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May 30, 2013

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 served October 25, 2012, both issued in the above-referenced proceeding, enclosed are the "Reply Comments 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**

STB DOCKET NO. EP 711

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

**REPLY COMMENTS OF THE
KANSAS CITY SOUTHERN RAILWAY COMPANY**

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Dated: May 30, 2013

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STB DOCKET NO. EP 711

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**REPLY COMMENTS OF THE
KANSAS CITY SOUTHERN RAILWAY COMPANY**

BRIEF BACKGROUND

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 the subject National Industrial Transportation League (“NITL”) proposal for new, so-called “competitive switching” rules (the “NITL Proposal”). The NITL Proposal would have the Board promulgate a series of rules requiring all seven Class I railroads to fundamentally restructure existing operating and marketing practices to provide a limited group of shippers with government-mandated “competitive access” to another railroad. Railroads would be required to provide such forced access even in the absence of evidence that – (1) existing service is inadequate, (2) current rates are unreasonable, (3) there is inadequate intermodal competition or anticompetitive activity; and (4) the serving railroad has market dominance.

On March 1, various parties, including The Kansas City Southern Railway Company (“KCS”) submitted opening comments on the NITL Proposal. In accordance with the Board’s procedural schedule, KCS hereby provides these comments in reply to the various opening comments, and urges the Board not to move forward with the NITL Proposal.

SUMMARY

Given that the NITL Proposal purportedly promises lower rates and better service for “shippers,” one would have expected widespread support from most, if not all, of the shipping community. However, there obviously is no consensus among shippers that the NITL Proposal is worth the effort. Although the proposal received strong support from a few large chemical companies, who anticipate receiving the lion's share of the purported benefits of the proposal, there was only lukewarm support from other shippers and government agencies. Some shippers were unenthusiastic because, as they acknowledged, the NITL Proposal would not apply to them. Many expressed concern over rates, insisting that the Board needed to remain focused on rate relief. Further, not one independent trade association or academic think-tank endorsed the proposal. The opening comments thus confirm that the NITL Proposal is only of interest to a limited group of large shippers.

Not only did the proposal receive limited support, but the evidentiary record does not justify pursuing the proposal. Indeed, NITL didn't even analyze its own proposal, omitting analysis of the effects on 3 of the 7 Class I carriers; failing to analyze one of the two principal proposed threshold criteria - the 75% criterion; failing to include many existing interchanges; failing to analyze the impacts of the proposal on carrier costs and efficiency; and failing to clarify the many ill-defined aspects of the proposal. Similarly, the United States Department of Agriculture (“USDA”) and others only addressed select elements of the NITL Proposal. Instead, NITL and other proponents generally said, “Well, it works in Canada, so it will work here,” while failing to acknowledge the substantial differences between U.S. and Canadian rail systems and between the NITL Proposal and Canadian interswitching, and without acknowledging that

even in Canada, despite interswitching, shippers continue to make the same types of complaints about carrier rates and service that the Board hears.

The net effect is that the proposal's proponents have not fully analyzed the proposal's impacts, contrary to the Board's request. Such incomplete analysis simply makes it impossible for the Board to accurately assess forced switching's true impact on traffic, revenue, and network efficiency (the latter being an issue that most shippers assiduously avoided in their opening comments). On the other hand, the record contains independent and objective evidence presented by well-respected and well-known economic consulting firms, such as Oliver Wyman and Christensen Associates, showing that the proposal would result in rail network inefficiency, and that it is nothing more than a redistribution scheme intended to benefit a limited subset of very wealthy companies to the detriment of other shippers and customers.

In view of the NITL Proposal's acknowledged vagueness, lack of cohesive shipper support (due to more promising rate reasonableness reform), and the serious threat of transportation network harm, the Board should not move forward with the proposal. Instead, the Board should continue to review, and if necessary, refine, its rate complaint processes to make them less costly and more efficient for shippers to have their rate concerns addressed.

I. THE RECORD REFLECTS LIMITED SUPPORT FOR THE NITL PROPOSAL BUT GREATER CONCERN OVER THE PERCEIVED INABILITY TO EFFECTIVELY CHALLENGE RAIL RATES

A. NITL's Proposal Has Limited Support

As the Decision pointed out, the origins of this proceeding can be traced back to STB Docket No. EP 705, Competition in the Railroad Industry, including the two-day hearing that the Board held in that proceeding to address the topic of competition in the rail industry. The EP 705 proceeding generated widespread interest, and over one hundred parties filed comments and

participated in that matter in one way or another. Due to the broad scope of interest in the EP 705 proceeding, and NITL's contention that its proposal is in the public interest, one might have expected here an outpouring of support from shippers, government agencies, and independent academics and economists. That hasn't happened.

What shipper support there is comes from some of the largest, most profitable companies in this country (and in the world), which can easily afford to apply the Board's existing regulatory processes and their considerable bargaining leverage to resolve rate and service matters with railroads. Even those very large industries expressed support through trade associations, not individually. Besides NITL, the American Chemistry Council, whose membership consists of such companies as Dow and DuPont (both also members of NITL), supports the proposal. No other large, independent shippers or other trade associations expressed full support for the NITL Proposal. While a few individual shippers expressed support for the proposal, including Glacial Lakes Energy ("GLE"), Roanoke Cement, and Diversified CPC International, even these shippers didn't support the NITL Proposal as it now exists, believing that it didn't go far enough. Perhaps most noteworthy is that the largest U.S. trade association for utility companies, Edison Electric Institute, a well-known litigant before the Board, filed no comments.

Only two governmental entities commented: The United States Department of Transportation ("DOT") and USDA. DOT provided numerical analysis but took no position on the NITL Proposal. USDA provided evidentiary analysis, sponsoring the same expert as NITL. USDA generally supported the NITL Proposal, but insisted that it didn't go far enough. Instead, USDA wanted to expand it even further, which would only exacerbate the operational problems that the proposal would bring. The two primary federal agencies tasked with ensuring and

promoting competition, the Department of Justice and the Federal Trade Commission, did not participate.

Likewise, given that the NITL Proposal advocates that forced switching is “pro-competitive’ and would result in net public benefits, one would have expected the emergence of academic or “think tank” community support. At least there would have been support from some well-known, pro-competition economists. Yet, no independent academic, antitrust economist, or third-party think tank supported the proposal. Instead, the Competitive Enterprise Institute, a think tank committed to preserving and enhancing competition, filed initial comments opposing the proposal because it would endanger the financial health of the rail industry, was contrary to economic principles governing network industries, and would result in over-regulation. Most importantly, the very same independent and well-respected economic consulting firm hired by the Board in 2007 and 2008 to assess the state of competition in the rail industry, Christensen Associates, acknowledged that the proposal would create winners and losers among shippers, and that the economic costs of a forced switching regime could outweigh any potential benefit.¹

The proposal was opposed by every single participating railroad for very good reason: they understand the crippling operating problems and disinvestment it would bring the nation’s rail network. The evidence submitted by the railroads made numerous salient points.

Specifically, railroads demonstrated that the NITL Proposal would create substantial operating problems, and it is merely a redistribution scheme intended to benefit a limited group of very

¹ According to Chistensen’s analysis, even for shippers who might benefit through lower rates, the “potential side effects of the NITL proposal would be degradation in service quality that ... could spread throughout the network.” STB Docket No. EP 711, Opening Comments of the Association of American Railroads (“AAR’s Opening Comments”), Verified Statement of B. Kelly Eakin and Mark E. Meitzen, Page 18. Shippers ineligible for relief under the proposal “would likely suffer service quality declines and cost increases, but receive no offsetting rate reductions to compensate for these negative impacts.” Id.

wealthy companies to the detriment of many other shippers and customers. Also, the NITL Proposal would create substantial inefficiencies, and is inconsistent with the statute. Finally, adoption of the NITL Proposal would result in net public costs rather than benefits, and could substantially reduce the capital available for future infrastructure investment. Even the short line railroad industry, whose members are specifically exempted under the proposal, expressed concern.

In the end, when compared to the EP 705 proceeding, where the focus was on rail competition and rates, there is a remarkable lack of support for the NITL Proposal, especially given that the proposal's intent is (ostensibly) improved service and lower rates. Indeed, it is clear that there is no consensus within the shipper community itself regarding how, when, and under what circumstances should shippers qualify for forced switching under the NITL Proposal. The Board should take note of this lack of consensus around NITL's "competitive access" proposal, and should not move forward with the NITL Proposal. Instead, the Board should continue its efforts at reforming its rate relief processes.

B. The Comments Reflect Concern Over Access To Rate Relief Rather Than Support For A Mandatory Switching Regime

The lack of a general consensus for the adoption of a "competitive access" switching proposal should not be surprising given the numerous comments made in STB Docket No. EP 705 focusing on rates at the expense of switching proposals. As KCS has previously noted, the majority of shipper interests in STB Docket No. EP 705 focused upon rail rates and the perceived regulatory obstacles to rate relief. There was in that proceeding, as is the case here, a division of opinion among the shipper community as to the effectiveness of a forced switching regime.

Here, several shippers and shipper groups expressed reservations about the NITL Proposal, and instead commented on continuing concerns over the Board's rate reasonableness processes. For example, the Alliance for Rail Competition ("ARC") expressed qualified support for the NITL Proposal, but noted that the proposal would not resolve concerns about rates and unreasonable practices. ARC added that many of its members would be unable to avail themselves of forced access under the NITL Proposal.

The Chlorine Institute ("CI"), which has such large members as Bayer Corporation, Borden, Canexus, Clorox, and Westlake Chemicals (all companies who have separately participated in prior Board proceedings), was concerned that the STB might be viewing the NITL Proposal as a "cure-all" for shippers that also relieves the Board of any need to address the agency's rate complaint processes. According to CI, "[regulating rates] will continue to be a crucial factor to ensure fairness in the rail transportation market." STB Docket No. EP 711, Opening Comments of The Chlorine Institute, Inc., Page 2. CI believes that the Board should focus on the rate relief process and consider reopening some of the "mega merger" proceedings to reevaluate whether the conditions imposed in those mergers have truly been effective in preserving competition.

The Joint Coal Shippers ("JCS"), a consortium of coal consumers, including Kansas City Power & Light Company, expressed concern that the proposal would undermine a shipper's ability to utilize the Board's rate relief process, and observed that the NITL Proposal may fail to "provide any meaningful market-based rate relief." STB Docket No. EP 711, Opening Submission of Entergy Arkansas, Inc., Kansas City Power and Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company d/b/a WE Energies, Page 8. JCS does not appear to share NITL's view that the proposal will result in improved service and lower

prices, and instead, appears to believe that the Board's resources should be focused, in part, on improving the rate complaint process.

JCS's view was echoed by Olin Corporation. In Olin's view, it is the ability to utilize the rate complaint process that will provide the incentive for railroads to compete, even with the adoption of the NITL Proposal. Without some method to force railroads to compete (and Olin implies that the Board's rate complaint process is that method), the "logical result is that the NITL proposal will not promote more rail-to-rail competition." STB Docket No. EP 711, Initial Comments of Olin Corporation, Page 7.

There are several other comments by the above parties and others that reflect their view that the NITL Proposal may not actually result in better rates and service. While such shippers do not oppose the NITL Proposal, the evidence here, especially when combined with the record in STB Docket No. EP 705, indicates that the primary concern of most of the commenting shippers remains rate increases and rate levels and having an effective process by which they can challenge those rates. KCS believes that these shippers have it conceptually right -- the Board can and should continue to review, and if necessary, reform, its rate complaint process rather than embarking on a radical restructuring that could have significant unintended consequences.

C. The Board's Resources Should Be Devoted To Improving Its Rate Complaint Process For All Shippers

Given the limited support for the NITL Proposal, the concerns expressed by many that the proposal could be counter-productive, and that many shippers want the Board to continue to focus on reforming its rate complaint process, the Board should not pursue the NITL Proposal further. The record in STB Docket No. EP 705 and here show that shippers are concerned more about rate increases, the existing rail rates, and their perceived inability to effectively challenge those rates. The obvious path, therefore, is for the Board address those rate-related concerns

directly, rather than continue along the path of considering a systemic change in rail regulation that would at best attack the perceived problem only indirectly and likely won't resolve shippers' expressed concerns at all; and at worst, result in crippling operating problems and disinvestment in the U.S. rail network.

Reforming the rate complaint process, rather than implementing a mandatory switching regime lacking in widespread support, is quite possible and it avoids unintended consequences.² In the past, both the ICC and this agency have repeatedly responded to shipper concerns by revising the Board's rate reasonableness processes in ways that have favored shippers.³ More

² It appears that NITL and others supporting forced access have decided to focus on obtaining switching relief rather than rate regulation reform, all in the hope of attaining some sort of rate relief via a process other than the rate complaint process. Of course 49 U.S.C. § 11102 was never intended as an alternative statutory remedy for unreasonable rates. The Board recently reiterated this principle in Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc. & BNSF Railway Company, STB Docket No. NOR 42104, slip op. at 15 (STB served March 15, 2011), where it noted that "as we stated in CP&L, the competitive access rules were promulgated not to provide shippers with an alternative form of rate relief, but to offer a competitive remedy where a bottleneck carrier has exploited its market power.... [footnote omitted] Thus, the proper inquiry is whether we have before us a monopolist, indifferent to the needs of its shipper, who is exploiting its market power by charging abusive rates (or providing poor service)." NITL's proposal is of course intended to do away with any requirement that a carrier be shown to have abused its market power and as such is simply a thinly-disguised attempt to obtain rate relief through another means.

³ See e.g. 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)(adoption of productivity adjustment); 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)(simplifying the market dominance analysis); 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)(streamlining the process for resolving stand alone cost ("SAC") cases brought under the Coal Rate Guidelines standard); Major Issues in Rail Rate Cases, Docket No. EP 657 (Sub-No. 1) (STB served October 30, 2006)(adopting several procedural and substantive changes to the SAC test); and Simplified Standards for Rail Rate Cases ("Simplified Standards"), Docket No. EP 646 (Sub-No. 1) (STB served September 5, 2007)(adopting new methodologies for assessing the reasonableness of rates involving small shipments and small shippers).

recently, the Board has continued to propose changes to how it undertakes its market dominance analysis,⁴ to its URCS methodology,⁵ and to its Simplified Standards, including raising the relief caps.⁶ It has also very recently rejected a rail industry call for reinserting readily-apparent market and geographic competition considerations into the Board's threshold market dominance inquiry in even a few cases.⁷ All of these steps were (and are) aimed at lowering litigation costs, simplifying the rate complaint procedures, and increasing shipper access to rate relief. The changes make shippers better able than ever in the post-ICCTA world to challenge rates and to use the regulatory processes to defend against railroad market power abuse to the extent such exists.

Obviously some of the comments in STB Docket No. EP 705 and here reflect that, notwithstanding the Board's continued efforts to move the rate complaint process in the direction requested by shippers, some shippers continue to believe the Board still has not done enough. Conversely, some railroads would likely charge that the Board has already gone too far, substituting expediency for accuracy in setting railroad rates. Perhaps this means that the Board has it "just about right." Indeed, a seeming recent increase in the number of matters being settled, rather than litigated to completion, indicates that the Board's efforts are having favorable effects of reducing the difficulty of resolving rate complaints. Simply because some shippers

⁴ M&G Polymers USA, LLC v. CSX Transp., Inc., STB Docket No. NOR 42123 (STB served Sept. 27, 2012).

⁵ Review of the General Purpose Costing System, STB Docket No. EP 431 (Sub-No. 4) (STB served Feb. 4, 2013).

⁶ Rate Regulation Reforms, STB Docket No. EP 715 (STB served July 25, 2012).

⁷ Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities, STB Docket No. 717 (STB served March 19, 2013).

remain unhappy with the Board's rate case policies doesn't mean the Board should abandon its rate review reforms in favor of a forced switching scheme that permits shippers and this agency to tinker dangerously with railroad operations.

There remain opportunities to simplify the rate review process and make it less expensive. The Board currently has several such proceedings under consideration. KCS supports consideration of proposals such as these to determine whether they could provide useful reform without sacrificing needed accuracy in the rate challenge system. The Board should actively pursue a more cost-effective and quicker way (or ways) to ascertain whether a disputed rate is reasonable or not. Such a process would be in the best interest of all and avoids the ill consequences to rail network operations and to the majority of shippers who could not access the "solution" proposed by NITL. The Board should not accept the extreme shipper mantra that any rate above 180 R/VC must mean the Board's processes aren't working and the Board needs to fix it through forced switching no matter the cost to the rail industry or other shippers.

II. THE RECORD DOES NOT SUPPORT A CONCLUSION THAT THE NITL PROPOSAL IS IN THE PUBLIC INTEREST

The major purpose of the Board's July 25, 2012 decision seeking comments was for the Board to gather information to help it assess the impact of the proposal on shippers and the rail industry. As the Board stated:

[W]e cannot fully gauge [the NITL proposal's] potential impact. For example, we do not know how many shippers would be able to take advantage of mandatory competitive switching, nor has NITL provided such data in its submission. We must also consider an appropriate methodology for access pricing that would be used in conjunction with competitive switching. The access price would be a significant factor in determining the impact of such a broad competitive switching requirement, but that critical element also was not included in NITL's petition. Therefore, additional information is needed before we can determine how to proceed.

The Decision also states as follows:

NITL's proposal does not provide enough information for the Board to determine fully its effect on qualifying shippers, as we do not yet have an estimate of how many shippers would be able to take advantage of mandatory competitive switching. (Decision at 7)

NITL's petition itself, however, does not include detailed evidence or analysis of the likely benefits to shippers that could obtain mandatory switching that would result from its proposal, nor does it address how remaining shippers might be affected. And, it does not include a methodology for access pricing, which we believe would be a significant factor in determining the extent to which a broad competitive switching requirement could affect qualifying shippers, as well as the financial strength of the railroad industry. (Id.)

[W]e cannot project the extent of any net revenue loss to railroads that would result from NITL's proposal, we also cannot predict whether, or by how much, the remaining captive traffic would likely be charged to make up for any revenues that would otherwise be lost to the carriers... Therefore, the extent to which a program of broad competitive access could affect other captive shippers who may not participate in the program must also be examined. (Id.)

[W]e need more precise information about whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads' network operations. (Decision at 8)

The Board then listed five specific questions for commenters to address. Taking the numerous comments and questions in context, the Board's questions and comments basically solicit input on four key items of legitimate concern – (1) the number of shippers who could invoke the proposal; (2) impacts upon ineligible shippers; (3) impacts on operating efficiency; and (4) the access price and its impact on the proposal.

The opening comments did not fully respond to such questions. No party fully addressed each of the Board's specific requests for information regarding the proposal's breadth and impact. If anything, the opening comments demonstrate that it would be all but impossible to find that the proposal would be in the public interest because there are too many unusual questions and the proposal is too vague.

As discussed below, the proposal's proponents have failed to produce a solid basis for finding that the proposal is in the public interest. To begin with, the proposal remains too ill-defined, requiring interested parties to make critical assumptions about the scope of the proposal and interpretation of key elements. As such, the proposal is not a fully-developed concept, and it is an inadequate foundation for thorough discussion and assessment worthy of a rulemaking, as many commenters tacitly have acknowledged. Beyond that, the proposal's advocates, as noted, failed to address key items of Board concern (such as number of eligible shippers, the impacts on operating efficiencies, and the access price methodology). As such, there are many important questions left unanswered about the proposed forced switching regime and its impact.

A. The Proposal Is Incomplete And Leaves Too Many Unanswered Questions; Such Gaps Require Making Numerous Assumptions

Much of the fault underlying commenters' incomplete analyses lies in the NITL Proposal itself. The NITL Proposal fails to set forth the specific parameters underlying the various criteria NITL posited for applying forced switching. As a result, the NITL Proposal requires that each commenter first make assumptions about significant aspects of the proposal that may or may not be part of the Board's (or NITL's) specific vision of a forced switching regime. This in turn, means there is not an accurate record reflecting comment and analysis on "the" NITL Proposal.

As examples of the many critical questions that go begging in light of the vagueness of the proposal are the following:

- Does the phrase "shipper (or group of shippers) served by a single Class I rail carrier" mean one particular facility at a specific location or a group of facilities in proximity to each other and, if the latter, how is that group defined?
- If the R/VC ratio for one product shipped to or from a particular shipper facility (or group of shippers' facilities?) is over 240% or meets the 75% market share test, is reciprocal switching available on all commodities shipped to/from that facility (or facilities)?
- Does the 75% presumption apply regardless of price level or competitiveness of other modes of transportation?

- Once a shipper facility or certain traffic qualifies for forced switching under the rules, does the remedy last forever?
- Who would be responsible for paying labor protection costs under Section 11102(c)(2)? Which labor protective conditions would apply? Would unions have standing to intervene or challenge the application of the rule so as to avoid labor impacts?

As DOT explained, “there are varying interpretations and corresponding methodologies on how much traffic should be included in the data set . . . The analysis and results may vary depending upon how such assumptions are made.” STB Docket No. EP 711, Opening Comments of the United States Department of Transportation, Page 3. How the parties addressed the above questions and the assumptions made in addressing those questions impacted their analysis. Because each party made different assumptions, no party - including NITL itself - can be said to have actually analyzed the same proposal. There simply is no one “NITL Proposal” to analyze.

NITL itself failed to take the opportunity in its comments to further define its proposal. Instead of filling out the details of its proposal, closing gaps and providing accurate definitions of the proposal, NITL chose to analyze only part of the proposal, limiting its waybill analysis to only the four largest Class I's, ignoring the 75% standard for triggering access, limiting its analysis to an arbitrary 30 rail miles instead of a similar arbitrary 30 mile radius as it proposed, and limiting the number of interchanges analyzed. NITL had no analysis on the impact of the proposal on the remaining, smaller Class I's and the impact on the vital role they provide as competitive alternatives to the four largest Class I's. When NITL did have to make a choice, it made assumptions that effectively resulted in a knowing understatement by NITL of the effect of its proposal. The end result is that the Board simply does not know the impact of the NITL Proposal because the parties all analyzed different proposals based upon the assumptions they were forced to make.

B. No One Knows How Many Shippers Would Be Eligible

1. No One Has Determined How Many Shippers Meet The 75% Rail Market Share Threshold

Among the criteria that NITL sets forth as allowing a shipper to obtain forced access is the notion that if the incumbent Class I railroad handles 75% or more of a given movement from a facility in the prior twelve months, market dominance will be presumed. This is an alternative test to the 240 R/VC test.⁸ But there are several unanswered questions. For example, is mandatory access available if the railroad had 75% of the traffic because it was the lowest-priced transportation option, and even though other modes were available? If a railroad lowered its rate and thus attracted 90% of a shipper's shipments of a particular product from a competitive barge movement, would that rate reduction open access to the shipper, or even to a group of shippers, by forced switching? If rail handles 75% of one origin-destination move for one commodity, is the entire shipper facility or group of shipper facilities opened to forced switching for all commodities? If rail handles 75% of the subject traffic at rates with an R/VC ratio less than 180, does the NITL Proposal still conclusively presume market dominance even though by statute an R/VC ratio less than 180 conclusively shows lack of market dominance? Is the 75% test calculated using contract traffic, so that if a railroad offers an attractive rate and service package

⁸ The use of a 75% market share test, like the use of a 240 R/VC test, is wholly arbitrary. There is no rational basis to conclude that an R/VC above 240 or a rail market share above 75% incontrovertibly proves that a railroad is market dominant. Indeed, 49 U.S.C. Section 10707(d)(2) says that an R/VC above 180 does NOT establish a presumption of market dominance. Likewise, such arbitrary presumptions make no sense in those instances where a shipper may be served by one Class I carrier at origin or destination but have several interchange options for completing the entire route. It is for these reasons, as KCS pointed out in its opening comments, that the courts and the Department of Justice have long rejected the use of conclusive presumptions in favor of a fact specific analysis when trying to determine market power. STB Docket No. EP 711, Opening Comments of The Kansas City Southern Railway Company ("KCS's Opening Comments"), Page 36.

in a contract, earning the shipper's traffic, the railroad also opens itself to forced switching?

What about exempt commodities? None of these questions were addressed by NITL or clarified in any opening comments of the proposal's advocates.

As a result, parties simply could not determine how to analyze the 75% market share criteria. As NS observed, “determining whether the customer ships 75% of its traffic by rail would require substantial discovery and litigation – even if the 75% criterion were defensible” STB Docket No. EP 711, Opening Comments of the Norfolk Southern Railway Company (“Norfolk Southern’s Opening Comments”), Page 48, and the data and other limitations “make[] it impossible for parties to conduct any meaningful study.” Id. at 45. UP admitted that it cannot determine how many shippers may meet the 75% threshold test. STB Docket No. EP 711, Opening Comments and Evidence of Union Pacific Railroad Company (“Opening Comments of Union Pacific”), Page 59. NITL notes “that . . . its analyses of the CSP include only the 240% R/VC conclusive presumption and not the 75% market share presumption.” NITL at 7, n.10. National Grain and Feed Association noted that it would require a special study to examine the 75% requirement, and admitted that most of its members wouldn’t benefit from the presumption anyhow.⁹ AAR could not assess the effect of the 75% presumption because the Waybill sample lacks data that would allow analysis of the 75% presumption. AAR’s Opening Comments, Pages 12-13. DOT similarly did not include any traffic that would be potentially eligible under the 75% presumption. See STB Docket No. EP 711 Opening Comments of Department of Transportation (“DOT’s Opening Comments”), Page 3, n.2 (“The Department did not undertake

⁹ See STB Docket No. EP 711, Joint Opening Submission of the National Grain and Feed Association, the Agricultural Retailers Association, National Barley Growers Association, USA Rice Federation, National Oilseed Processors Association, the National Chicken Council, the National Association of Wheat Growers, the National Council of Farmer Cooperatives, and the National Corn Growers Association (“Interested Agricultural Parties”), Page 13, n.25

an examination of the NITL's 75 percent test proposal," and DOT "could not figure how to account for it easily in its analysis." Id. And USDA did not even mention the 75% requirement.

The simple fact is that none of the studies presented by any party included any analysis of potentially eligible shipments under this element of the NITL Proposal. As such, the Board has no evidentiary basis on which to make a rational conclusion regarding how many shippers would be impacted by the proposal and what those impacts would be.

2. The Impact of the Proposal Also Depends Upon The Unresolved Question Of Rail Miles vs. Air Miles

Likewise, because the proposal was not clear on whether it uses air miles or rail miles, no party's analysis fully addressed how many shippers would qualify for relief under the NITL Proposal. The NITL Proposal itself says it applies if a shipper's facility(ies) "are within a radius of 30 miles" of an interchange, NITL Pet. at 36, implying that NITL is using air miles as its point of reference, as does Canadian interswitching. However, commenters' analyses applied different approaches. Consistent with NITL's language, AAR used air miles (AAR's Opening Comments, Page 11). DOT and USDA used track miles (DOT's Opening Comments, Page 9 and STB Docket No. EP 711, Comments of the U.S. Department of Agriculture ("USDA's Opening Comments"), Page 5). NITL used rail miles, but then conveniently leaves open the possibility of shifting to an air miles standard, explaining that it "chose" rail miles for purposes of analysis (which has the obvious effect of reducing the scope of the traffic covered by the proposal). Yet, nowhere has NITL made clear which measuring standard its proposal intends will apply. For the Board and the parties to conduct an accurate analysis, there must be (but currently isn't) a single measuring standard.

C. The Proposal Lacks An Access Price Methodology, And No One Has Filled This Void

Despite the Board's clear directives, there was no meaningful analysis on the issue of access price. AAR explained that it cannot estimate rate reductions resulting from forced switching, in part because there is no set STB access rate prescription. AAR's Opening Comments, Pages 14-15. NS noted that the access price is to be set by the carriers and it could not fully analyze the impacts of the proposal in part because there is no way to determine the compensation level that the carriers might agree to. Norfolk Southern's Opening Comments, Pages 35-36. NS said it too cannot fully study the impact of NITL's proposal because, under the statute, the access price is to be negotiated in each instance by the two carriers involved, and failing agreement, then set by the Board. Id. And UP noted that access price uncertainties also make quantification/projections impossible. Opening Comments of Union Pacific, Page 59.

USDA said that the methodology for determining the access price must be "simple, easily calculated, and applied to all switching under the competitive access rules" and afford genuine, economical access to another carrier. USDA's Opening Comments, Page 19. But in so doing, USDA ignored the statutory requirement that carriers first negotiate an access price, and recommended instead that the STB adopt the Canadian interswitching fee structure. NITL did not offer an objective methodology that reflects the movement's operating and market characteristics. Instead, NITL suggested use of a Canadian "cost based" fee in its analysis.

In the end, no party provided a methodology that could be applied and used in the Board's analysis. While NITL suggested basically adopting the Canadian model, it did so at the expense of ignoring the statutory language that requires the involved railroads to negotiate the access price. And, lacking a readily-available methodology, NITL did not even analyze its own proposal. As the Board said, the access price is a "critical element" of the NITL proposal, as is

the calculation of the access price. Without this “significant factor” and “critical element,” the Board cannot “determine how to proceed.” See Petition For Rulemaking To Adopt Revised Competitive Switching Rules, Docket No. EP 711 (STB served July 25, 2012).

If the Board does not terminate this proceeding at this stage, which it should, before the Board moves forward it will have to at least require further analysis on a specific access price methodology and then require parties to update or redo their impact analysis after taking into account the access price. The Board requested the parties to do that here, but the issue remains largely unaddressed, and without evidence or discussion, the Board cannot fully analyze the proposal’s impact.

D. Several Other Important Issues Highly Relevant To The Board’s Consideration Of The Proposal Are Likewise Missing

1. No Party Analyzed The Proposal’s Impact On Smaller Class I Railroads And Other Smaller Railroads

The NITL study includes no evidence or attempt to show the impact of its proposal on the three smaller Class I railroads: KCS, CN, and CP. Yet, traffic originating or terminating on these three railroads would be subject to the proposal to same extent as on the so-called “Big Four,” specifically UP, BNSF, CSX, and NS.

While the Decision posited that an analysis of the Big Four is “sufficiently representative of the railroad industry as a whole,” it is not representative of the NITL Proposal’s impact on KCS. As explained in its Opening Comments, KCS’s network and traffic mix is much more akin to a Class II or III than to any of the four largest Class I’s.¹⁰ KCS has nowhere near the revenues,

¹⁰ The NITL Proposal exempts Class II and III carriers from its application because “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.” NITL Pet. at 40. Because it, too, lacks the market power of the Big Four, KCS has suggested that if the proposal moves

geographic reach, or market power of the four largest carriers. Its average length of haul is significantly shorter, it generally does not serve multiple plant locations of the same shipper as do the larger carriers, and it is heavily dependent upon interline traffic.¹¹ For example, on average, the four largest Class I carriers handle approximately 72% or more of their traffic 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 traffic. Like those carriers, the vast majority of KCS's traffic – approximately 88% – originates or terminates on other carriers through interchange. KCS's Opening Comments, Page 24. Accordingly, analysis relying upon data concerning BNSF, CSX, NS and UP alone is not representative of the impacts of the NITL Proposal on KCS.¹²

NITL's omission of KCS, CP, and CN from its waybill analysis also significantly understates the proposal's impact on the rail network as a whole. Each of these carriers' traffic is represented in the waybill sample, yet the NITL analysis excluded consideration of their traffic. Because KCS, CP and CN largely operate north-south, with the larger Class I's crossing them at multiple locations, omitting KCS, CP and CN from NITL's analysis significantly understates the number of interchanges enveloped in NITL's Proposal. Also, because CP and CN, like KCS, each also handle a larger percentage of interline traffic than do any of the larger Class I's, the effect of the NITL Proposal on the larger Class I's is not at all representative of the effect on the 3 smaller Class I's who rely so much more on interchange traffic which gives shippers more

forward, which it should not, the Board should consider exempting interline traffic (or perhaps carriers with large amounts of interline traffic).

¹¹ STB Docket No. EP 705, Initial Comments of Kansas City Southern Railway Company, Page 12.

¹² There are no data limitations on including KCS, as the Waybill data includes information on KCS traffic.

competitive options. Accordingly, NITL's choice to exclude KCS, CN and CP from its waybill analysis deliberately skews the data in a way that leaves the Board uninformed of the effect of NITL's Proposal on KCS, CP and CN.

Similarly, no party analyzed the impacts on Class II's and III's. Because they are excluded from NITL's Proposal, one would think the impacts need not be analyzed. However, there are several aspects of the proposal that could impact Class II's and III's. For example, while a shipper facility served exclusively by a Class II or III carrier cannot obtain access to a Class I, shippers eligible to invoke forced access under the NITL Proposal can employ a Class II or III carrier as the competitive alternative. ("Of course, the requirement that a party seeking competitive switching show that the facility of the shipper is served by rail only by a single, Class I carrier could mean that a Class II or Class III carrier could . . . provide competitive rail service to the facility of that shipper." NITL Petition at 40-41). In other words, Class II's and III's can't lose traffic, but they can gain traffic.

Likewise, many shortline carriers do not show up in the Waybill because their rates are often included in the connecting Class I's line haul rate. As such, a particular shipper facility may be exclusively served by a Class II or Class III but the Waybill reflects the facility as being exclusively served by the connecting Class I carrier, which may or may not be the only Class I interchange for that shortline carrier. If that shipper facility otherwise qualifies for access, how does that impact the shortline carrier? We don't know because no party included such impacts in its analysis. There are more than 500 Class II and Class III railroads in the United States. Failure to include an analysis of the impact of the NITL Proposal significantly underestimates the potentially eligible traffic and the potential revenue loss.

2. Many Other Questions Go Begging, Which Should Not Be The Case

Besides the unanswered questions noted above, there were other questions contained in the opening comments of others, such as those set forth in the NS and CSX comments, which highlighted the ambiguities of the NITL Proposal. But very few of those questions are addressed by NITL or others in the opening comments. Following are just a few of the issues that were either unanalyzed or overlooked:

- Is Exempt Traffic and Contract Traffic Included Or Excluded?

Under statute, exempt traffic and traffic moving under contract would not be subject to the proposal (unless, for exempt traffic, the exemption is first removed). But the Decision requesting comments on the NITL Proposal is unclear on whether this traffic should be analyzed. NITL's opening comments didn't specifically address the topic, although Mr. Roman's statement does not list such traffic as being excluded from his analysis. AAR and USDA, on the other hand, included this traffic in their studies. See AAR's Opening Comments, Page 13 (including contract and exempt traffic "because the NITL proposal does not appear to exclude such traffic"); USDA's Opening Comments, Page 14 (discussing need to offset results because of contract traffic). DOT included some, removing "exempt trailer-on-flatcar and container-on-flatcar (TOFC/COFC) traffic, as well as other exempt commodity traffic," but included traffic moving in other exempt equipment (boxcars) and contract traffic. DOT's Opening Comments, Page 4. NGFA excluded TOFC/COFC traffic but included the other types of traffic in its analysis. See Interested Agricultural Parties' Opening Comments, Page 12. The Board cannot make a reasoned analysis on the treatment of such exempt and contract traffic without more clarification and consistent analysis.

- Who Pays For Labor Protection And What Labor Protection Applies?

Similarly, NITL and other proponents were silent on the statute's requirement that any mandatory switching include labor protections. KCS, NS and CSX raised the issue, and pointed out that the proposal is unclear on how the Board would address employees whose positions were impacted by forced switching and who would bear the costs of any imposed labor conditions, or for that matter, which condition should apply – New York Dock or some other provision. The United Transportation Union-New York State Legislative Board (“UTU-NY”) filed comments asking the Board to make labor protections for employees mandatory should it adopt NITL's proposal, but it did not address the question of who pays and bears the costs. Again, as this issue bears on the NITL Proposal's cost and the access price, the Board cannot fully appreciate the impact without further evidence and analysis.

- Other “Small” Considerations With Huge Ramifications

There are many other questions caused by the vagueness of the NITL Proposal. This leaves each interested party with the opportunity to fill the gaps with its own assumptions, which, in turn, prompts each party to draw its own conclusions concerning the proposal's scope and impact. It is unclear what assumptions the Board will embrace, and thus it is not yet possible for the parties to have a consistent discourse on the issues or to provide accurate analysis. For example, the parties do not appear to agree on such fundamental proposal elements as the definition of “working interchange.” Consequently, the various analyses disagree on how many such interchanges exist. NITL's Mr. Roman identified 407 interchanges (NITL's Opening Comments, Roman V.S. at 16-17), but USDA, applying a similar methodology, identified 500 interchanges (USDA's Opening Comments, Appendix at 3). AAR identified 1500. STB Docket No. EP 711, Reply Comments of the Association of American Railroads, Reply V.S. of Phil C.

Ireland and Rodney E. Case, Page 8. Without an agreed-upon definition, the parties are left to guess between figurative “apples” and “oranges.”

Similarly, parties made different assumptions with respect to traffic originating or terminating outside of the United States. DOT, for example, excluded traffic moving to/from Canada, but didn’t address what it did with traffic moving to/from Mexico. Presumably the Big Four’s traffic to/from the Mexican border was included in DOT’s analysis, but KCS traffic was not. Likewise, it is unclear how NITL and others analyzed traffic that either originates or terminates outside of the U.S.

Finally, no party addressed NEPA.¹³ Yet, when authorizing switching, NEPA considerations apply to the Board’s regulatory action. Such forced switching will increase train activity within discrete areas, and the Board would have to consider the impact of its decision ordering switching with respect to air quality, noise, and the like. NITL fails to explain how the Board will take such environmental impacts into account in assessing the merits of a request for forced switching.

Given that the proposal is ambiguous and undefined with respect to many of its terms, it is not surprising that different parties took different assumptions and came to vastly different conclusions with respect to the proposal’s impact. Likewise, certain key issues simply went unaddressed due to the lack of adequate data (e.g., failure to analyze the impact of the 75% market share), or because of the complexity of the issue (e.g., failure to set forth an access price methodology). In light of the fact that no party presented a complete analysis of the actual proposal and given the widely divergent approaches to “solving” the proposal’s ambiguities, the Board cannot conclude based upon the existing record that it has enough “precise information” to

¹³ National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370(f)

“fully gauge” the proposal’s impact. As a result, the Board cannot make a reasoned conclusion with respect to some of the critical elements of the proposal so as to justify moving forward with the proposal at this time.

III. THE PROPOSAL WILL HARM MOST SHIPPERS RATHER THAN BENEFIT THEM

A. Shipper Commenters Ignore Or Gloss Over The Fact That a Few Large Shippers Would Benefit At The Expense Of Many Smaller Shippers

As AAR and its witnesses, B. Kelly Eakin and Mark E. Meitzen, both with Christensen Associates, pointed out on opening, the NITL Proposal would create winners and losers among shippers. The comments filed by other parties, including the shippers themselves, back up this analysis. Many of the “winners” (who assume the proposal would result in lower rates and better service, though that has not been established) would be large chemical and coal shippers; a fact that even the shippers appear to recognize. Other non-favored shippers may see their rates go up, lose the benefit of operational efficiencies, see service quality go down, and ultimately lose market share to their beneficiary shipper competitors.

Among the large shippers, the American Chemistry Council (“ACC”) candidly admits that chemical shippers will be the primary beneficiaries of the NITL Proposal.¹⁴ Large coal shippers have also expressed general support for the proposal, although they remained concerned about the Board’s rate complaint process. On the other hand, many small shippers who could not avail themselves of the proposal would be disadvantaged. ARC noted that many of its members

¹⁴ “ACC estimates that the potential rate reductions for chemical shippers would generate nearly one billion dollars in economic output.” STB Docket No. EP 711, Comments of American Chemical Council, Page 5. NITL’s own analysis claims that its proposal will only result in a revenue loss to the railroads of \$1.3 billion. The fact that the chemical shippers are claiming \$1 billion would go to them clearly shows that even under the assumptions most favorable to shippers, it is large chemical companies that would gain the most from the proposal.

would be unable to avail themselves of the proposal. Opening Comments of Alliance for Rail Competition, et al., Page 13. GLE admitted that “most of its traffic moves at rates below 240 R/VC” (STB Docket No. EP 711, Comments and Verified Statement by The Tom O’Connor Group, LLC on behalf of Glacial Lakes Energy, LLC, Page 10) and therefore the proposal might do little to provide meaningful relief to their rate concerns. Roanoke Cement, while filing comments, admits that it would not qualify under the proposal. NGFA asserts that relief for agricultural shippers would be “minimal.” Interested Agricultural Parties’ Opening Comments, Page 23. It appears that if the proposal is broken down into winners and losers, the Ag parties fear they would fall under the losers’ category. *Id.* at 7. USDA claims that the proposal “would benefit too few grain and oilseed shippers.” (USDA’s Opening Comments, Page 5). NITL itself appears to believe that many shippers will not qualify for forced switching. (NITL Pet. at 57).

While even the shippers acknowledge that some groups will benefit from the NITL Proposal while others will not, there is no recognition by these same parties of the notion that even for those shippers who might see rates reduced, all shippers will most likely bear the burdens and costs of the proposal. As AAR and the railroad commenters note (see B below), forced switching will most likely result in service problems and added operational costs so there will be a net reduction in public benefits. As a network industry, operating inefficiencies in one area will “spill over” and impact the entire network.

While favored shippers may see rate reductions, non-favored shippers will suffer these inefficiencies without any offsetting reduction in rates. Furthermore, to the extent the favored shippers do (*if* the proposal has the effects NITL intends) see reduced costs, this will enable them to take market share from their non-favored competitors. None of the commenters other than AAR addressed this issue; *i.e.*, that the favored shippers could use their reduced transportation

cost (assuming the favored shippers don't simply distribute cost savings to their shareholders) to take market share away from the non-favored shippers. Thus, reduced rates to the favored shippers could competitively disadvantage their non-favored competitors.

B. Forced Switching Will Cause Substantial Network Inefficiency

The opening comments by AAR and the railroad parties, including KCS, clearly established that a forced switching regime, if implemented, would strain existing rail network capacity and drive down operating efficiency. The result will be to drive up rail service costs. Most forced switching advocates ignore this issue.¹⁵ The handful of shipper interest acknowledging the NITL Proposal's adverse impacts upon "rail network efficiency" offer nothing more than unsupported platitudes that network impacts probably won't be that bad, and that setbacks probably can be overcome in time. Opening Comments of ARC, et al., Page 9.

The railroads each provided detailed analyses of the rail network impacts that would result from a forced switching regime. In their respective opening comments, CSX, KCS, NS, and UP each offered numerous specific illustrations of how the NITL Proposal could result in serious operational challenges and increased operating costs for the railroads in the event that they are forced to submit to a forced switching regime. KCS, for its part, offered the testimony of Gregory Walling, Assistant Vice President, International Network Planning, who provided two concrete examples of interchange points on its system that are ill-suited to handle forced switching traffic – Sallisaw, Oklahoma, and West Monroe, Louisiana. Consistent with the testimony of the other participating railroads, Mr. Walling's testimony reinforced the point that a forced switching regime would undo various operating practices that have evolved over time to

¹⁵ To its credit, NGFA and various agricultural interests sharing NGFA's position acknowledged up front that they would not attempt to address the potential impact of the NITL Proposal on rail network efficiency. See Comments of the "Interested Agricultural Parties" at 7.

maximize rail network efficiency in the interest of improving the competitiveness of rail to other modes of transportation.

The NITL Proposal's advocates downplay or ignore the reality that the proposal will disrupt long standing efficient network interchanges. NITL did not examine the essential particulars of inter-carrier switching (especially where such switching does not exist today, may never have existed, or has not existed for years), what sort of yard and track facilities would need to be in place to ensure the "least inefficient" forced switching, or how switching would or could be carried out to avoid (ostensibly) or minimize handling and transit time delays and the attendant costs. Other proponents, such as Highroad Consulting, similarly concede that forced switching would inevitably increase rail operating costs.¹⁶ Indeed, NITL itself actually acknowledges that the forced switching regime it would like to see implemented will not necessarily yield service improvements, and that the competitive alternative to an incumbent carrier's direct service made available through forced switching will likely mean slower overall transit times.¹⁷

The record makes clear that the essence of a forced switching regime is more car handling, reduced car velocity, and increased transit times, not just for the shipper seeking access, but for all shippers who must adjust to the operational changes required by forced switching. Simply put, increased car handling will translate into added costs for shipper and carrier alike. In the face of this evidentiary record, KCS submits that the only rational conclusion is that the NITL Proposal would be harmful to rail network efficiency.

¹⁶ STB Docket No. 711, Opening Comments of Highroad Consulting, Neil Thurston V.S., Page 27.

¹⁷ See, e.g., Opening Comments of NITL, Page 49.

C. The Proposal Creates More Litigation And Regulation, Not Less

In soliciting comments on the proposal, the Board expressed its view that implementing some form of forced switching somehow would reduce agency involvement in rate and service issues and stave off related litigation. NITL, as the forced switching proponent, shared this view, stating that forced switching would “reduce the need for complex and expensive litigation.” NITL Petition at 6. But a review of the opening comments shows precisely the opposite – the proposal will result in more litigation and more regulation.

As an initial matter, most of the shipper comments expressed the view that the NITL Proposal should not be a substitute for, but rather, a supplement to, the Board’s rate reasonableness processes. In that regard, NITL acknowledged that it “did not intend to limit or foreclose captive shippers’ options to address railroad market power” (NITL Opening Comments, Page 16), and viewed the proposal as simply “a supplement to, and not a replacement for, the existing remedies to shippers.” *Id.* Other shippers expressed a similar view that the proposal should be in addition to the rate complaint processes, not in lieu of it.¹⁸ Of course “supplementation” of the current regulatory regime, rather than replacement of that regime, will only add to regulatory oversight and litigation.

¹⁸ ARC Opening Comments at 2 (The STB needs to be ready to step-in when a shipper lacks access to a switching remedy); Opening Comments of Chlorine Institute, Page 2 (“The STB’s role in regulating rates will continue to be a crucial factor to ensure fairness in the rail transportation market.”); Opening Comments of Joint Coal Shippers at 9 (Expressing view that the mere availability of a competitive switching option should not, standing alone, substitute for other remedies); Interested Agricultural Parties Comments, Page 24 (Arguing that if the STB adopts mandatory switching rules, such rules should have no effect on the STB’s determination of whether the STB has jurisdiction over the reasonableness of line-haul rates in the presence of a switching alternative.); and Opening Comments of Olin, Page 6 (Suggesting shippers must be able to challenge the reasonableness of rates resulting from mandated switching.).

Aside from the fact that shippers want the forced switching remedy to add another layer of Board regulation, a mandatory switching regime would also engender substantial litigation. As noted previously, there are numerous vague terms, each of which will be subject to extensive debate and litigation. Rather than avoiding the expense of complicated, multi-faceted litigation and removing pressure upon the Board's already overburdened docket, the proposal will do the opposite. It will, if invoked, trigger more agency activity and litigation, putting more pressure on the Board's limited resources by leading to invocation of forced switching, followed by attempts to challenge the resulting rate (including the switch charge). In the end, adding a vague, incomplete, and untested process will not "reduce the need for complex and expensive litigation," but will, as KCS said, "result in creating a full employment program for private lawyers, accountants, and economists, while draining STB staff resources." KCS Opening Comments, Page 20.

IV. THE CANADIAN MODEL DOES NOT ESTABLISH THAT FORCED SWITCHING WILL RESULT IN LOWER RATES AND BETTER SERVICE WITHIN THE CONTEXT OF THE U.S. NETWORK

Perhaps one of the greatest fallacies put forth by the proposal's advocates is that interswitching works in Canada, so NITL's Proposal undoubtedly will work in the U.S. According to these shippers, the mere right to invoke the so-called Canadian "interswitching remedy" results in lower rates, better service, and reduced regulation – just like they believe it will do here in the U.S. For example, Highroad Consulting's opening comments include a report by Neil Thurston entitled "Assessing Canada's Regulated Interswitching Impact on Rail Operations and Service to Customers" which suggests that Canadian interswitching has had a limited impact on railroad operations. See EP 711, Opening Comments of Highroad Consulting, LTD., Neil Thurston report. Highroad's comments reflect two unsupported, and ultimately

invalid, propositions – (1) that Canadian interswitching “works,” and (2) that Canadian interswitching would work in the U.S. without causing serious rail network disruption. Id.

Expert testimony in the reply comments of AAR and others will more than adequately address the lack of merit in equating interswitching in Canada to NITL's Proposal. Furthermore, publicly-available information demonstrates that Canadian interswitching does not operate as the panacea that shippers would lead this Board to believe. In reality, Canadian shippers, like their U.S. counterparts, still complain that their rates are too high and/or that the rail service they receive is inadequate. And shippers in Canada continue to call for more government regulation and action to curb the alleged “abuses” of railroads in a never-ending campaign to get lower transportation rates.

KCS' research revealed that various Canadian industries, such as the farming, forest, mining, and chemical industries are as engaged as ever in asserting concerns over rates, alleged geographic monopolies, service, and the desire for expanded access. For example, in a recent article, Pierre Gratton, President and CEO of the Mining Association of Canada said: “To date, the CTA [Canadian Transportation Act] has largely been ineffective at protecting shippers against high prices and spotty service.”¹⁹ Canadian agricultural economist Ian McCreary has expressed frustration that freight rates have gone up by 18% over the last decade when adjusted for hauling distance.²⁰ The Western Canadian Wheat Growers Association (“WCWGA”) questions whether shippers are actually better off under the CTA. Earlier this year, for example,

¹⁹ Pierre Gratton, Miners needs better rail freight deal, Financial Post, Aug. 15, 2012, available at <http://opinion.financialpost.com/2012/08/15/miners-need-better-rail-freight-deal/>.

²⁰ Allan Dawson, Railway revenues rekindle costing review calls, AGCanada.com, Jan. 4, 2013, available at <http://www.agcanada.com/manitobacooperator/2013/01/04/railway-revenues-rekindle-costing-review-calls%e2%80%a9/>.

Blair Rutter, WCWGA's policy manager stated, "We want to ensure farmers are paying freight rates that would be in line with what we would see in a competitive market." Id. Of course, if NITL were correct that Canadian-style interswitching reduces the role of government, yields lower rail rates, and betters service, then such expressions of dissatisfaction with the Canadian system should not exist. But they do.

Shipper dissatisfaction with the Canadian system eventually resulted in the appointment of a Rail Freight Service Review Panel ("RFSR Panel") tasked with examining the Canadian rail service and rail-based logistics issues. In January 2011, the Department of Transport, Canada released a report based upon the RFSR Panel's investigation. The report disclosed that shippers expressed a high level of dissatisfaction with service provided by CN and CP under the CTA. Shipper complaints ranged from such issues as inadequate car supply, inconsistent transit times, high rates, and railroad detachment and unwillingness to resolve apparent operational problems.²¹ In short, despite decades of interswitching in Canada, shippers there still complain almost incessantly about rates and service.

Contrary to NITL's assertions, the grass is clearly not greener in Canada. Canadian interswitching has left shippers there dissatisfied and eager to challenge the effectiveness of the rail regulatory processes there. This experience shows that the mere existence of competitive access through government-mandated switching will not reduce the STB's role, but rather would simply add another regulatory layer on top of what already exists and provide yet another regulation for shippers to complain about and seek further refinement.

²¹ Rail Freight Service Review Final Report, Transport Canada, Jan. 2011, available at <http://www.tc.gc.ca/eng/policy/acg-rfs-review-examen-sfm-rvw-eng-2616.htm>

As demonstrated more fully in the AAR's reply comments, even if Canadian interswitching can be seen as providing competitive choices to otherwise captive shippers, the predominantly two-carrier, east/west Canadian rail system is not a good model for whether interswitching could be imposed in the U.S. without causing operational nightmares. A multitude of factors differentiate rail operations in Canada from those in the U.S., including the number of major carriers, the volume of traffic, the number of cities served by multiple large carriers, and the number of interchanges at which forced switching could apply. The statement of Phil Ireland and Rodney Case submitted by AAR explains these important differences in detail.

Moreover, NITL is not proposing adoption of the Canadian interswitching system. Instead, NITL plucked the number "30" from the Canadian rules that measure distances in kilometers, and simply tacked it onto the U.S. measure of distance, miles. This one, seemingly small change increases the area of each forced switching zone by approximately 160%, from roughly 1086 square miles to over 2800 square miles. When factored in with the number of Class I carriers, the number of affected interchanges, and the number of major communities served by more than 2 Class I carriers, NITL's Proposal multiplies the complexities of the Canadian system many fold in trying to impose forced switching on the United States. These complexities make it highly unlikely that the benefits of the Canadian system, if any, can be achieved in the U.S.

CONCLUSION

NITL has put forth an unworkable and ill-defined proposal that could fundamentally change the financial, operational, and regulatory structure of the rail industry in the U.S. NITL appears to assume that a forced switching regime will assuredly result in lower rates, better

service, and reduce the need for the Board to involve itself in regulatory disputes over price and service. To test these assumptions, the Board requested commenters to address several questions regarding the proposal's impacts.

KCS filed opening comments showing that shippers were more concerned with access to a cost effective-process by which to test the reasonableness of rates rather than access to government-mandated switching. KCS showed that the Board has, and continues to be, responsive to shippers over rate concerns. KCS also showed that the proposal would not result in lower rates, would result in operating inefficiencies, no net public benefits, increased government involvement, and would be contrary to the statute and precedent. Finally, KCS pointed out that the proposal could easily be manipulated by both shippers and other railroads so as to result in the unintended consequence of reducing the competitive role played by smaller Class I's, like KCS.

The opening comments filed by others confirmed some of KCS's views. The comments reflected that although a few large corporations supported the NITL Proposal, there was lukewarm support from many shippers and government agencies. Other shippers indicated that the proposal would not help them at all. Most continued to express concern over rate levels and the need for the Board to focus on effective rate relief as a more meaningful "fix" to their concerns.

Furthermore, even though the Board asked for specific evidence analyzing specific components, the evidence provided by the shippers did not fully address the Board's questions. Many proponents, including NITL itself, didn't even analyze the proposal, failing to: (1) address the impact of the 75% threshold criterion; (2) analyze the impacts on smaller Class I's and the Class II's and III's; (3) include many existing interchanges; (4) analyze the impacts of the

proposal on carrier costs and efficiency; and (5) clarify the many ill-defined aspects of the proposal. Most ignored one of the proposal's most crucial elements – what is the access price, how should it be determined, and what is the impact of applying the access price to the analysis.

In contrast, there was independent and objective evidence presented by well-respected and well known economic consulting firms that the proposal would create substantial operating problems, is merely a redistribution scheme intended to benefit a limited subset of very wealthy companies to the detriment of many other shippers and customers, and would create substantial inefficiencies. The opening comments also reflected that the proposal would result in more regulation, not less, and was inconsistent with the Board's prior precedents and operating statutes.

As KCS stated in its opening comments, “until such time as NITL or the Board can establish that the underlying assumptions [i.e. that the proposal will result in lower rates and better service] 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.” KCS's Opening Comments, Page 51. The empirical data presented by proponents of the proposal failed this test. As a result, the Board should not move forward with the proposal. Instead, the Board should continue to review, and if necessary, refine, its rate complaint processes to make it less costly and more efficient for shippers to have their rate concerns addressed.

Respectfully Submitted,



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