



**U.S. Department of
Transportation**
Office of the Secretary
of Transportation

General Counsel

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

October 25, 2016

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FILED ELECTRONICALLY

Ms. Cynthia Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
October 25, 2016
Part of
Public Record

**Re: Reciprocal Switching
No. EP 711 (Sub-No. 1)**

Dear Ms. Brown:

Attached please find for filing in the above-referenced proceeding the Opening Comments of the United States Department of Transportation. If you have any questions, please feel free to contact me.

Respectfully,

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WASHINGTON, D.C.

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Reciprocal Switching)	No. EP 711 (Sub-No. 1)
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**OPENING COMMENTS OF THE
UNITED STATES DEPARTMENT OF TRANSPORTATION**

Pursuant to the Board's Notice of Proposed Rulemaking dated July 25, 2016, the United States Department of Transportation (Department or DOT) and the Federal Railroad Administration (FRA), an operating administration of DOT, hereby submit their opening comments in this proceeding. The Department is pleased to have the opportunity to continue its consideration of the important issues raised here.

The NPRM is the product of the Board's efforts over the past several years in examining a framework set forth by the National Industrial Transportation League (NITL) to change the Board's standards for reciprocal switching of railroad traffic. *See* 49 U.S.C. § 11102(c)(1) (granting the Board the authority to order reciprocal switching arrangements under certain conditions in the public interest); 49 C.F.R. § 1144.2 (enumerating factors that the STB considers when determining if a switching arrangement should be ordered). Contending that the Board's established procedures were insufficient to carry out Congress's intent to promote effective competition, NITL proposed an amendment that would mandate Board-ordered switching in specific circumstances, based upon an examination of a shipper's access to effective intermodal or intramodal competition. NPRM at 5.

In July 2012, the Board sought comment from interested parties on NITL's proposal, and received detailed data analyses and viewpoints from a variety of public and private stakeholders. Many shippers favored NITL's proposal, although some argued that it would still be insufficient to address the concerns of "captive" shippers with respect to competitive conditions and rates. *Id.* at 6-7. By contrast, the railroads oppose NITL's proposal, contending that it is legally flawed, disruptive to the competitive and operational balance of the industry, and contrary to Congress's intent. *Id.* at 7.

DOT submitted a data analysis to the Board and offered oral testimony to help illustrate the potential impact of the Board's proposal. *See* Opening Comments of the United States Department of Transportation, No. EP 711 (Mar. 1, 2013); Testimony of the United States Department of Transportation, Tr. of Hrg., No. EP 711, at 9-18 (Mar. 25, 2014). DOT did not opine upon the legal issues raised in the proceeding or the wisdom of the Board's proposal as a matter of policy. Hrg. Tr. at 12. Instead, DOT performed an empirical analysis to determine the origin/destination pairs that could potentially take advantage of NITL's proposal, as well as the rail revenues reflected in those markets. *Id.* at 12-13. In so doing, DOT determined "that around \$1.1 billion in revenues, or 2.1 percent of total revenues of \$51.8 billion, and 360,000 carloads, or 1.3 percent of carloads out of a total of 26.8 million carloads originated, [would be] potentially affected by the NITL's proposed revenue-to-variable cost ratio and 30-mile test." DOT Opening Comment at 2-3. However, DOT made clear that the analysis depended heavily upon the assumptions that were employed, and that other reasonable assumptions or parameters could lead to very different results for the Board to consider. Hrg. Tr. at 13-14.

Upon consideration of the voluminous submissions from stakeholders, the Board has determined that NITL's proposal is "a valuable starting point," but that the Board is interested in adopting modifications to its regulations that rely less upon conclusive presumptions; instead, the Board plans to address the need for reciprocal switching on a case-by-case basis, in a way that is intended to "make[] the remedy more equally available to all shippers, rather than a limited subset of shippers." NPRM at 13. In particular, the Board observed that NITL's proposal would make relief available to chemical shippers in many cases, but that agricultural shippers would often be precluded from obtaining switching remedies under the NITL framework. *Id.* at 14. Thus, STB has "propose[d] a two-pronged approach, pursuant to which the Board would have the ability to order reciprocal switching either when it is practicable and in the public interest *or* when it is necessary to provide competitive rail service." *Id.* at 16 (emphasis in original). Furthermore, "either of the railroads that would potentially be subject to a reciprocal switching order may attempt to show as an affirmative defense that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers." *Id.* at 19. In all events, shippers bear the burden of demonstrating the need for reciprocal switching relief. *Id.*

DOT appreciates the Board's careful attention to the evidence and recommendations that stakeholders have raised in the course of these proceedings over the past several years. Although there is disagreement among interested parties over the Board's proposal, the Department nonetheless recognizes the Board's interest in striking the correct balance here, making relief available to shippers in appropriate cases while working to maintain competition and efficiency in the operation of the rail network as a whole. Such efficiency is important not only to our nation's interconnected system of freight movement, but also, to sustaining and improving the

system of intercity passenger rail that travels over host freight railroads. DOT is continuing to consider the Board's proposal and will review the submissions of other parties, and may offer further views or information at a later stage of the proceeding.

Dated: October 25, 2016

Respectfully,



Molly J. Moran
Acting General Counsel
United States Department of Transportation