interline movements (1) risks carriers manipulating their division requirements so as obtain access to the shipment regardless of whether the serving railroad is exercising undue market power; (2) could provide a windfall to the very same carrier whose division of the rate may be well above any given R/VC ratio at the risk of the carrier who has less bargaining power with respect to divisions; (3) puts those carriers who are heavily dependent upon interline traffic at risk of having profitable traffic "skimmed" away by the carrier with the larger geographic scope, which could lead to less competition rather than more; and (4) could result in more operational problems, not less.[23] Therefore, KCS believes it is both appropriate and legally sufficient to limit the proposal to those instances where a single railroad serves both the origin and destination in single-line service and not to apply the proposal to rates and service involving joint-line service.

[23] Unlike single-line traffic, in the context of an interline movement, the involved carriers have already figured out the most effective and operationally efficient interchange for that movement; having developed both service and capital budgets based upon that interchange location. The NITL proposal would disrupt that effective interchange.

## III. AS PRESENTED, THE PROPOSAL IS INCONSISTENT WITH THE STATUTE AND CANNOT BE LEGALLY SUSTAINED

### A. Section 11102(c) Cannot Be Used To Require Switching Outside Of A Terminal

The Board and NITL have loosely described the proposal as requiring one carrier to provide a "reciprocal switch" to a "working interchange" between the incumbent Class I carrier and a connecting carrier if that "working interchange" is within a "reasonable distance." The interchange would be considered within a "reasonable distance" if it is within the boundaries of a terminal; or, in the alternative, within a 30-mile radius of an active interchange where cars are "regularly switched." As the legal basis for the Board's authority to order forced switching in such circumstances, the NITL proposal relies upon Section 11102(c).

NITL's proposal goes far beyond the legal confines of Section 11102(c). The NITL proposal is only partially tethered to considerations of whether or not the shipper's facility is located within a terminal. To the extent the remedy was limited to ordering "reciprocal switching" solely within a terminal, Section 11102(c) may be legally applicable; however, NITL's proposal would have the Board extend forced switching remedies[24] to areas far beyond a terminal area, thus far beyond traditional reciprocal switching. Under the NITL construct, the Board would profess to have the authority to order the forced switching regardless of the presence or absence of a terminal, and regardless of whether the connecting carrier to which the shipper seeks access even operates within a terminal. In fact, NITL proposes that such access can be ordered up to 30 miles away regardless of whether that interchange is within a terminal or

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[24] Although the Section 11102(c) remedy is specifically termed "reciprocal switching," the Board has in this proceeding coined a new term not specifically found in the statute – "competitive switching." The Board's re-labeling has no basis in the statute. It would have been more accurate, for example – if the Board insists upon abandoning the term "reciprocal switching" – to adopt the term "forced switching" as a substitute. The statute, however, makes clear that the Board may impose "reciprocal switching" as Congress then understood that term, not "competitive switching."

a switching district. As these comments will show, this construct is not legally defensible under Section 11102(c).

As NITL correctly notes, until passage of the Staggers Act, it was unclear whether the agency even possessed the legal authority to order railroads to enter into reciprocal switching arrangements in the first instance.[25] With the Staggers Act, and the adoption of what has since become 49 U.S.C. § 11102(c), the Board was given explicit authority to direct railroads to enter into reciprocal switching arrangements. But under what conditions and geographic scope did Congress allow the Board to order such forced switching? NITL's Petition claims that the Board has the authority to order the forced switching regardless of the presence or absence of a terminal, and regardless of whether the connecting carrier to which the shipper seeks access even operates within the nearest terminal. In fact, under NITL's proposal, such access can be ordered for distances up to 30 miles outside of a terminal.[26] Yet, a review of the legislative and case history clearly establishes that Section 11102(c) entrusts the Board with the discretion to order a reciprocal switching agreement only in a terminal area (and not beyond) and to do so only where the remedy is both "practicable" and "in the public interest" (the element of the standard that is NITL's Petitions chief focus in the request for a liberalized access regime). The proposal totally ignores this limited scope of Section 11102(c).

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[25] "Prior to the Staggers Act of 1980, the authority of the ICC to impose reciprocal switching arrangements upon carriers or to decide the terms and conditions of reciprocal switching arrangements was not clear." NITL Pet. at 10.

[26] Curiously, in initiating this proceeding and seeking comments, the Board seems to have at least initially cast the NITL proposal as requiring the presence of a terminal, even though such characterizations are not entirely in keeping with what the NITL proposal wants. For example, in introducing the proposal, the Board's Notice states that the NITL has asked the Board to "mandate switching where a captive shipper (located in a terminal area) is within 30 miles of a working interchange." A bit later in the Decision, however, the Board dispenses with the limiting "shipper located in a terminal area" language and clarifies that the NITL' proposal would have a potential impact upon "captive shippers" that are "located in a terminal area <u>or</u> within 30 miles of a working interchange." Notice at 2.

In adopting the precursor to today's Section 11102(c), Congress explained that the provision empowered the ICC to "order the more limited action of reciprocal switching," when compared to the ICC's established, and more expansive authority to "order joint use of terminal facilities."[27] At that time Congress rejected calls to expand the scope of Section 11102(c) to allow the Board to order reciprocal switching in "all standard metropolitan areas,"[28] evidently preferring instead to permit the agency to engage in a fact-based evaluation of whether the requested relief was sought in a terminal. The rejection of the application of Section 11102(c) to all metropolitan areas, combined with Congress' position that ordering reciprocal switching is a "more limited action" than ordering terminal trackage rights,[29] signifies that Congress intended for the reciprocal switching provision to be less far-reaching in scope than the terminal trackage rights provision.

The notion that Section 11102(c) was only to apply to activity that occurs in terminal areas and/or "switching districts" is confirmed by examining the long-standing agency definition of the term "reciprocal switching" – which is the phrase that appears in the statute and which Congress would have been well aware of at the time it adopted the precursor to Section 11102(c). According to long-standing precedent, reciprocal switching is by definition an activity

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[27] S. Res. 15319, 96th Congress, Congressional Record, P.L.- 448, 94 Stat. 1895 (1980).

[28] Id.

[29] NITL's Petition confuses Section 11102(c)'s more limited purpose and function (which addresses activities exclusively within a terminal or switching district) with the wider reach of Section 11102(a)'s terminal trackage rights, which, unlike the Section 11102(c) provision, allows forced trackage rights operations in "terminal facilities" and over "main-line tracks for a reasonable distance outside of a terminal." Despite the Petition's evident, result-oriented "hybridizing" of Subsections (a) and (c), because this proceeding does not involve imposing terminal trackage rights or trackage rights outside of a terminal, but is deemed to be switching, it must be grounded by Section 11102(c), including the limiting scope of that provision.

occurring within a terminal or switching district. Before the advent of Staggers, the ICC described reciprocal switching thusly:

> In practice [reciprocal switching] means that one line-haul carrier operating within a terminal area will act only as a switching carrier in placing cars at industries on its own trackage . . . as an incident of the line-haul movement of those cars over another carrier whose trackage does not extend to the serviced industry.[30]

The ICC continued to embrace the Switching Charges description of reciprocal switching in post-Staggers decisions. For example, in 1982, the ICC described reciprocal switching as follows:

> It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage.[31]

And again, in 1985, the ICC reaffirmed that reciprocal switching pertains to activities within a terminal area as follows:

> Reciprocal switching involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at commonly served terminal areas in an arrangement under which one of the carriers acts as the switching carrier, placing cars at customer locations on its lines for loading and unloading which it will deliver to or has received from the other carrier for the line-haul movement. In the simplest reciprocal arrangement, . . . [t]he carriers, in effect, mutually exchange their

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[30] Switching Charges and Absorption Thereof at Shreveport, La., 339 I.C.C. 65, 70 (1971) ("Switching Charges"). The U.S. Supreme Court shortly thereafter took judicial notice of the ICC's Switching Charges definition of reciprocal switching in Port of Portland v. United States, 408 U.S. 811, 820 n. 8 (U.S. 1972).

[31] Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement, 366 I.C.C. 845, 846 (1982) ("Delaware and Hudson").

> switching services so that each can extend its lines to the industries served by the other, even on traffic for which they may be directly competitive as line-haul carriers.[32]

In practice, the agency's actions have consistently reflected the understanding that reciprocal switching is by definition an activity occurring exclusively within discernible terminal areas – areas where reciprocal switching is common or customary, and therefore is or could be practicable under the statutory standard. Because there has been little dispute over the appropriate geographic scope of reciprocal switching, there are few post-Staggers cases taking on this discrete issue directly. But what cases there are reinforce the understanding that reciprocal switching is fundamentally and exclusively a terminal activity.

Leading among these cases is Central States Enterprises, Inc. v. Seaboard Coast Line Railroad, Finance Docket No. 38891 (ICC served May 15, 1984) ("Central States"), aff'd sub nom. Central States Enterprises, Inc. v. ICC, 780 F.2d 664 (7th Cir. 1985). In Central States, the ICC denied a request for forced reciprocal switching in part because the shipper seeking the remedy was not within a nearby switching district, even though the shipper was located at a station just outside of an established switching district. As the ICC explained, because the shipper was not located in a common station or within a jointly-served terminal, "this was not a reciprocal switching situation" appropriate for the requested relief.[33] Central States not only reflects the understanding that reciprocal switching is available only in a terminal area, but it also recognizes the more limited scope of reciprocal switching in view of the agency's refusal to expand reciprocal switching to a "reasonable distance outside of a terminal" (in that case, only

[32] Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules and Practices, *1 I.C.C. 2d 700* (citing Switching Charges and Absorption, 339 I.C.C. 65, 90 (1971).

[33] Central States, slip op. at 6.

1.4 miles beyond the established bounds of the terminal area) as could be done under the terminal trackage rights provisions of Section 11102(a).[34]

Other post-Staggers decisions are consistent with Central States. For example, in Vista Chemical the parties acknowledged that the reciprocal switching request was appropriate for adjudication on the merits, inasmuch as there was "no controversy between the parties as to whether the [requested reciprocal switching arrangement] would be performed wholly within the limits of [an established] switching district."[35] This is true also of Midtec Paper Corp. v. Chicago and North Western Transportation, 3 I.C.C.2d 171, 179-180 (1986), aff'd Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) ("Midtec"), where the ICC's discussion of reciprocal switching consistently depicts the remedy as one inherently tied to a rail terminal. Finally, the aforementioned Delaware and Hudson decision clearly embraces the understanding that reciprocal switching is "terminal-centric."[36]

The above analysis establishes clearly that "reciprocal switching" has, and did have at the time of the Staggers Act, a very specific meaning within the railroad industry and at the agency. In particular, while reciprocal switching may not always be truly "reciprocal,"[37] it is always conducted within areas that are recognizable as terminals or switching districts. It is a term

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[34] In contrast, the NITL proposal would have "reciprocal switching" re-defined as the open-ended provision of intermediate transportation to and from any relatively nearby active or potentially active point of interchange. Under NITL's proposal, a shipper need not be in, or even near, a terminal area to obtain forced reciprocal switching. The proximity of a terminal is merely one of several conclusive presumptions under which NITL's proposal would have the Board order switching to another carrier. See Petition at 55-57. Yet, there is no legal support in the statute or case history for such an expansive reading of the scope of Section 11102(c).

[35] Vista Chemical, at 337.

[36] Delaware & Hudson, at 846 (observing that it is "common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching").

[37] See, e.g., id. at 847 ("Although traditionally service was assumed to be in balance between carriers in the terminal under a reciprocal switching agreement, in practice that is not a prerequisite to an agreement").

inapplicable to intermediate carriage outside of such territories. Unlike the plain language of Section 11102(a)(which involves terminal trackage rights and allows the Board to impose trackage rights over "main line tracks for a reasonable distance outside of a terminal"), there is no provision in Section 11102(c)(which provides for reciprocal switching), and none in agency precedent, giving the Board the statutory authority to compel reciprocal switching outside of the bounds of a terminal, yet alone over main-line tracks up to 30 miles away to the nearest working interchange.[38] As such, NITL's proposal to extend a so-called "reciprocal switching" remedy to so-called "captive" shippers who are not even located in a terminal area or to order that the switching can occur to areas far beyond any terminal area (including areas nowhere near a terminal) does not comport with the law. No matter how the proposed switching access may be labeled, the Board lacks the statutory authority under Section 11102(c) to compel switching access under any circumstances outside of the bounds of a terminal facility.

B. The Proposal Would Force Railroads To Short-Haul Themselves in Violation of Section 10705

Taken at face value, NITL's proposal to establish a regime of forced switching when a shipper's facility is at least 30 miles from a "working interchange" entails far more than a reciprocal switching remedy sanctioned under Section 11102(c). This is so because the NITL's proposal is not limited to any traditional and long-standing notions of reciprocal switching, which, as shown above, have been consistently predicated upon the shipper's location within a discernible terminal area or switching district. Thus, to the extent NITL's proposal extends to areas beyond a terminal, it is no longer governed by Section 11102(c). Rather, it becomes a regime for forcing an incumbent Class I to short-haul itself. As such, the NITL proposal does

[38] There is no justification in the statute or case precedent for use of a 30 mile threshold. This is an arbitrary figure which appears to be based upon the use of 30km (18.64 miles) in the Canadian system.

not seek to revisit competition issues in the railroad industry in a measured and cautious manner at all. The NITL proposal is, instead, under the misleading guise of the reciprocal switching provisions of Section 11102(c), urging radical and sweeping changes to Board regulation to basically reverse the Bottleneck Decisions by requiring a "rate," i.e. access charge, for upwards of 30 miles and then imposing a regulated cap on that bottleneck rate. NITL's Petition also seeks a short-cut around the through route provisions of Section 10705; forcing incumbent railroads to short-haul themselves contrary to the dictates of Section 10705(a).

In the Bottleneck Decisions, the Board concluded that a shipper could not routinely direct a bottleneck carrier capable of providing origin-to-destination rail service to "short haul itself by routing traffic over the lines of a connecting, non-bottleneck carrier." In so holding, the Board explained that a shipper could seek to force an alternative routing only if it could show, under Section 10705 and the Board's rules developed in Intramodal Rail Competition,[39] that there would be sufficient benefits associated with the alternative routing.[40] Importantly, the statute places strict limits on the Board's ability to require carriers to short-haul themselves. The statutory preference essentially dates back over 100 years.[41]

NITL's proposal would have the Board ignore Section 10705 and the Bottleneck Decisions. It would allow shippers to circumvent the requirements and limitations in the

[39] Intramodal Rail Competition – Proportional Rates, Ex Parte No. 445 (Sub-No. 2) (Apr. 17, 1990) ("Proportional Rates")

[40] See Policy Alternatives to Increase Competition in the Railroad Industry, Docket No. EP 688, slip op. at 2-3 (STB served Apr. 14, 2009) (summarizing the outcome of the aforementioned Bottleneck Decisions).

[41] "The origins of [the Section 10705(a)(2)] directive can be traced to the 1910 statute. The provision was amended in the Transportation Act of 1940 as part of an expansion of the ICC's authority to prescribe routes, in order to limit the ICC's ability to require a carrier to short-haul itself (i.e., to embrace a route substantially less than the entire length of its railroad)." Canexus Chemicals Canada L.P. v. BNSF Railway Company, STB Docket No. NOR 42131, slip op. at 10 (STB served Feb. 8, 2012).

governing statute on the prescription of through routes, and require carriers to short-haul themselves in violation of Section 10705. There simply is no basis in law for the Board to order a carrier to participate in a through movement in a manner prohibited by the statute under the guise of ordering "reciprocal switching." Any relief available under Section 11102(c) must be limited to "reciprocal switching" within a terminal or switching district, but the proposals 30-mile presumption fails to meet this test.

### C. Traffic Moving Pursuant to A Section 10709 Contract Cannot Be Included Under The Proposal

Section 10709(b) makes it clear that except as otherwise provided in that section, that "[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." Likewise, Section 10709(c) states that "transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." The NITL proposal fails to account for the fact that its proposal cannot be used to override in whole or in part any rail service being provided via a Section 10709 transportation contract.[42]

Unless the Board or NITL makes it clear that its proposal is not intended to cover transportation under Section 10709, the threat that this new regulatory regime could be used to invalidate rail transportation agreements would only serve to discourage the use of such arrangements in the future. Yet, shippers in other proceedings have decried the lack of railroads' desires to enter into contracts. See EP 705 Opening Comments of M&G Polymers USA, LLC at 3; EP 705 Opening Comments of National Industrial Transportation League at 6. In light of this,

[42] Furthermore the existence of a Section 10709 contract may result in 75% of the traffic to/from that facility being transported by rail regardless of the lack of market dominance.

KCS believes that shippers would expect the Board to preserve the sanctity of railroad-shipper contracts, even within the context of a forced reciprocal switching regime.[43]

Consistent with the statutory provisions of Section 10709, KCS would expect the Board, if it determines to move forward with the proposal, which it should not, to clarify that the proposal cannot be used to abrogate shipper obligations under separately negotiated-for railroad transportation agreements with the carriers. Such a clarification would be wholly consistent with other recent decisions such as Rail Fuel Surcharges, STB Ex Parte No. 661, slip op. at 13 (STB served Jan. 26, 2007).[44] At a minimum, therefore, were the Board to proceed with the subject rulemaking in some fashion or another, it should clarify that the new regulations it would adopt would have no impact on existing or future railroad transportation contracts.

D. Existing Commodity Transportation Exemptions Govern When Applicable, Unless Fully Or Partially Revoked

Although not squarely addressed by either the NITL Petition or the Board, the Board should clarify that the proposed forced switching regime, if it moves forward (which, again, it should not), would not extend to the transportation of commodities previously exempted from agency regulation pursuant to the Board's broad exemption authority (and mandate) under 49 U.S.C. § 10502. In fact, the Board has explained that the "exemption of a commodity under [Section 10502] generally excuses carriers from virtually all aspects of regulation involving the transportation of that commodity [including, for example,] . . . the dual requirements that a

[43] See, e.g., Major Rail Consolidation Procedures, STB Docket No. EP 582 (Sub-No. 1), slip op. at 349 (STB served June 11, 2001) (National Grain and Feed Association argued that, in revising its major railroad consolidation rules, the Board should "respect the sanctity of . . . privately negotiated contracts between railroads and their customers," just as it does with respect to collective bargaining agreements and that the Board should, accordingly, "look with extreme disfavor on overrides of such agreements").

[44] In that proceeding, the Board made it clear that its surcharges holding did not apply to traffic handled under rail transportation contracts because under 49 U.S.C. § 10709 the Board lacked the authority to regulate rail rates and services that are governed by a contract.

carrier furnish rates and provide service on reasonable request pursuant to those rates."[45] Moreover, "the exemption bars regulatory relief during the period when the exemption is in force."[46] To avoid any uncertainty on this issue, however, should the Board adopt some version of the proposed forced switching regulations, the Board should clarify that – (1) the new regulations would not extend to the transportation of commodities previously exempted from agency oversight under Section 10502; and (2) if a shipper of an exempted commodity seeks relief under the new regulations now under consideration, that shipper must first obtain a full or partial revocation of the subject commodity exemption(s) pursuant to Section 10502(d).

E. ICCTA Precludes Forcing A Carrier To Provide Switching Services When The Issue Traffic Moves At A Rate Less Than 180 R/VC

Under their proposal, the NITL would have the Board adopt alternative "conclusive presumptions" that forced switching is warranted where either –(1) the rate for the issue movement has an R/VC ratio of 240% or more; or (2) the incumbent has handled 75% or more of the transported volumes over the most recent 12-month period. As is discussed below, the "75%-of-the-traffic" categorical presumption (which the NITL proposal intends to serve as a proxy for a finding that the incumbent has market dominance over the issue traffic and that the shipper lacks effective inter- and intramodal service alternatives) is inconsistent with antitrust principles and ICC/STB precedent. But, even worse, the 75% categorical presumption – which the NITL Petition proposes to be an alternative to the 240 R/VC presumption – is an end-run around the 180 revenue-to-variable-cost ("180 R/VC") provisions of 49 U.S.C. §10707(d), which establish that the Board may not find that a carrier possesses market dominance over issue traffic where the applicable common carrier rate is below 180 R/VC.

[45] Pejepscot Indus. Park – Pet. for Declaratory Order, 6 S.T.B. 886, 891 (footnote omitted), reconsideration granted in part, 7 S.T.B. 220 (2003).

[46] Id.

It is possible, indeed very likely, that for certain commodities or distances, a shipper may depend heavily, if not exclusively, upon an incumbent rail carrier's service to the exclusion of other service options, which results in an R/VC ratio greater than 180%. But it is also quite plausible that, due to any variety of circumstances, the incumbent carrier's rate for such traffic is set below the R/VC 180 threshold. Nevertheless, under the NITL proposal, such traffic could be subject to forced switching under the 75% categorical presumption, notwithstanding the language of Section 10707(d)(1)(A) which states that a carrier does not have market dominance over the issue traffic "if the carrier proves that the rate charges results in a revenue-variable cost percentage . . . that is less than 180 percent."

Simply put, the NITL Petition has proposed a new rule that would give a shipper seeking forced switching an alternative path to such a remedy even where the shipper cannot satisfy the statutorily-prescribed 180 R/VC "jurisdictional threshold" for an STB finding of market dominance, which is itself a threshold consideration for rate-related remedies. As such, the proposed alternative 75% presumption would nullify the protections afforded to railroads by statute under Section 10707 where the shipper cannot satisfy the proposed 240 R/VC presumption and the issue traffic is moving at rates below 180 R/VC. Accordingly, a Board finding that a forced switching remedy should be afforded to a shipper whose issue traffic is shown to be moving at rates below 180 R/VC because that shipper can satisfy the alternative 75% presumption would clearly violate Section 10707.[47]

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[47] For the same reason, should the Board be called upon under a forced switching order to prescribe the economic terms for such switching under Section 11102(c)(1), then the Board is limited in its discretion to prescribe the economic terms of the switching service by virtue of Chapter 107 (Rates) of Title 49. Assuming that the incumbent's switching charge may be challenged separately, the Board may not prescribe a rate that set that rate below the 180 R/VC threshold of 49 U.S.C. §10707(d). Accordingly, an incumbent carrier forced to provide switching services to a connecting carrier under NITL's proposal is legally entitled to charge a

F. Any Regime That Would Force A Carrier To Provide Switching Or Short-Haul Services At Compensation Levels Below the Incumbent's RSAM Figure Violates The Rail Transportation Policy of 49 U.S.C. § 10101(2)-(6)

In the Notice, the Board explained that "the policies governing railroad regulation require [it] to balance a variety of factors reflecting the tension between the desire for competitive rates for shippers, on the one hand, and adequate revenues for railroads, on the other."[48] The difficulty with NITL's proposal is that it is an utterly one-sided proposition focusing entirely on mechanisms for achieving what NITL's Petition states, but does not prove, will be lower rates, and totally ignores the Board's statutory mandate to ensure that the nation's railroads become, and remain, revenue adequate. AAR previously pointed out the glaring omissions in NITL's proposal, including, as relevant here, the Petitions failure to address access pricing, and the failure to address the revenue impacts of forced switching,[49] and it does so again in its March 1 Opening Comments, which KCS supports.

Noting the potentially serious revenue impacts of the forced switching proposal, the Board acknowledges that it "may be appropriate" in this proceeding for the parties and for the Board itself to bear in mind "the amount of demand-based differential pricing that the carrier needs to earn a reasonable return on its investments."[50] In light of this consideration, the Board has suggested that perhaps the forced switching presumption should, for example, be based upon

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switching rate that is at least equal to the 180 R/VC ratio, and the Board may not set a rate below that threshold. See Official-Southwestern Divisions; In the Matter of Joint Rates Between Official and Southwestern Territories, Docket No. 29886 (Sub-No. 1), slip op. at 3 (Aug. 4, 1989) ("[t]he Staggers Rail Act of 1980 removed from [the agency's] reasonableness jurisdiction rates (including joint rates) with revenue to variable cost ratios below certain levels (now, 180 percent); and see 49 U.S.C. § 10707(d).

[48] Notice 6 (49 U.S.C. §§ 10101(1)-(6); 49 U.S.C. § 10704(a)).

[49] See Reply of the Association of American Railroads to the National Industrial Transportation League's Petition for Rulemaking at 2-3.

[50] Notice at 2.

"a carrier's 4-year average Revenue Shortfall Allocation Methodology (RSAM) benchmark," rather than on the proposals arbitrary 240 R/VC ratio. The Board's comments, although unfocused in light of the uncertainties and vague terms of NITL's proposal regarding when and how the proposal could actually be implemented, reflect an understanding that the Board does have an obligation to ensure that the railroads attain and maintain revenue-adequacy.

This is not the first time that certain shipper interests have attempted to have the agency overlook railroad revenue adequacy considerations in the interest of changing the competitive dynamics of railroad transportation. Rather, in Proportional Rates, the ICC rejected an eerily-similar proposal by some shippers to have the agency require railroads to publish a proportional rate to a junction point with a second railroad on traffic that the first railroad could handle single-line for a longer haul. When a consortium of shippers urged the ICC to reconsider its original decision not to institute the proportional rate regime, the ICC, using language that has been echoed by the Board in this proceeding, explained that the shippers' proposal essentially ignored the fact that the proposal undercut the agency's statutory obligation to promote railroad efforts to achieve revenue adequacy as follows:

> [The shippers] contend that the Congressional policy of encouraging competition among railroads is ...independent of considerations of revenue need . . . [T]hat interpretation [is] erroneous . . . [The ICC] properly rejected the notion that the Staggers Act is a mandate for it to compel restructuring of the rail industry to create more rail-to-rail competition . . . The contention that the policy favoring promotion of rail-to-rail competition is independent or preeminent of revenue need ignores the statute's clear requirement that we maintain standards and procedures for adequate revenue levels and ignores the principle that the various policies of the Act, some of which conflict, must be balanced. See [former] 49 U.S.C. 10101a(1), (2), (3), and (6); and [former] 49 U.S.C. 10704(a) (2). NITL's proposal would seriously diminish the ability of railroads to price their services differentially and, ultimately, to compete effectively with other modes. We have consistently recognized that differential pricing is crucial to the viability of the industry . . . [T]his is economically sound pricing.[51]

[51] Proportional Rates at 7-8 (footnotes and citations omitted).

In keeping with the above passage from Proportional Rates, the Board cannot adopt new regulations concerning the proposed forced switching regime without taking careful stock of regulation's impact upon differential pricing principles and railroad revenue adequacy, and it cannot implement new rules if the agency's action is likely to preclude affected railroads from becoming (and remaining) revenue adequate.

At this time, it is difficult to assess the full impact of the proposed forced switching regime's impact on railroad revenue adequacy, because there at too many vague terms and unanswered questions regarding when and how the proposal would apply, including the question of what compensation standard the Board should apply in the absence of an "agreement" among the involved carriers under Section 11102(c)(1). However, one thing is for sure - the proposed regulation clearly would open up circumstances under which an incumbent carrier would be deprived of long-haul traffic that, as differentially-priced, contributes toward that carrier's efforts to become revenue adequate. As such, any switching services compensation scheme that falls short of making the incumbent carrier whole takes the incumbent farther away from the incumbent's revenue adequacy aspirations.

For these reasons, although KCS objects to the Board moving forward with any forced switching scheme at this time, KCS submits that at no point should access even be considered if the existing overall rate is less than the carrier's Revenue Shortfall Allocation Method ("RSAM") rate. Furthermore, any proposed access compensation standard must allow an incumbent carrier to assess switching charges that allow that carrier to continue to move toward revenue adequacy. Anything less than the RSAM rate would be patently contrary to the Rail Transportation Policy provisions set forth at 49 U.S.C. § 10101(2)-(6). Inasmuch as the RSAM methodology "takes into account the key economic and equity principles embodied in the

Interstate Commerce Act[, and] . . . provides for differential pricing and a railroad's need to earn adequate revenues by directly linking its 'revenue need shortfall' to a benchmark markup for captive traffic,"[52] it should be abundantly clear that no prescribed switching rate below an incumbent carrier's RSAM figure could ever satisfy the Board's mandate under the Rail Transportation Policy – particularly as set forth in 49 U.S.C. § 10101(3).

## IV. THE PROPOSAL GOES IN THE OPPOSITE DIRECTION OF EXISTING ANTITRUST THEORY AND IS INCONSISTENT WITH PRIOR ICC FINDINGS ON MARKET DOMINANCE

### A. The Proposal Is Inconsistent With Modern Day Antitrust Theory

NITL claims its proposal is a good thing because its focus on market-shares, rather than competitive abuse, is fully consistent with antitrust principles and would reduce the Board's role in regulating rates. KCS has already explained, in Section II-B, why the proposal will actually increase the Board's regulatory role rather than reduce it. But what the NITL proposal does not recognize is that the use of "conclusive presumptions," especially the 75% market share test, actually runs counter to modern antitrust policy and law and is inconsistent with previous findings by the ICC.

The proposals conclusive presumption test is meant to establish that "there is no such effective competition where *either*: (a) movement for which competitive switching is sought has a R/VC of 240% or more; *or* (b) the Landlord Class I carrier has handled 75% or more of the freight volume for a movement for which competitive switching is sought in the twelve months prior to the petition seeking switching." (NITL Pet. 8, emphasis added). As previously noted,

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[52] M&G Polymers USA, LLC v. CSX Transportation, Inc., STB Docket No. NOR 42123, slip op at 15 (STB served Sept. 27, 2012) (quoting Rate Guidelines – Non-Coal Proceedings, EP 347 (Sub-No. 2), slip op. at 4 (ICC served Nov. 16, 1992) (footnote omitted)).

this requirement is disjunctive and can generate compulsory switching even if the R/VC <240% but the rail traffic market share >75%.

This customer-centric market share measurement is open to numerous defects or manipulations that are broadly inconsistent with sound antitrust policy. First, the 75% test could be used to punish the incumbent railroad for having done a *very good job* of serving the customer(s) that are now seeking to invoke NITL's proposed compulsory switching rule (i.e., the petitioning shipper had alternatives that it chose to forego because the incumbent railroad's offerings were significantly better; either in terms of price or service).[53] Because the proposed NITL rule makes the market share presumption irrebuttable, the incumbent railroad would be barred from making a "superior service" defense to explain its >75% share of the petitioning shipper's traffic![54] Second, each individual shipper (or group of shippers) might forego slightly better competitive alternatives to achieve the 75% market share, if it (or they) believed a STB compulsory switching order would be likely to produce even more favorable rates than the already existing competition providing by either the railroad or some other mode, particularly if a carrier's temporary handling of 75%+ of the traffic would lead to a permanent reciprocal switching access. Third, and most importantly, the use of such a test runs plainly counter to the fundamental trend of modern antitrust law since the 1970's.

NITL's proposal closely echoes the justifications accepted by the Supreme Court, especially during the 1940-1970 era, to adopt *per se* antitrust prohibitions for often ambiguous conduct as a way of eliminating litigation burdens for the Government and private plaintiffs.

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[53] As Judge Learned Hand, explained in his seminal Sherman Act Section 2 opinion: "The successful competitor, having been urged to compete, must not be turned upon when he wins." U.S. v Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[54] In these circumstances, the shipper(s) might still file a compulsory switching petition as a way of pressuring the incumbent railroad to offer even lower rates as settlement that would avoid all the costs of the costs of going through the STB proceeding.

"This principle of *per se* unreasonableness...avoids the necessity for an incredibly complicated and prolonged economic investigation...in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often fruitless when undertaken."[55] Yet, beginning in the 1970's, the Department of Justice and the courts began to (i) abandon conclusive presumptions found in *per se* prohibitions; and (ii) replace them with market-based evaluations of actual facts under the so-called "Rule of Reason".[56] Such an approach was firmly supported by the Supreme Court which ultimately concluded that "easy labels do not always supply ready answers," and therefore a fuller threshold inquiry is needed over whether the challenged category of competitor conduct "facially appears to be one that would always or almost always tend to restrict competition and decrease output."[57] And in dealing with vertical customer-supplier relationships, the Court has gone further, saying "a *per se* rule based on the nature of the restriction is, in general, undesirable."[58] NITL's Petition ignores these antitrust principles and seeks to turn the clock back to the use of *per se* rules regardless of whether such rules are truly reflective of the use of monopoly power.

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[55] See Northern Pacific Ry. Co. v. U.S., 356 US 1, 5 (1958)(Douglas J).

[56] The one exception where antitrust law remains fully committed to *per se* prohibitions concerns naked agreements among direct competitors concerning prices, output, or markets or customers served (i.e., "Cartel Agreements"). Agreements in this category are generally treated as felonies under Section 1 of the Sherman Act (15 USC 1). This limited category of *per se* prohibitions for hard core conduct has no particular relevance to NITL's proposal for extensive conclusive presumptions as a way of avoiding litigation over subjects on which reasonable people can sometimes differ.

[57] Broadcast Music Inc. v. CBS, 441 US 1, 8,19-20 (1978) (rejecting the use of a *per se* rule vis-à-vis an agreement among competitors which involved packaged licensing and pricing the competitors' copyrighted music).

[58] Continental TV v. GTE Sylvania, Inc., 433 US 36, 58 n.29 (1977) (striking down the *per se* rule on vertical territorial restrictions adopted in U.S. v. Arnold Schwinn & Co., 388 US 365 (1967)). Also, see Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 US 877 (2007)(striking down the *per se* prohibition on resale price maintenance originally adopted in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 US 373 (1911)).

This is true even with respect to the Petition's spirited defense of the use of market shares. While NITL's Petition claims such an approach is fully consistent with antitrust principles, but the facts tell another story. It is true that in the 1960's and early 1970's, market shares were accepted by the Supreme Court as creating a virtually irrebuttable presumption of market power. Thus, in its 1963 landmark Philadelphia National Bank decision, the Court said that a merger that "results in a significant increase in the concentration of firms in [the relevant] market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[59] Eleven years later, however, this mechanistic approach was abandoned by the Court in a case with high market shares, because "other pertinent factors affecting the...industry and the business of the [parties] mandated a conclusion that no substantial lessening of competition occurred or was threatened by the acquisition."[60] That 1974 case was the Supreme Court's last decision on the relevance of market shares in a merger case.

Since then, the merger enforcement process has evolved, so that market shares have become merely a screening device used by the antitrust agencies to determine whether they have to even do an in depth investigation of a particular merger, not a conclusive presumption. The 2010 Merger Guidelines, issued by the Department of Justice and the Federal Trade Commission ("the Agencies"), make clear that they no longer follow an "uniform methodology" relying heavily on market shares; instead they use a "fact-specific process through which the Agencies, guided by their extensive experience, apply a range of analytical tools to the reasonably available and reliable evidence to evaluate competitive concerns in a limited period of time."[61] This "fact-

[59] U.S. v. Philadelphia National Bank, 374 US 321, 363 (1963).

[60] U.S. v. General Dynamics Corp., 415 US 486, (1974)

[61] 2010 MERGER GUIDELINES Section 1

specific process" is the very opposite of the conclusory process that NITL's Petition argues for at pp. 50-52 of its Petition.

The NITL Petition relies heavily on a few Supreme Court monopoly decisions out of the same earlier "don't bother us with too many facts" era in antitrust history to support its conclusive presumption that handling 75% of a shipper's shipments establishes that Class I railway has monopoly power.[62] As with mergers, the modern trend in antitrust enforcement and decision making on monopolies has been to look beyond market shares somewhat as a way of establishing monopoly power, and certainly not relying on market shares as establishing conclusive presumptions. Rather, the Agencies and the courts use market shares merely as threshold screens which can be used to exclude some weaker cases from further consideration. They do not use them alone as determinative factors establishing the monopoly power necessary for liability.[63]

In addition, the 75% rail traffic share test proposed is essentially different from normal antitrust market share analysis. A true market share analysis depends on a supplier's share of all sales to all customers in the relevant market. Instead, the proposal would have the Board look to a supplier's share of revenues from a self-defined customer or set of customers—i.e., those that are participating in the petition for compulsory switching - rather than first defining the relevant market, i.e. the selling of electricity in a given market and railroad's market share of the relevant commodity used to produce that electricity. By elevating rail traffic market shares as

[62] See NITL Pet. 50, citing the last Section 2 monopoly case in which market shares were used that way. U.S. v Grinnell Corp., 384 US 563, 571 (1966) ("existence of such [monopoly] power ordinarily may be inferred from the predominant share of the market" held by the defendant).

[63] See e.g., PepsiCo. Inc. v Coca Cola Co., 315 F.3d 101, 109 (2nd Cir. 2002)(a 64% market share is insufficient to show monopoly power absent additional evidence to exclude competition or control prices).

determinative of monopoly power, NITL's Petition is standing modern antitrust learning on its head.[64]

B. The Proposal Is Also Inconsistent With The ICC's Prior Market Dominance Findings

The NITL proposal is also an attempt to reverse the clock on modern day ICC and STB jurisprudence. Prior to the Staggers Act, the ICC did rely upon a series of rebuttable presumptions[65] in making market dominance determinations in the context of a rate complaint. Such presumptions included an R/VC test, a market share test, whether shippers had made a substantial investment into long term rail infrastructure, whether shippers had entered into long term coal supply contracts, and whether the rates were set through the rate bureau process. In 1981, the ICC eliminated the use of such rebuttable presumptions.[66] The ICC found that:

> Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures. Further the measures themselves are often only approximations of the underlying conditions they are intended to reflect. For these reasons, the use of rebuttable presumptions in market dominance determinations often placed too much emphasis on quantitative evidence which did not fully reflect the circumstances of any given movement. This quantitative evidence was frequently offered at the expense of

[64] The post-1980 Sherman Act Section 2 decisions cited on pp. 51-52 of the NITL Petition all weigh other factors (such as barriers to entry) into the court's determination of monopoly power, rather than relying exclusively on a high market share number to control this determination, as NITL's Petition urges the Board to do in this proceeding.

[65] In contrast to NITL's proposal, at least these presumptions were rebuttable presumptions as opposed to "conclusive" presumptions, and notwithstanding the rebuttable nature of such presumptions, the ICC still found that the use of presumptions was not consistent with modern day economic analysis.

[66] Market Dominance Determinations And Consideration Of Product Competition, EP 320 (Sub-No. 2), 365 I.C.C. 118, 1981 ICC LEXIS 51 (1981)("Market Dominance").

> other evidence which, though less subject to quantification, is more reflective of the degree of market power possessed by a rail carrier over certain traffic.

Market Dominance, 1981 ICC LEXIS 51, *6 (1981).

As was happening in the courts with respect to the evolution of antitrust analysis, many agencies and shippers argued for the elimination of such rebuttable presumptions. The Department of Transportation argued that the presumptions were "excessively restrictive." Inland Steel argued that the presumptions should be eliminated because they were "not universally suitable" and that cases should be treated individually. However, as here, the various shippers groups argued for the retention of the rebuttable presumptions. The ICC, perhaps even slightly ahead of the courts and the various federal agencies, held firm and rejected the shippers' arguments; holding that presumptions were inaccurate indicators of the presence of market dominance and should be rejected because they encouraged rate complaints that should not be brought and discouraged others that should. In the ICC's view, flexibility was key because there were substantial differences among the various cases that precluded application of universal rules.

It is illuminating to read what the ICC said about the applicability of an R/VC threshold test and the market share test (the very same ideas that have been resurrected by in NITL's proposal here) and whether such tests were truly indicative of market power as NITL's Petition would have the STB believe. With respect to the R/VC test, the ICC said:

> But we question whether, even if calculated on the basis of accurate cost information, they reliably indicate the presence or absence of market dominance. Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad.

> Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.

With respect to the market share test, which held that a "rebuttable presumption of market dominance will arise where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year." The ICC said:

> [T] here are formidable difficulties associated with both the accurate calculation of a market share percentage and the interpretation of such a percentage in relation to market dominance. Such problems make impractical the use of market share information in the form of a rebuttable presumption.
>
> * * *
>
> To calculate accurately a market share percentage for the proponent carrier in a rate case, one must first determine the appropriate scope of the market. Since the purpose of a market dominance proceeding is to determine the degree of competition that the proponent carrier faces in regard to the movement in question, the appropriate scope of a market must be compatible with all movements of traffic that directly or indirectly exert competitive pressures on the challenged rate. The factors that determine the appropriate scope of a market vary widely from one case to another. This problem precludes any formula for market share determination which is both practicable and serviceable.
>
> Another drawback of the market share presumption is that the competitive implications of any given market share percentage, even if accurately calculated, also vary widely from case to case. For example, the market share percentage does not measure the substitutability of one carrier or mode for another. Substitutability, which is what market share is primarily intended to measure, can be more accurately determined with a combination of evidence, both quantitative and qualitative. In short, observed market share percentage are more indicative of what transportation alternatives have been selected in the past as opposed to what alternatives are currently available.
>
> We, therefore, conclude that use of market share information in the form of a rebuttable presumption detracts from the accuracy of market dominance determinations and, as a consequence, we have decided to eliminate the market share test. Evidence of current market shares and market share trends may, of course, be submitted in addition to or in conjunction with evidence suggested in guidelines.

NITL's Petition would have the Board believe that its approach – relying upon conclusive presumptions regarding R/VC ratios and market shares -- is somehow novel, unique, and designed to reduce government's regulatory role. It is not. Both the courts, in the context of antitrust theory, and the ICC, in struggling with how best to determine market dominance, have dealt with these precise same issues in the past. In both instances, the approach suggested by NITL's Petition was rejected. This agency should do so again.

## CONCLUSION

In this proceeding, NITL has put forth an unworkable and ill-defined proposal that could fundamentally change the financial and regulatory structure of the rail industry. NITL has put forth this proposal based on the following assumptions: (1) rail rates having been increasing due to railroads' exercising undue market power; (2) that the proposal will increase rail-to-rail competition, which will result in lower rates and better service; (3) that the Board will not have to involve itself in any underlying regulatory disputes over the access; and (4) the access price will be set pursuant to some formula where Board involvement will be limited.

All of these assumptions have to be true for the proposal to make any regulatory sense and to even justify further consideration. Yet, NITL's Petition does not present any underlying data or evidence to support the underlying assumptions. While rail rates may have been increasing for some commodities in some areas, there is no evidence that those rate increases are being driven by railroads exercising undue market power. Indeed, the Board's own Christensen Study showed that rate increases reflected cost increases rather than an increased exercise of market power by the railroads. Likewise, given the numerous changes the Board has made in its rate complaint processes and methodologies, and continues to make, there is no discussion or analysis as to why these changes are insufficient to resolve the rate concerns. There is no data to back up the assumption that the proposal will actually result in lower rail rates or better service.

In fact, the evidence indicates that the proposal will result in less operating efficiencies, not more.

What about the assumption that the proposal will result in less regulatory involvement, not more? Prior case precedent establishes that parties will argue over every aspect of both the applicability of, and implementation of, the proposal. Indeed, because the terms of the NITL proposal are vague and undefined there is likely to be more litigation, not less. Furthermore, there are several aspects of the proposal that can't even be legally implemented, such as ordering switching for a shipper not located within a terminal or ordering the switching to an interchange located outside of a terminal or switching district or applying NITL's proposal to contract traffic. These legal challenges will only add to the complexity and ineffectiveness of the proposal. Finally, rather than representing a step forward, the NITL proposal is an attempt to turn the clock back to regulatory and economic theories that were popular in the 1960's and early 1970's, but have been thoroughly rejected by the ICC, the courts, and numerous government agencies since at least the early 1980's.

In the end, the Board should not be criticized for not doing enough for shippers. It has made significant progress over the past decade in responding to shippers' concerns about rates and the rate complaint process, and the vast majority of those changes were done at the request of shippers. These changes have clearly sacrificed accuracy in favor of expediency in the rate challenge process, and in some ways, compromised the fairness of the process to the railroads, but they nonetheless made the process faster and less costly for the shipper. The STB has also significantly improved the communication between shippers and the rail industry and adopted significant other changes to resolve non-rate issues, such as service or other complaints. This progress appears to have borne fruit as the shippers have filed more and more rate and other complaints and have won significant cases over the past several years and obtained several settlements.

Given this progress, the Board should not embark upon an unsupported and untested proposal and theory, especially when that theory could lead to more regulation and less competition. Until such time as NITL or the Board can establish that the underlying assumptions are in fact grounded in empirical data, the Board should resist the siren call for fundamental changes in its regulatory structure and should allow its existing processes and procedures to work.

Respectfully Submitted,

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Dated: March 1, 2013

Attorneys For The Kansas City Southern Railway Company

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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**STB DOCKET NO. EP 711**

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**PETITION FOR RULEMAKING TO ADOPT REVISED COMPETITIVE SWITCHING RULES**

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**OPENING COMMENTS AND EVIDENCE OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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**EXHIBIT A**

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**VERIFIED STATEMENT OF GREGORY WALLING**

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My name is Gregory ("Greg") Walling. I am the Assistant Vice President, International Network Services for The Kansas City Southern Railway Company (KCS). I previously served as KCS' General Director, Service Design. Prior to joining KCS, I worked for Norfolk Southern for six years, largely on former Conrail properties. In all, I have thirteen years' experience working for Class I carriers. I hold a Bachelor's Degree in International Business with a concentration on Intermodal Transportation.

In my current position, I am responsible for KCS asset management and service design. My responsibilities extend to oversight of the KCS transportation operating plan, in connection with which I manage service agreements, new service design, asset modeling, capacity/demand forecasting and operating systems, and participate in infrastructure planning. I am offering this verified statement to offer examples of how the forced switching proposal currently under consideration by the Surface Transportation Board (STB) would, if implemented, affect rail network efficiency.

In its petition for a rulemaking to establish a new STB-administered forced switching regime, The National Industrial Transportation League (NITL) offers a essentially "one-size-fits-all" proposal that would permit shippers within 30 miles (or possibly more) of an existing or potential "working interchange" to force switching between railroads. Such an approach ignores the physical and operational limitations of many interchange points – particularly but not exclusively at points of interchange outside of traditional terminal areas –is impracticable, fails to account for "real world" rail operations, and could have serious adverse impact upon KCS's interchange operations. As the illustrations provided below will demonstrate, NITL's proposal would undo decades of railroad industry operational and infrastructure modifications that were accomplished to make interline rail operations more efficient and less capital-intensive.

## I. <u>Sallisaw, Oklahoma – A Location-Specific Case Study On The Inefficiencies Of NITL's Proposal</u>

The NITL proposal would insert serious new inefficiencies into railroad network operations. One case-in-point is the KCS interchange with Union Pacific Railroad Company (UP) in Sallisaw, Oklahoma, where the NITL proposal could disrupt the current provision of efficient and cost-effective interline service to Sallisaw-area shippers.

**Sallisaw, Oklahoma – History and Facility Configuration**

Sallisaw is a small community located about 20 miles west of the Arkansas-Oklahoma border, roughly equidistant between the northern and southern borders of Oklahoma. Sallisaw is approximately 21 miles west of Fort Smith, Arkansas, and about 40 miles southeast of Muscogee, Oklahoma.

KCS' north- south main line between Kansas City, Missouri, and Shreveport, Louisiana, runs through the western side of Sallisaw. There, KCS's main line intersects UP's east-west-oriented main line extending between Wagoner/Muscogee, Oklahoma and Fort Smith, Arkansas. KCS' Kansas City-Shreveport line is KCS' core north-south route. UP's line through Sallisaw is a medium-density, single-track main line.[67] UP's line is principally operated directionally, with a predominant west-to-east traffic flow. The UP line connects with a UP Kansas City-Dallas route, and serves as a conduit for traffic flowing to or from Little Rock and Pine Bluff, Arkansas.

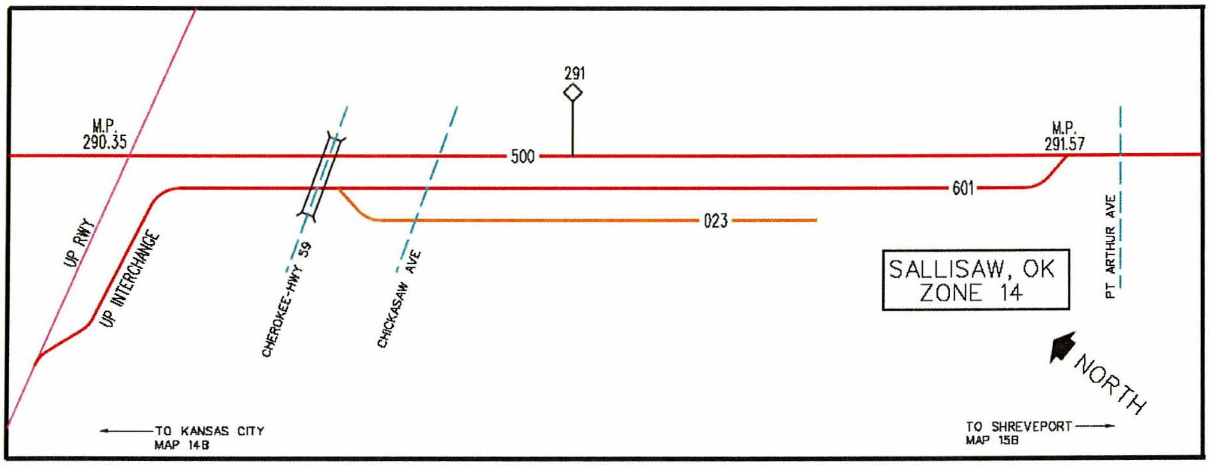
The KCS-UP crossing and interchange track at Sallisaw are depicted in Map A, below. Several features of the crossing and interchange are important to note, including the following:

- The interchange is configured so that only UP traffic coming from the west can be delivered to KCS efficiently.

[67] http://www.up.com/investors/factbooks/2011/disclosure.shtml, Union Pacific Corporation 2011 Fact Book at 5.

- There is a single interchange track (Track 601 shown on Map A). (Track 500 is the KCS main line, and Track 023 is a stub-ended storage track, primarily used for holding maintenance-of-way equipment.)
- Track 601 has approximately 4,350 feet of interchange capacity, and is intersected at grade by a public street – Chickasaw Ave. – as is shown on Map A. As is shown on Map A, Track 601 and the KCS main line cross U.S. Highway 64/West Cherokee Avenue via a rail-over-road grade separation. The grade separation structure is configured to accommodate only the two tracks currently located on it.
- Neither UP nor KCS has personnel stationed at Sallisaw. There are no crew change facilities. The nearest standard crew change location for KCS is Heavener, Oklahoma, 47 miles to the south. KCS understands that the nearest UP crew change location is Fort Smith, Arkansas, approximately 21 miles distant.

While it is possible for KCS and UP to interchange traffic at Sallisaw, no regular interchange occurs there, due to the low volume of local business and the physical limitations of the interchange facilities. A map of the Sallisaw crossing and interchange tracks follows:



**Sallisaw Area Operations**

There are at least two KCS-served shippers located along the KCS main line that are within 30 miles of the KCS-UP crossing at Sallisaw. One is a coal-fired power plant that receives unit trains of Powder River Basin coal. The other is a carload shipper receiving inbound traffic that currently originates on UP.

UP and KCS interchange traffic for these two shippers in the Kansas City terminal area. The UP-originated unit coal trains move directly from the UP-KCS point of interchange at Kansas City to the power plant, a distance of approximately 310 rail miles, ordinarily utilizing a total of two KCS crews out of Kansas City. The carload shipper's inbound freight, on the other hand, moves from the current UP-KCS point of interchange at Kansas City to Watts, Oklahoma – the location of a KCS secondary yard about 75 miles north of the customer. At Watts, the traffic is placed on a KCS local train that operates five days per week, picking up and delivering cars from and to the customer as needed.

The Kansas City-based interchange of traffic for these two customers located near Sallisaw is highly efficient. KCS and UP have invested heavily in facilities in Kansas City that promote the efficient interchange of interline traffic. For KCS' part, these facilities include three coal main tracks at KCS' Knoche Yard, each capable of receiving an entire unit coal train. Related facilities include ancillary tracks for positioning locomotives at different points in the train to provide distributed power capability. Knoche Yard is a major crew change point for KCS. Equipment maintenance facilities are also available in Knoche Yard to deal with mechanical issues on interchanged cars and/or locomotives. KCS and UP also have large switching yards in Kansas City, facilitating the cost-effective assembly and transport of carload traffic blocks destined to intermediate yards, such as Watts.

**The NITL Proposal Would Disrupt Efficient, Cost-Effective Service For Shippers Near Sallisaw**

Sallisaw has very little of the yard and interchange facilities that can be found in Kansas City.[68] Track 601, the UP-KCS interchange track, is not long enough to hold a standard unit coal train. If it were extended to do so (a significant cost), the track would extend over multiple at-grade street crossings, each of which would be blocked by an empty or loaded unit coal train designated for interchange there.[69] Even assuming the simplest "step-on/step-off" interchange where a KCS crew would replace a UP crew on a loaded train destined to the power plant the moment that a train arrived at Sallisaw, without having to change locomotives on the train (there being no track on which to hold the UP locomotives if they were to be swapped out for KCS locomotives), the coal train would probably block the crossings at least 20-30 minutes each time a train was received from UP and, for that matter, each time the empty train was returned to UP via Sallisaw.

That relatively short interchange process, however, assumes that both carriers would have crews and crew transport vans immediately available to accomplish such a time-sensitive exchange. As mentioned, there is no KCS or UP crew change point at Sallisaw. Rather, each carrier would have to taxi crews 20-40 miles one way to Sallisaw. Moreover, even if Track 601 were long enough to contain a unit coal train, there would be no track space for an empty train to

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68 For purposes of the examples in this statement, I have assumed that the shipments involved would meet the '75% of shipments' and 'within 30 miles of an interchange' tests stated in NITL's proposal. I have not considered for any of these examples the rate levels of any of the shippers involved.

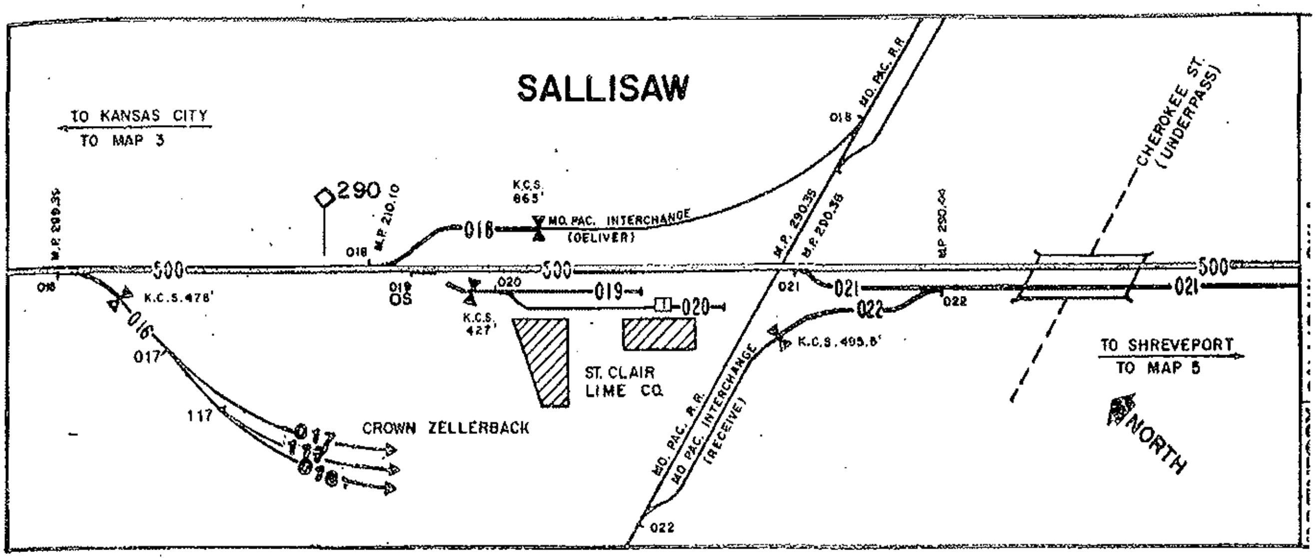
69 If the Sallisaw interchange track were not extended, then interchanging coal trains at Sallisaw could require either carrier to park unit coal trains on their respective main lines or at a passing siding some distance from the actual interchange point. Such an arrangement would convert one or more passing sidings that now facilitate expeditious main line operations into a storage or staging track, thereby unnecessarily consuming infrastructure not intended for interchange purposes, and resulting in less efficient main line service for both KCS and UP.

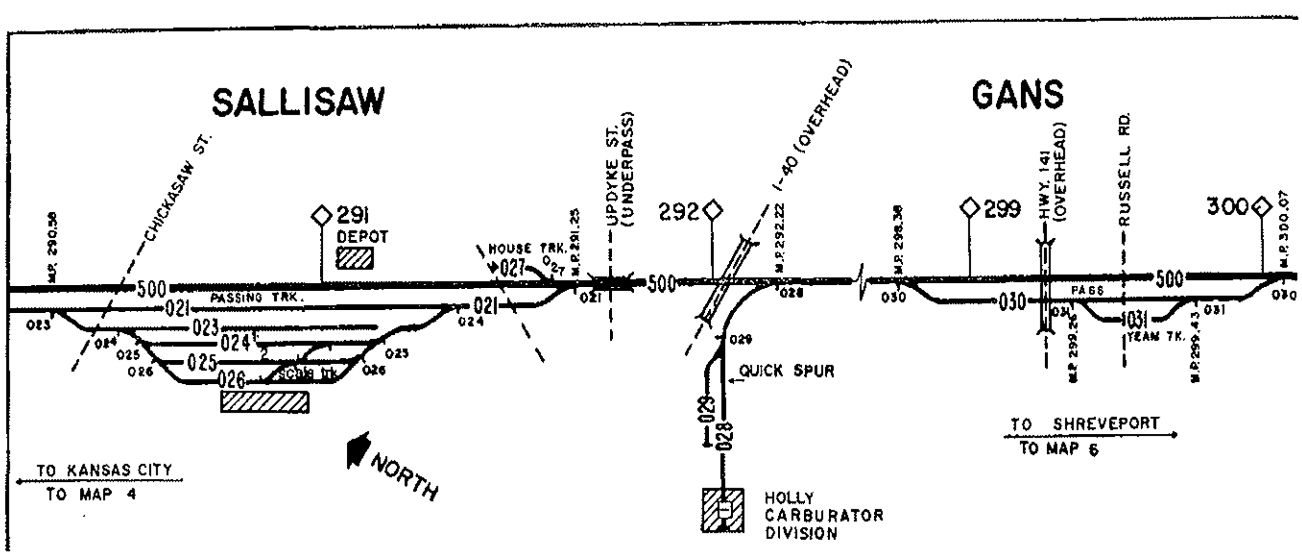
interchange back to UP when a loaded train was delivered. Thus, UP and KCS crews would likely have to be transported by van to or from Sallisaw at least twice to complete one round trip for a unit coal train. Traffic, weather, and the challenges of coordinating the activities of the two crews at a location without any crew facilities would make an efficient interchange at Sallisaw nearly impossible. Such an arrangement would be considerably less efficient than the current practice of interchanging trains at Kansas City. These difficulties which would be encountered in trying to interchange unit coal trains between KCS and UP at Sallisaw do not occur today because the physical facilities and crew change capabilities on both UP and KCS at Kansas City are capable of handling such interchange.

Interchange problems and inefficiencies at Sallisaw would be even more forbidding when one factors the carload shipper's traffic into the equation. Interchanging the occasional KCS-UP carload shipments at Sallisaw also would also require use of the lone interchange track – Track 601. The carload traffic would not move in unit coal train service, so the carload interchanges would occur on a different schedule than the unit train interchanges. Interchanging the carload shipments between UP and KCS on Track 601 would conflict with unit coal train interchange, and would make a very difficult interchange arrangement for unit trains virtually impossible once carload interchange is added to the mix. Therefore, before a coal train could be interchanged, someone (likely a passing KCS train on the main line) would have to confirm that no loaded or empty car destined to or from the carload shipper was occupying Track 601, and if carload traffic was set out on Track 601, no unit train exchanges could occur until the carload traffic was picked up by the appropriate local train. Such a system of holding coal trains out due to interchange facility "congestion" at Sallisaw would disrupt the current cycle times of the unit trains. The economics of the carload interchange likely also would be unattractive, as each carrier would have to arrange for separate local trains to interchange the load and the empty of the carload shipper at different times, since the configuration of Track 601 would not allow both dropping off and picking up at the same time.

**The NITL Proposal Would Undo Years of Service Improvements In The Sallisaw Area**

Due to the efficiency of the Kansas City interchange for traffic moving to and from the general Sallisaw area, KCS and UP have been able to eliminate unnecessary infrastructure at Sallisaw over the years, thus reducing overall track maintenance and operating costs. Below is a graphic representation of rail facilities at Sallisaw in 1983. As can be seen, KCS' facilities at Sallisaw previously included a small yard, a track scale and other facilities. In addition, UP's



facilities included interchange tracks allowing connection to KCS by both eastbound and westbound UP trains.

As KCS and UP scaled their respective operations to reflect relative declines in the amount of interline rail traffic in the Sallisaw area, and to account for operational changes (such as UP's use of its line through Sallisaw predominantly for eastbound movements), unnecessary facilities were removed. Such facilities, which have been rendered unnecessary in light of improved interline handling at Kansas City, would have to be rebuilt at significant expense if the STB were to force KCS and UP to restore the practice of interchanging traffic at Sallisaw.

## II. <u>Forced Switching Would Create System Inefficiencies</u>

Sallisaw is not an isolated example of the inefficiencies and increased costs that would be occasioned by NITL's proposal. Rather, the changes at Sallisaw over the years illustrate the types of efficiencies that can be and have been achieved throughout the rail system in the last thirty years, through the consolidation of various interchange operations at larger yards. Those efficiencies, and the way those savings have kept many rail rates down since the passage of the Staggers Act are undone by the NITL proposal.

Another example of inefficiencies that the NITL proposal could cause involves KCS-served shippers in the general vicinity of West Monroe, Louisiana. West Monroe is in north Louisiana, at Milepost 72.3 of the Vicksburg Subdivision, on the Meridian Speedway, LLC (MSLLC) line. The Ouachita River separates West Monroe from Monroe, Louisiana, where UP's Alexandria, Louisiana-to-Pine Bluff, Arkansas, line crosses MSLLC at Milepost 71.1. A small interchange track along the UP line connects to a small and busy 6-track yard lying parallel to the MSLLC line.

Within thirty miles of the UP crossing of the MSLLC line at Monroe, KCS serves shippers that move traffic in boxcars to off-line destinations on the West Coast.[70] Currently, KCS handles such traffic for these customers via its direct east-west route over Shreveport to the Dallas/Fort Worth area. Such carload traffic originating at West Monroe is assembled into a block of westbound cars, and is handled in carload train service to Shreveport, where the cars are added to KCS's Jackson-to-Dallas train for transport to the Dallas area. At Dallas, the traffic is interchanged to either BNSF or UP for movement to the West Coast. KCS's route via MSLLC and KCS track to Dallas from West Monroe is the shortest available route, extending about 316 rail miles.

Applying NITL's proposal to this traffic would undo the efficiencies of the current traffic routing. KCS's West Monroe-area carload shipper(s) are within the 30-mile zone of the UP-MSLLC crossing, and thus potentially could appeal to the STB for forced switching/interchange of cars at Monroe under the NITL proposal. If the shipper(s) did so, their traffic could be interchanged to UP at Monroe rather than Dallas, using the rather limited and crowded facilities at Monroe. KCS understands that, from Monroe, UP would move the traffic about 85 miles south to a freight classification yard at Alexandria, Louisiana. And from Alexandria, UP would move the car(s) back north and west about 113 miles to Shreveport, and then west along UP's line from Shreveport to Dallas/Fort Worth. In all, UP's route would likely involve an additional switch at Alexandria and, at 404.5 rail miles from Monroe to Dallas, is 28 percent longer than KCS' direct routing. So, while the shipper might consider using forced switching to get to the "closest" point of interchange with UP, doing so would add inefficiency to the overall rail system with extra mileage, extra switching and extra delay.

70 The MSLLC agreement provides that KCS retains the right and responsibility to provide local service to shippers along the MSLLC line.

## VERIFICATION

I, Gregory Walling, Assistant Vice President, International Network Services for The Kansas City Southern Railway Company, declare under penalty of perjury that the foregoing statement is true and correct. Further, I certify that I am qualified to file this Verified Statement. Executed this 28th day of February, 2013.

Gregory Walling