

ENTERED  
Office of Proceeding  
May 30, 2013  
Part of Public  
Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**STB Docket No. EP 711**

---

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

---

**REPLY COMMENTS  
OF NORFOLK SOUTHERN RAILWAY COMPANY**

James A. Hixon  
John M. Scheib  
Maquiling Parkerson  
Garrett D. Urban  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2657

*Counsel for Norfolk Southern Railway Company*

May 30, 2013

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**STB Docket No. EP 711**

---

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

---

**REPLY COMMENTS  
OF NORFOLK SOUTHERN RAILWAY COMPANY**

<b>I. INTRODUCTION.....</b>	<b>4</b>
<b>II. STUDIES SUBMITTED IN THE OPENING COMMENTS ARE SO FUNDAMENTALLY FLAWED THAT THEY ARE NOT MEANINGFUL. ....</b>	<b>7</b>
<b>A. Number of Shippers or Facilities Affected By and Revenue Loss From the NITL     Proposal Are Grossly Understated Because Parties Did Not Model the NITL Proposal. .</b>	<b>8</b>
<b>1. Elements of NITL’s Proposal Are Completely Ignored in Studies Submitted. ....</b>	<b>9</b>
<b>2. The Absurdity of the Low Numbers Provided Regarding Revenue Loss Is         Obvious from Other Statements Made by Shippers.....</b>	<b>16</b>
<b>B. Assertions of Possible Revenue Gains for Railroads Are Unsupported and     Inconsistent, and Most Hypothesized Scenarios Concern Traffic with Intermodal     Competition That Is Excluded by the Terms of NITL’s Proposal. ....</b>	<b>18</b>
<b>C. Increase In Railroad Operating Costs, Additional Infrastructure Needs, and     Operating Effects on Other Customers Ignored in the Submitted Studies. ....</b>	<b>22</b>
<b>D. Commenters Use the Wrong Comparative Metrics to Examine Impact of NITL     Proposal on Railroad Health.....</b>	<b>24</b>
<b>III. THE NITL PROPOSAL’S ATTEMPT TO REDISTRIBUTE RATE REDUCTIONS TO A LIMITED GROUP IS FAR OUTWEIGHED BY NETWORK INEFFICIENCIES AND COSTS TO ALL SHIPPERS. ....</b>	<b>27</b>
<b>A. NITL Proposal Will Result in the Board Picking “Winners” and “Losers,” and     Shippers Left Out Will Face Regulatory Consequences. ....</b>	<b>28</b>
<b>B. Comments Confirm Effects on Railroad Operations Would Be Substantial,     Depend on Location, and Would Affect All Customers. ....</b>	<b>30</b>
<b>C. As a Result, Excluded Shippers Will Be Disadvantaged in the Marketplace. ....</b>	<b>35</b>
<b>IV. SHIPPERS’ COMMENTS AND PROPOSALS CONTINUE TO IGNORE THE CONSTRAINTS OF THE LAW. ....</b>	<b>36</b>
<b>A. Forced Access Is Aimed at Impermissibly Getting Lower Rates.....</b>	<b>36</b>
<b>B. Congress Has Ratified Longstanding Interpretation of Section 11102.....</b>	<b>38</b>

C.	Access Price Proposals Are Unlawful and Arbitrary. ....	38
D.	Some Shippers Want to Ignore Section 10707 so They Can Have Their Cake and Eat It Too. ....	39
E.	The Record Here Reinforces Prior Board Decisions that R/VC Ratios Are Not a Proxy for the Absence of Competition. ....	41
F.	Switching the Burden of Proof Would Be Illegal. ....	42
V.	SHIPPER COMMENTS DEMONSTRATE CONCLUSIVELY THAT THE NITL PROPOSAL WOULD MASSIVELY INCREASE REGULATORY ACTIVITY AND LITIGATION BEFORE BOARD. ....	43
A.	Shipper Comments Show Proposed “Supplemental” Forced Switching Not Intended to Decrease Board’s Involvement or Litigation. ....	44
B.	Regulatory Activity to Implement A Canadian Style System Would Require Substantial Governmental Resources. ....	44
C.	Comments Further Illustrate Conflicts Among Parties Over Issues Left Ambiguous by NITL Proposal. ....	46
1.	NITL’s Undefined Fourth Criterion – Safe and Feasible Operations. ....	47
2.	Disagreement over Treatment of Exempt Traffic and Contract Traffic. ....	47
3.	NITL Itself Does Not Seem to Know Whether Its Own Proposal Contemplates Rail Miles or Air Miles. ....	48
4.	Eligibility of Joint-Line Traffic for Forced Switching. ....	49
5.	Other Conflicting Assumptions. ....	50
D.	Comments Ignore Other Issues That NS Observed Remain Unaddressed or Unanalyzed. ....	51
1.	Labor Protections. ....	51
2.	Environmental Review. ....	52
3.	Hazardous Traffic and Toxic-by-Inhalation (“TIH”) Traffic. ....	52
VI.	CONCLUSION. ....	54

## I. INTRODUCTION

NITL and fellow proponents have not justified that the NITL proposal and the risk it poses to the rail network and all shippers is in the public interest. The Board recently denied a petition for a rulemaking (without asking for further information or data) when it found that the petitioner “ha[d] not presented a practical framework that could be developed in a rulemaking proceeding for determining the existence of indirect competition and that the sample analyses it offers fails to overcome the practical difficulties the agency has identified in previous decisions.”<sup>1</sup> Here, NITL failed to meet the same standard when it filed its Petition for a Rulemaking. In *Ex Parte 717*, AAR tendered a sample analysis. Here, NITL did not, which is self-evident from the fact that the Board had to ask in this proceeding for sample analyses of the NITL proposal. Furthermore, the opening comments demonstrate that (1) NITL’s framework is not practical or workable, (2) NITL’s proposal violates the statute and prior Board and court decisions, and (3) NITL’s proposal exacerbates practical difficulties rather than overcoming them. If the petition in *Ex Parte 717* failed the Board’s standard for even asking for more information and data and warranted an outright denial, NITL’s Petition fails as well. Accordingly, the Board should reject the NITL Petition.

More specifically, after review of the opening comments, the responses fall short in several key areas.

First, NS believes that the studies submitted by other parties are meaningless. Even NITL could not model its own proposal. As NS anticipated in its opening comments, NITL’s ambiguous and incomplete proposal renders it impossible to provide an accurate assessment of

---

<sup>1</sup> *Petition of 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 Generating Stations*, Ex Parte 717, Decision at 7 (March 18, 2013) [hereinafter *Ex Parte 717 Decision*].

the proposal's impact on traffic and revenue. On top of those difficulties, commenters, including NITL itself, completely ignore elements of the actual proposal when carrying out their calculations. The most substantial omission – of many – is that none of the studies submitted in support of NITL's proposal even considered the NITL presumption of potential eligibility if 75% or more of the shipments in a year moved by a single Class I railroad. As a result, these studies grossly understate the number of eligible shipments and the potential revenue loss to the railroads.

Further still, stark inconsistencies appear between these studies and the comments submitted by supporters of the NITL proposal. First, the shipper advocates attempt to demonize the railroads as much as possible by focusing on the amount of rail shipments that allegedly have only one rail option. *See* ACC Opening Comments at 4 (“Nearly 73 percent of inbound rail transportation is served by a single railroad while 65 percent of all outbound transportation is served by a single railroad.”); Olin Corporation Opening Comments at 3 (“[A]t least 78.4% of freight rail stations in the United States are served by a single major railroad . . .”). Second, they also assert that nearly all shippers in the United States are located near a place where the serving Class I railroad regularly interchanges cars. *See* NITL Opening Comments at 40 (“[Not] surprisingly . . . switching regularly takes place near points at which most rail shippers are located.”). Finally, they then present studies claiming inconsistently low numbers of eligible carloads and revenue are at risk. *See* NITL Opening Comments at 47 (claiming total revenue impact of \$1.29 billion); *see also* ACC Opening Comments at 5 (endorsing NITL's calculation of revenue impact). These three points are irreconcilable.

Second, even if these studies could be seen as directionally correct, they would then prove two major points: (1) the proposal is not in the public interest but merely a redistribution

scheme intended to provide a parochial subset of shippers with lower rates to the detriment of many customers, and (2) it would take few additional costs from the inefficiencies created under forced access to offset any theoretical public benefits of NITL's proposal.

Shipper and governmental parties do not even address or attempt to estimate the operating problems and inefficiencies that the NITL proposal would create. However, independent studies show that it would not take much inefficiency to saddle the railroads with significant losses. And it is undisputed that the cost of a shipment increases when one railroad is compelled to switch cars from its customers to the tracks of a second railroad. *See, e.g.,* Christensen Associates, Lauritis R. (2009). "A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition." Revised Final Report to the Surface Transportation Board, at Volume 3, 22-7 [hereinafter *Christensen Report*]. Even small cost increases would swamp any theoretical public benefits realized under the NITL proposal.

Third, NITL and other commenters willfully continue to ignore the legal constraints that govern the Board in this area. Shippers' singular stated goal of lower rates is not a valid basis for forced switching, a point confirmed by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). Moreover, other arguments found in shippers' opening comments run afoul of additional statutory provisions. These comments continue to demonstrate that there is no valid legal basis for NITL's proposal.

Finally, it is clear from the comments submitted on opening that the Board's hope that NITL's proposal could somehow limit or reduce governmental involvement and litigation is sorely misplaced. Shippers strongly resisted the inference that forced switching could somehow affect or limit the Board's current regulatory role. Rather, forced switching will "supplement"

the Board's docket with a litany of issues to litigate for every interchange application. The overwhelming majority of these issues remain unacknowledged or unaddressed by NITL and the proponents of its proposal.

In sum, the opening comments confirm that the only goal of NITL and other shippers is to use unlawful forced access as a means to avoid the statutory requirements of demonstrating the unreasonableness of rates that they consider too high. The flawed studies presented on opening can provide no basis for the Board to assess the likely impact of forced switching, while clearly understating whatever that impact would be. When combined with the degradation of railroad operations and service to other customers along with the burdens that would be placed on parties and the Board in administering the scheme, NITL's proposal perversely risks significant negative impacts to the entire rail network merely to provide some rate reductions to a limited group of favored shippers. The Board should recognize that such risk is not in the public interest, and dismiss NITL's Petition.

**II. STUDIES SUBMITTED IN THE OPENING COMMENTS ARE SO FUNDAMENTALLY FLAWED THAT THEY ARE NOT MEANINGFUL.**

The ambiguities in and omissions from NITL's proposal prevented NITL or any other supporter of NITL's proposal from submitting a meaningful study. Even a cursory examination of the methodologies used by different commenters demonstrates the exact limitations and flaws that NS described in its opening comments. NS Opening Comments at 34-56. The United States Department of Agriculture ("USDA") aptly summarized the problem, stating: "[d]ue to unknowns, one cannot analyze the Waybill and expect to predict the actual outcome of

competitive switching.” USDA Opening Comments at 13. As a result, no conclusions can be drawn from the data presented on opening.<sup>2</sup>

Adding to the distortion, most commenters completely ignored fundamental aspects of NITL’s proposal. In particular, NITL’s own repeated claims to have “fully respond[ed]” to the Board’s requests are demonstrably false, as it ignored provisions of its own proposal. NITL Opening Comments at 2, 16. Whatever NITL and others modeled, it was not NITL’s proposal. A review of the issues that NITL and other commenters did not address demonstrates that the studies are meaningless and substantially understate the effects of NITL’s actual proposal.

**A. Number of Shippers or Facilities Affected By and Revenue Loss From the NITL Proposal Are Grossly Understated Because Parties Did Not Model the NITL Proposal.**

The United States Department of Transportation (“DOT”) explained in part the very substantial problems inherent in attempting to answer the Board’s questions in this proceeding. “[T]here 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.” DOT Opening Comments at 3. These assumptions are required because of the ambiguities in and omissions from the NITL proposal. In addition, data issues prevent meaningful analyses. USDA notes that “several specific items the Board requested cannot be ascertained from the Waybill, such as the number of shippers who can currently obtain [reciprocal] switching or the number of shippers who will qualify under the NITL proposal.” USDA Opening Comments at 7.

---

<sup>2</sup> NS primarily focuses on the studies which attempted to be responsive to the Board’s general requests, rather than filings that only considered the individual commenter’s eligibility or interests. The six general studies were submitted by NITL, AAR, USDA, DOT, NGFA, and ACC.

## 1. Elements of NITL's Proposal Are Completely Ignored in Studies Submitted.

Among the fundamental flaws in the submitted studies is the fact that commenters simply ignored several elements of NITL's proposal. The result of each of these omissions was to understate the potentially eligible traffic. In some cases, parties openly admitted to these flaws in their studies.

*75% Requirement.* The NITL proposal makes a shipment potentially eligible for forced access if the serving Class I railroad handled 75% of the movement volumes in the prior twelve months. NITL Petition at 50-52. Eligibility under this presumption is an *alternative* way to demonstrate a lack of effective competition, separate and apart from potential eligibility because a rate generates a revenue-to-cost ratio that exceeds 240%. NS observed in its opening comments that this provision "makes it impossible for parties to conduct any meaningful study." NS Opening Comments at 45. Among other concerns, NS explained that: (1) many contracts would result in parties being potentially eligible even if they had access to effective competition, such as trucking, for the movement;<sup>3</sup> (2) shipments with low rates and low revenue-to-variable cost ratios would be potentially eligible under this provision;<sup>4</sup> and (3) no dataset exists on the relevant market share of rail and other transportation options for individual lanes and commodities, let alone which shippers have contracts with volume commitments.<sup>5</sup> In fact, any shipment which fails the 240% R/VC requirement could conceivably be found to lack effective competition under this conclusive presumption, because the shipper could simply choose to ship 75% of its traffic by rail for a twelve month period. Accordingly, the 75% eligibility provision has the potential to encompass an enormous number of movements.

---

<sup>3</sup> NS Opening Comments at 47-48.

<sup>4</sup> *Id.* at 47.

<sup>5</sup> *Id.* at 48.

Buried in a footnote, NITL admits that the study it submitted did not even attempt to address its own requirement. “The League notes that . . . its analyses of the CSP include only the 240% R/VC conclusive presumption and not the 75% market share presumption.” NITL Opening Comments at 7 n.10. Neither did the National Grain and Feed Association (“NGFA”). See NGFA Opening Comments at 13 n.25. The studies submitted by government agencies similarly did not include any traffic that would be potentially eligible under the 75% presumption. See DOT Opening Comments at 3 n.2 (“The Department did not undertake an examination of the NITL’s 75 percent test proposal.”). Like NS, DOT is “not aware of a data set that meets these immediate needs.” *Id.* USDA did not even mention the 75% requirement. Because none of these studies addressed the potentially eligible shipments under this element of the NITL proposal, each study *substantially* underestimates the number of potentially eligible shipments and the potential revenue loss to the railroads.

*Terminal Presumption.* The NITL proposal would establish two presumptions to determine whether there is a “working interchange” within a “reasonable distance” of the shipper’s facility. NITL Petition at 55-59. The first presumption is that a customer meets this requirement where shippers’ facilities “are within the geographic boundaries of a ‘terminal’ established by the Class I rail carrier serving the shipper.” *Id.* at 55. In its opening comments, NS explained that neither NITL nor the law defines the term “terminal.” NS Opening Comments at 49-51. NITL completely ignored this presumption in its study and therefore understates potentially eligible traffic to the extent any terminal might be found to extend beyond 30 rail miles from the working interchanges used by NITL in its study. No other commenters accounted for the terminal presumption either. See, e.g., AAR Opening Comments at 11 (noting that a fact-specific inquiry is required in each instance to determine the existence and extent of a terminal).

*Omission of KCS, CN, and CP.* The NITL study excludes three Class I railroads and therefore the number of affected customers and the revenue impact are understated. Traffic moving on these railroads would be subject to the NITL proposal. See NITL Petition at 35 (first criterion is “service by a single, Class I carrier”). However, despite having the waybill data for these railroads, NITL chose to ignore KCS, CN, and CP for purposes of its study. See also DOT Opening Comments at 3 (similarly limiting DOT’s study). This decision understates potentially eligible traffic because it excludes traffic that originates or terminates on these railroads and could be eligible for forced switching under NITL’s proposal.<sup>6</sup>

*Omission of Possible Interchange with Class II and Class III Railroads.* The DOT study substantially understates potentially eligible traffic for another reason. In assessing which traffic was within 30 miles of an interchange, “Class II and Class III railroads were not examined.” DOT Opening Comments at 9. It is clear that the NITL proposal considers Class II and Class III to be possible interchange options under its proposal. NITL Petition at 40-41 (“Of course, the requirement that a party seeking competitive switching shows 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.”). There are more than 500 Class II and Class III railroads in the United States. This omission means that DOT has substantially underestimated the potentially eligible traffic and the potential revenue loss associated with NITL’s forced access proposal.

*Examination of Only Subsets of Traffic.* Among even the six studies submitted, most commenters limited their examination of the impact of NITL’s proposal to specific commodities

---

<sup>6</sup> Although the Board sanctioned studies of subsets of rail traffic, the Board should bear in mind that it would be inappropriate to fail to consider the additional impacts that would result from adoption of the NITL proposal as applicable to all Class I railroads.

relevant to their members. ACC commissioned studies on “chemical commodities” and “chemical shippers.” ACC Opening Comments at 3-4. NGFA chose to focus on “raw and processed agricultural commodities and other, key agricultural commodities such as biodiesel and ethanol.” NGFA Opening Comments at 4. USDA only examined “eight major agricultural commodities.” USDA Opening Comments at 7. DOT narrowed its examination to coal, chemical, and farm products. *See* DOT Opening Comments at 7.<sup>7</sup> Because each study attempted to model only some fraction of potentially eligible traffic, it is impossible to assess the overall impact to the railroad industry. Moreover, it is impossible to reconcile the studies as discussed more fully below.<sup>8</sup>

*Use of 260 Junctions Understates Potentially Eligible Traffic.* There are plenty of locations where railroads have in the past or could interchange traffic but do not today because of attempts to streamline traffic flows to be more efficient. *See* NS Opening Comments Ehlers V.S. at 1. NITL and other parties only studied interchanges used in the last year. *See, e.g.*, NITL Opening Comments at 40. Many more shippers and traffic are potentially eligible under the plain language of the NITL proposal, which includes any locations for which there “is *or can be*” a working interchange within a reasonable distance. NITL Petition at 52-53 (emphasis added). NITL implicitly recognizes the larger universe of locations in its discussion of the Station Master List published by RailInc, which identifies 4,225 locations “where carriers have agreed to switch cars” – over *ten times* as many junctions as ultimately included in NITL’s study. NITL Opening Comments Roman V.S. at 16-17 (limiting its study to 407 junctions). As a result, NITL and

---

<sup>7</sup> DOT’s rationale for looking at only those commodities does not withstand scrutiny because the NITL proposal does not rely exclusively on R/VC ratios to determine potential eligibility. Shipments of many other commodities may be eligible under the 75% criteria even where there is substantial intermodal competition for the shipment.

<sup>8</sup> *See* discussion *infra* in Section II.A.2.

other parties have greatly underestimated the amount of traffic that may be eligible under the plain language of NITL's proposal.

*Captive Customers at Competitive Stations.* Another flaw in the studies advanced on opening is that no commenter could adequately gauge the amount of traffic located at competitive stations that actually originated from a sole-served shipper facility. Such traffic would look competitive based on the waybill sample data, but in actuality is sole-served. *See* AAR Opening Comments Baranowski V.S. at 8; NITL Opening Comments at 37. AAR, recognizing this limitation in the data, admitted that its results are understated. AAR Opening Comments Baranowski V.S. at 10.

In contrast, NITL's expert invented completely unsound "rules" in an attempt to generate numbers from a data set that simply does not contain the relevant information. *See* NITL Opening Comments Roman V.S. at 22-23. NS will not labor to dissect the many flaws with these rules. It should suffice to point out that *all of the carloads* at a particular station were grouped together so some invented metric could be applied, without knowledge or regard for how many different customers or facilities utilized that station or any way of matching traffic to them, and then conclusions were made about the status of *each individual movement at that station*. *Id.* NITL provides no statistical support for even a single piece of this analysis, and NITL's expert's own descriptions eviscerate any idea that there is sound methodology underneath the arbitrary cutoffs and groupings. *See, e.g., id.* at 22 ("I then considered it very likely. . ."). In fact, for one rule Mr. Roman claims the capability to discern that certain traffic moving through the same station must be from the same customer and originate at the same facility, merely because of its high R/VC ratio. *Id.* at 23. Any reasonable consideration will easily identify the (many) logical flaws in this approach and as a result recognize that any data

resulting from the study should be disregarded. USDA used the same expert applying the same rules, rendering its examination similarly meaningless. *See* USDA Opening Comments Appendix at 3.

*30 Mile Presumption.* NITL's proposal is less than clear as to whether its presumption of a "reasonable distance" of 30 miles is air miles or rail miles. But, NITL's proposed statutory language references facilities "within a radius of 30 miles of the interchange," terminology not reflective of rail mileage. NITL Petition at 8. Further, the Canadian model from which NITL claims inspiration makes allowances for shippers within 30 air kilometers but longer rail distances. *See* NITL Opening Comments at 28. Nevertheless, NITL's expert asserts that he used rail miles because it "was more equitable to railroads," NITL Opening Comments Roman V.S. at 16, which simply means it produced lower numbers. He cannot and does not represent that the NITL proposal is so limited as written.

*Inconclusiveness of Presumptions.* The so-called conclusive presumptions included in the NITL proposal are not conclusive at all. NS Opening Comments at 40-41, 49. These presumptions are only dispositive if they result in a shipper being eligible. If not, then a shipper is still free to argue it should nonetheless be eligible. *See* NGFA Opening Comments at 23 (recognizing shippers unable to take advantage of the presumptions could "incur the cost and expense of litigation before the STB on the market dominance and 'reasonable-distance' components of the new rules, in addition to litigation over other aspects of the test.").

NITL and other commenters have not accounted for the numerous customers who would likely attempt to argue they should be eligible. For example, Roanoke Cement apparently would seek to be eligible even though it believes it would fail the 30-mile presumption. *See, e.g.,* Roanoke Cement Opening Comments at 8 (discussing its desire for eligibility of one of its

facilities that is “42.1 miles from a potential interchange”). There is no way to estimate how many other customers would also pursue relief even though they may not be eligible under the “conclusive” presumptions.

*Attempts to Expand Criteria.* In addition to the understatements arising from the omissions and ambiguities discussed above, many commenters injected new proposals that would further increase the number of eligible shipments and the potential revenue impact. For example, some parties seek to expand the potential pool of eligible shippers under the R/VC presumption by arguing that it should be set at 180% rather than 240%. *See, e.g.*, Roanoke Cement Opening Comments at 9. Meanwhile, other commenters are against any market dominance requirement at all, which would expand the pool of potentially eligible shippers even further. *See, e.g.*, Highroad Consulting Opening Comments at 16, 22 (“We are not in favor of rules that will require customer to prove market dominance.”). NS covers these proposals in detail in Section III.A. Safe to say, any expansion of eligibility will only compound the understated results of the studies submitted on opening.

*Downstream Effects.* No study submitted to the Board attempted to consider the downstream effects of a forced access regime. Instead, parties try to hide behind naked assertions that “some shippers eligible to receive competitive switching, for various reasons, may not apply for competitive switching.” USDA Opening Comments at 15; *see also* NITL Opening Comments at 48. Yet any valid evaluation of NITL’s proposal must account for the downstream effects that would flow from a forced access regime. For example, a shipper may not need actually to “apply” for forced access to generate a rate reduction through negotiations. NS Opening Comments at 53-54. Shippers are not shy and will no doubt use whatever leverage they have in a negotiation, including the possibility of filing for forced access. Thus, comments like

NITL's that contend that their grossly understated revenue reductions are actually "overstated" because not "every shipper that qualifies for competitive switching under the CSP will obtain relief" are naïve and misleading. NITL Opening Comments at 48.

## **2. The Absurdity of the Low Numbers Provided Regarding Revenue Loss Is Obvious from Other Statements Made by Shippers.**

Setting aside for the moment all the elements of the NITL proposal that parties did not analyze, it is impossible to reconcile the comments of some parties with the very data that they provide. Indeed, based on the statements of those parties, it is clear that a substantially larger amount of revenue is potentially eligible than their flawed studies claim to show.

This conflict is most obvious when one examines the statements and data put forward on chemical shipments. ACC asserts that "[n]early 73 percent of inbound rail transportation is served by a single railroad while 65 percent of all outbound transportation is served by a single railroad." ACC Opening Comments at 4. Overall, parties seem to agree that chemical shipments are one of the two commodities most affected by the NITL proposal's 240% R/VC presumption (remembering, again, that no proponent of NITL's proposal attempts to study the impact of the 75% "market share" presumption). *See id.* at 5 ("Chemical shipments have the largest potential savings of any commodity group . . ." citing NITL's analysis); DOT Opening Comments at 7 (asserting that chemicals would be one of three major commodity groups affected); AAR Opening Comments Baranowski V.S. at 10 (showing chemicals would have the most affected lanes and second most affected carloads).

In fact, ACC contends that for chemical traffic with an R/VC ratio > 240%, by definition eligible under one of the NITL proposal's competition presumptions, chemical shippers pay a so-

called “rate premium” of \$3.546 billion.<sup>9</sup> *See* ACC Opening Comments Attachment A at 7, tbl.1. These dollars are supposedly derived from a little over 1,194,000 carloads of chemicals. *Id.* Yet ACC turns around and endorses NITL’s calculation that the total impact of the NITL proposal is only \$1.29 billion for *all* commodities and carloads, or barely more than a third of this chemical “premium” by itself.

Could it be that so many chemical movements become ineligible under the other presumptions that little of this \$3.5 billion in alleged chemical “rate premiums” is potentially eligible for forced access under the NITL proposal? Not likely.

NITL says “[not] surprisingly . . . switching regularly takes place near points at which most rail shippers are located.” NITL Opening Comments at 40. If NITL is correct, then proximity to an interchange should not restrict so severely the potentially eligible chemical traffic.

Instead, ACC reports that the NITL proposal included 400,000 carloads of chemical traffic, approximately a third of the carloads making up ACC’s “rate premium” study. *See* ACC Opening Comments at 5. This carload number seems clearly low according to other studies submitted. DOT reviewed 343,121 carloads of chemical traffic and concluded more than 50% of those carloads (182,904) would be potentially eligible under the NITL proposal. DOT Opening Comments at 8-11.<sup>10</sup>

Still, even if one conceived that the 400,000 carload total could be in the ballpark, one would expect a similar percentage reduction in revenue. Taking a little over a third of the total

---

<sup>9</sup> Again, the ACC study understates the effect of the NITL proposal for various reasons, including that it omitted any analysis of the 75% eligibility criteria.

<sup>10</sup> And again, DOT could not account for – among other elements of NITL’s proposal – the 75% presumption and the terminal presumption, which would make even more carloads potentially eligible for forced access.

of ACC's alleged "rate premium" calculation, in proportion to the carloads, one would expect \$1.2 billion in rate reductions for chemical traffic, enough to swallow the entire NITL estimate.

Instead, ACC endorses NITL's estimate that chemical shippers would receive only \$500 million in revenue reductions out of a \$1.29 billion total impact across all commodities. See ACC Opening Comments at 5. This number simply does not pass the smell test. How can NITL include more than *one-third* of the carloads ACC cites in its "rate premium" analysis, yet predict less than *one-seventh* of the rate reductions?

If one also questioned the 400,000 carload total and substituted something closer to DOT's eligibility percentage of more than 50% in its place, the revenue impact would appear to be over \$1.75 billion for chemicals, which far outpaces NITL's overall projection across all commodities with just the revenue impacts from chemicals alone.<sup>11</sup>

NS does not carry out these calculations in an attempt to endorse any particular number or to estimate the actual revenue impact. It only endeavors to show what should already be obvious from any serious examination of the statements and data presented – the studies are impossible to reconcile amongst themselves and with other statements. And it is clear that a substantially larger amount of revenue is potentially eligible than the false impression these studies are intended to leave.

**B. Assertions of Possible Revenue Gains for Railroads Are Unsupported and Inconsistent, and Most Hypothesized Scenarios Concern Traffic with Intermodal Competition That Is Excluded by the Terms of NITL's Proposal.**

Shippers responding to the Board's request for empirical information on the potential that revenue losses might be offset in part through traffic increases provided no support for their assertions that there would be traffic gains by railroads resulting from forced switching. Instead,

---

<sup>11</sup> \$3.546 billion x 50% = \$1.7523 billion

their self-serving generalized statements are inconsistent and conflict with the structure of NITL's own proposal.

Numerous shippers commenting on opening claimed that NITL's proposal could result in increased traffic volumes as a result of lower rates.<sup>12</sup> However, devoid from the record is any evidentiary support for these assertions or any supported calculation of this purported effect. Some parties preface their comments by admitting as much. *See* ACC Opening Comments at 5 (“ACC has not quantified the expected traffic increases or the resulting revenue offset.”); NITL Opening Comments at 56 (“[I]t is impossible to make exact predictions about the amount of traffic that U.S. rail carriers might expect to gain under a more competitive regulatory and business model. . . .”).

Still, many try to rationalize their naked assertions with inconsistent claims about recapturing traffic lost to trucking or other shipping options. *See, e.g.*, NITL Opening Comments Roman V.S. at 43 (“Lower rail rates on impacted movements under the CSP can help reverse this trend and help traffic switch back from truck to rail”); Diversified CPC International Opening Comments at 6 (discussing some of its own traffic currently “moving [by] truck” as potential increased traffic); Highroad Consulting Opening Comments at 12 (suggesting generally that traffic might increase as transload and trucking operations could be diverted to direct rail by lower rates). Such assertions fly in the face of the stated limitations of NITL's actual proposal, which NITL claims would exclude traffic that faces intra- or inter-modal competition. *Cf.* NITL Proposal at 49 (“But movements that qualify for the CSP are, by definition, unlikely to be

---

<sup>12</sup> *See, e.g.*, NITL Opening Comments at 56 (describing generally a “likely increase in traffic”); USDA Opening Comments at 15 (“Common sense would indicate that as rail rates fall, the quantity demanded for rail service should increase.”); ACC Opening Comments at 5 (“[T]he revenue loss would be at least somewhat offset by traffic increases that would result from lower rates.”); Highroad Consulting Opening Comments at 11 (discussing “a number of areas that present opportunity for the railroads to increase business” after imposing forced switching).

restrained by effective intermodal competition.”). If traffic can or is moving by truck or other means, it should be ineligible for forced switching under NITL’s second criterion because the railroad cannot be market dominant. Therefore, forced access that might result from NITL’s proposal could not generate additional traffic from trucks. Correspondingly, most of the traffic that would be eligible under NITL’s proposal, according to DOT and AAR, is coal, chemicals, and grain, commodities which are generally among the least truck competitive.<sup>13</sup>

Other claims of increased traffic are purely anecdotal. NS completely agrees that competition between natural gas and coal results in product substitution by some utilities as recognized by NITL’s expert. *See* NITL Opening Comments Roman V.S. at 41-42. Indeed, NITL’s expert validates the basis for the AAR’s Petition for Rulemaking in *Ex Parte 717*, which the Board acknowledged was presented by AAR as a “compelling portrait of changes in the wholesale power industry where indirect competition may well have an impact on coal transportation rates.” *Ex Parte 717 Decision* at 7. However, NITL does not even attempt to quantify the potential effect of the new railroad traffic that it alleges would result from forced access lowering rail rates and changing a utility’s decision between burning coal or gas to generate electricity. In the absence of evidence presented by any commenter supporting the NITL Petition, the Board cannot now assume that there will be a change in the relationship of coal use and gas use because of forced access when the Board has already decided in *Ex Parte 717* that it would not examine that relationship because doing so would require the Board to “analyze[] matters far removed from the transportation industries it regulates.” *Id.* at 10. Similarly, NITL does not support its even more attenuated assertions – influenced by factors

---

<sup>13</sup> Certainly, there is truck competition for some of these commodities and in some lanes, but that competition is also not so universal that these commodities have been exempt from regulation. Moreover, for rate cases, determining which lanes have competition requires a factual inquiry conducted by the Board pursuant to 49 U.S.C. § 10707.

equally far removed from the transportation industries the Board regulates – concerning foreign competition and resourcing.<sup>14</sup>

In fact, the only attempted quantification came from USDA. USDA cited a 21-year old “Interpretative Study,” which itself pulled data from “studies which appeared in the late 1970s and 1980s” to estimate ranges of the elasticities of demand for various commodities at that time.<sup>15</sup> On this sole basis, USDA arbitrarily guessed at the present day elasticity of demand for the subset of grain and oilseed shipments that are the subject of USDA’s restricted study. *See* USDA Opening Comments at 15. USDA then made a completely unfounded and economically unsupportable assumption about the elasticity of demand doubling as a result of forced switching, resulting in a 30%-50% offset through traffic creation. *See id.* One wonders where all this extra grain traffic is today and how it is being transported since it is not by rail. If it exists and is being moved by other modes, then of course the railroad is not market dominant regardless of the rate. Indeed, academics who have looked at why railroads have failed to gain market share for grain transportation as grain production increased have observed two factors:

The relationship between the growth in grain production and the inability for rail to capture all of this market is explained by a few factors. First, new production is mostly for domestic consumption, not longer-haul exports, and this favors the truck because of the shorter distances (USDA, 2006). Second, farm consolidation and rail network consolidation has eliminated many smaller grain elevators and

---

<sup>14</sup> NITL disingenuously attempts to imply changes in markets for some plastic, liquefied gas, and sulfuric acid movements are attributable to rail prices. *See* NITL Opening Comments Roman V.S. at 44-47. NITL itself actually admits the fatal flaw in its cherry-picking of statistics, namely that “[m]arkets can change for a number of reasons.” *Id.* at 46. Implying causation to unrelated numbers in this way has no probative value absent a full study of all the unique characteristics at issue in each market over the time period. *See also* AAR Reply Comments Eakin and Meitzen Reply V.S. (discussing flaws in analysis). It further has no value given that these statements have been contradicted and undermined by public statements of ACC officials. *See* NS Opening Comments at 14-15.

<sup>15</sup> Oum, Tae H., W.G. Waters II, and Jong-Say Yong (1992). “Concepts of Price Elasticities of Transport Demand and Recent Empirical Estimates: An Interpretative Survey.” *Journal of Transport Economics and Policy*, 26(2), 139.

branch lines. Grain farmers rely more on trucks to deliver grain to the larger elevators (Fittelli, 2005). Although the railroad may seem well suited to transport a bulk good like grain, the consolidation of farms, increase in domestic demand, and the reduction of the rail network in rural areas has hindered the railroads' ability to capture more of the market.

Paul Lewis, *Rail Freight Traffic: An Analysis to Better Understand the Industry and the Factors that Influence Traffic*, Eno Center for Transportation, at 14 (2012).<sup>16</sup> USDA itself recently noted that the rail market share of the grain harvest has declined substantially, “partly as a result of changes in grain markets, especially the location of more cattle feedlots and newly constructed ethanol plants in grain-producing States.” *Study of Rural Transportation Issues*, USDA/DOT, at 192 (Apr. 2010). Yet USDA’s flawed guesstimate is the only number advanced by proponents of NITL’s proposal to justify any conclusion that some of the revenue losses would be offset through increased volume, and it is highly suspect.

**C. Increase In Railroad Operating Costs, Additional Infrastructure Needs, and Operating Effects on Other Customers Ignored in the Submitted Studies.**

Although covered in more detail in Section III.B, *infra*, the studies submitted on opening confirm that there will be operating impacts and costs as a result of the NITL proposal. For example, a witness for Highroad Consulting observed that: “[f]rom a purely task-oriented perspective, switching rail cars between railways at interchange points or within rail yards for train-building or shipper placement objectives is a more time consuming and resource demanding activity than simply hauling trains along a mainline operation.” Highroad Consulting Opening Comments Thurston V.S. at 27. Thus, it is undisputed that forced access will result in rail movements that are less efficient and more costly for the traffic for which forced access is sought.

---

<sup>16</sup> Available at [http://www.trforum.org/forum/downloads/2012\\_98\\_Rail\\_Traffic\\_Factors.pdf](http://www.trforum.org/forum/downloads/2012_98_Rail_Traffic_Factors.pdf).

These comments confirm and reinforce NS's opening comments and comments in *Ex Parte 705* that adding additional handlings to traffic in the form of interchanges will negatively impact NS's costs of operations and service to customers on the rest of the network. *See* NS Opening Comments Ehlers V.S. at 24. "Additional capacity – track, cars, locomotives, and crews – would be needed to maintain current service levels." *Id.* Similarly, NS discussed on opening the infrastructure limitations both within areas where forced access might be required and in other places within the system where the new routings cause other operational problems down the line. NS Opening Comments at 64-65. "The key is that the network that serves all customers must not be adversely affected by the forced access granted for any of the customers who would be eligible under the NITL proposal." *Id.* at 65. To avoid adverse impact additional infrastructure may be necessary. Someone will have to pay these costs. And what those costs are and who must pay (one of the railroads or the customer seeking forced access) will affect any study of the likely effects of the NITL proposal. Yet, no commenter in support of the NITL proposal addressed the weighty questions and costs presented by the need to hold harmless all other customers using the rail network.<sup>17</sup>

Although quantifying precise costs for the system would depend on the unique physical and operating characteristics of each interchange, they must be accounted for in any meaningful

---

<sup>17</sup> NITL briefly attempts to argue that forced switching will not have any adverse operational impacts, pointing to Canada and NITL's otherwise ignored fourth criterion, which NITL states would exclude traffic after a carrier showing "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 own customers." NITL Opening Comments at 64. AAR experts Phil Case and Rodney Ireland demonstrate that NITL's discussion of Canada is both irrelevant and inaccurate. *See* AAR Reply Comments Case and Ireland Reply V.S. As for NITL's assertion of a "safe and feasible" defense, no explanation or framework for this element appears in the record, let alone any analysis of the potential impact. NITL cannot hide behind the ambiguities and omissions in its own proposal to claim that substantial adverse operational effects, which *are* documented extensively in the record, will not materialize.

examination of NITL's proposal. AAR witness Mark Fagan explains that a public interest analysis must account for all costs – direct and indirect. AAR Reply Comments Fagan Reply V.S. Nevertheless, supporters of the NITL proposal completely ignore any increases in operating costs or infrastructure investment that would be required under a forced access regime. They are similarly dismissive of the adverse impacts on all customers and therefore the public interest.

**D. Commenters Use the Wrong Comparative Metrics to Examine Impact of NITL Proposal on Railroad Health.**

Shipper's comments universally look at the wrong metrics for assessing the impact of NITL's proposal on the railroads.

First, only measuring the impact of NITL's proposal on railroads' revenues does not permit the Board or shippers to reach meaningful conclusions about the financial impact on the industry. The more appropriate inquiry is to assess the impact of forced switching on railroad contribution and net income. *See* NS Opening Comments at 20 n. 41. Contribution is defined as the amount of the transportation rate that exceeds the railroad's variable cost, out of which a railroad can recoup fixed costs and potentially generate a profit. *See* AAR Opening Comments Christensen Associates V.S. at 14-15. It is from this total that railroads must be able to pay for their multi-billion dollar annual capital expenditure budgets, as well as to generate some return for shareholders.

No study specifically analyzed the impact of NITL's proposal on contribution, and instead most commenters made much out of purposefully misleading comparisons between their flawed numbers and overall industry revenue. However, USDA calculated comparisons between its understated numbers and both the revenue and net income railroads received from its traffic. Although USDA's study is flawed for many reasons already discussed, the relationship between

the effect on revenues and the effect on net income shows directionally the correct relationship – the impact on net income would be much more severe than the impact on revenues. Under all of USDA’s scenarios, the net income effect was more than six times greater than the revenue impact it reported. *See* USDA Opening Comments at 12 tbl.4. While such results at most provide directional information, such a large multiplier demonstrates commenters’ focus on revenue is misleading and falls far short of representing the true impact on the industry’s financial health.<sup>18</sup>

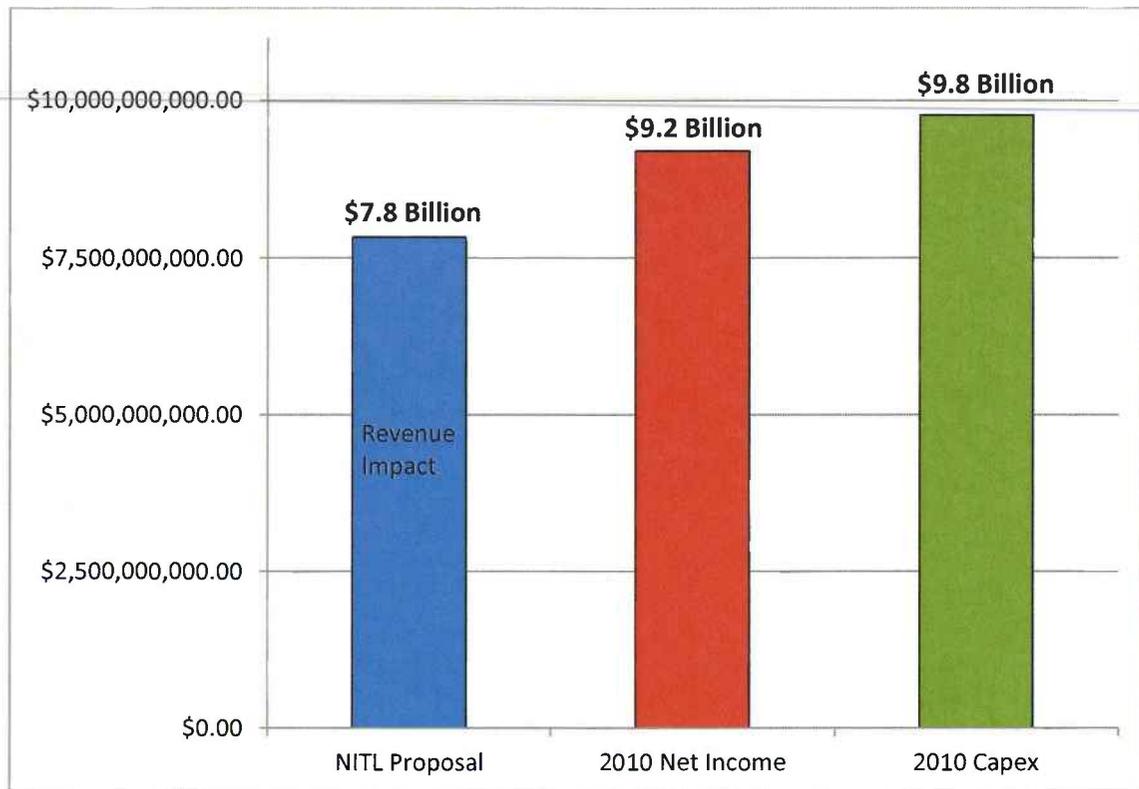
Indeed, a simple calculation using numbers submitted in the opening comments reveals an even bleaker picture. While NS has noted limitations inherent in each statistic, if the revenue impacts forecasted by NITL, approximately \$1,044 per car,<sup>19</sup> are multiplied by the number of impacted carloads projected by the AAR, approximately 7.5 million,<sup>20</sup> the revenue impact *alone* of NITL’s proposal is – by way of comparison only – nearly as large as the railroads’ entire capital expenditure budgets or net income from 2010.

---

<sup>18</sup> USDA’s numbers also only looked at grain and oilseed shipments. Several studies concluded that coal and chemical shipments, which tend to have higher than average contribution, would be even more affected by NITL’s proposal. *See* AAR Opening Comments Baranowski V.S. at 14; DOT Opening Comments at 11.

<sup>19</sup> *See* NITL Opening Comments Roman V.S. at 32 tbl. 7 (\$1,293,650,873 total revenue impacts divided by 1,239,297 carloads = approximately \$1,044 a car).

<sup>20</sup> *See* AAR Opening Comments at 13.



**Figure 1: Potential Revenue Impact of NITL Proposal (7.5 Million Carloads)<sup>21</sup>**

Put in a more proper context to account for NITL’s understatement of carloads and the improper comparison to total industry revenue, NITL’s claim that the revenue reductions it projects “will not cause undue financial harm to the railroad industry,” NITL Opening Comments at 48, falls apart completely.<sup>22</sup> Indeed, USDA admits that: “[I]t is likely that competitive switching would reduce [capital] expenditures by the amount not recovered from other captive shippers.” USDA Opening Comments at 19.

Second, commenters focus on potential revenue gain from the unsupported assertions that railroads would gain traffic from somewhere is similarly incorrect. As explained in the opening comments of the AAR, *see* AAR Opening Comments Christensen Associates V.S. at 14, even if

<sup>21</sup> Financial data drawn from Railroad Facts, 2012 Edition, Association of American Railroads, at 17, 44, and Class I Railroad Statistics, Association of American Railroads, at 2 (Apr. 2013).

<sup>22</sup> *See also* AAR Reply Comments Rennie Reply V.S.

some volume increases did materialize, those shipments would move at lower rates due to the imposition of forced switching. As a result, railroads would receive less contribution towards their fixed costs from any new traffic. No doubt it would take substantial increases of traffic with low contribution to replace the loss of contribution from forced access.

### **III. THE NITL PROPOSAL'S ATTEMPT TO REDISTRIBUTE RATE REDUCTIONS TO A LIMITED GROUP IS FAR OUTWEIGHED BY NETWORK INEFFICIENCIES AND COSTS TO ALL SHIPPERS.**

The Board should recognize that the flaws and omissions in the submitted studies deprive them of any value. Still, even if the studies could be seen as directionally informative of the revenue effects of forced switching, they would only confirm that the proposal is not in the public interest. NITL's proposal is merely a redistribution scheme intended to benefit a favored subset of shippers through reduced rates. However, implementation of the scheme would be to the detriment of the railroad network and *all* shippers, who would face potential operational inefficiencies, economic impacts, and regulatory consequences without any recourse.<sup>23</sup>

Rather than attempting to demonstrate that these real costs are outweighed by true public benefits – as opposed to the rate reductions accruing to a selected group – NITL and other proponents try to assume these costs away and ask the Board to impose a new regulatory scheme predicated on the foolhardy idea that forced access comes with no corresponding costs. Yet, statements on opening by numerous commenters confirm that NITL's proposal would create the inefficiencies and impacts that concerned the Board in its request for additional information. *See* Decision at 7-8. More importantly, studies show that it does not take significant increases in inefficiency, which will affect all rail customers, to overwhelm any theoretical public benefits received by a subset of shippers.

---

<sup>23</sup> *See* AAR Reply Comments Fagan Reply V.S.; Eakin and Meitzen Reply V.S.

### **A. NITL Proposal Will Result in the Board Picking “Winners” and “Losers,” and Shippers Left Out Will Face Regulatory Consequences.**

The NITL proposal would clearly result in government regulation picking “winners” and “losers” from among shippers. A limited subset of shippers would be granted the potential for rate reductions while all shippers are saddled with the operating inefficiencies and some shippers are left to make up for the lost contribution. Although AAR and NS discussed this “winners” and “losers” phenomenon in opening comments, *see* NS Opening Comments at 29, 65, other comments highlight its significance.

First, parties in the proceeding confirm that there would be potential “losers” under the NITL proposal, and they seek to expand its scope to avoid becoming “losers” themselves. Indeed, USDA summarized agricultural shippers only concern as being that “the NITL proposal would benefit too few grain and oilseed shipments.” *Id.* at 5. No one wants to risk being selected against, and pressure for more intervention will only grow. Examples of this push for expansion include:

- Some parties seek to expand the 30 mile presumption. Roanoke Cement seeks an expansion of the 30 mile requirement because one of its facilities would be a “loser” under the NITL proposal. Roanoke Cement Opening Comments at 8. Similarly, USDA reported agricultural shippers were concerned that most grain and oilseed shippers in the Rocky Mountain and Plain States would not be able to take advantage of NITL’s proposal because they were not within 30 miles of an interchange. USDA Opening Comments at 5. NGFA also sought a broader scope and recommended “that the Board adopt a more liberal, case-by-case determination of when a shipper facility is a ‘reasonable distance’ from a working interchange point.” NGFA Opening Comments at 24.<sup>24</sup>
- Several shippers questioned or attacked the NITL’s selection of a 240% R/VC ratio for its presumption of a lack of effective inter- or intra-modal competition simply because they

---

<sup>24</sup> NGFA presents no justification for its request other than that the change would make the new procedure “more useful and meaningful” to its members, which presumably means more of its members would be “winning” shippers rather than “losing” shippers.

would not be included under the current proposal.<sup>25</sup> Nowhere is any discussion found of how to determine if effective competition exists; shippers simply and honestly indicated that they wanted a lower threshold so that more traffic would be eligible for inclusion. In fact, one shipper did mention market dominance - Diversified CPC International – only to argue it shouldn't be required at all, because it didn't want one of its facilities to be left out even though Diversified admitted it has trucking options and alternative sourcing. See Diversified CPC International Opening Comments at 10.<sup>26</sup>

- Responses to the Board's request for consideration of substituting a four-year RSAM benchmark R/VC ratio met with identical unprincipled disapproval. USDA stated that “[s]etting the threshold at the RSAM benchmark level would exclude many agricultural shippers and therefore is not acceptable from USDA’s perspective.” USDA Opening Comments at 6. Highroad Consulting warned “RSAM could produce even higher benchmarks” than a 240% R/VC and therefore was not “ideal.” Highroad Consulting Opening Comments at 17. NGFA warned such a move “could effectively preclude *all* NGFA Commodity shippers captive to CP or CN from obtaining such relief.” NGFA Opening Comments at 14. Even NITL piled on to this point without referencing its own underlying criterion, stating it “strongly believes that . . . [the] RSAM alternative would result in too few shippers being able to benefit . . .” from the proposal. NITL Opening Comments at 18.

Second, other parties admit that someone will be left holding the bag to make up the lost contribution that would result from forced access. Many commenters conceded that NITL’s

---

<sup>25</sup> USDA advocated a 180% R/VC ratio, if one was imposed at all, not because it was sound economics but because “it would allow more agricultural shippers to benefit from competitive switching.” USDA Opening Comments at 6. Highroad Consulting is opposed to “rules that will require customers to prove market dominance, or for the rates to be higher than a designated benchmark,” but argued that if necessary the benchmark should be set at 180% R/VC. Highroad Consulting Opening Comments at 16-17. NGFA also urged without economic justification a minimum reduction to 180% so that the rules “are useful and meaningful to NGFA Commodity shippers.” NGFA Opening Comments at 23.

<sup>26</sup> The estimated increase in Board intervention and litigation resulting from lowering the R/VC presumption is stark. NGFA reported that while almost 200,000 carloads of the commodities it examined have R/VC ratios above 240%, another 440,000 carloads have R/VC ratios between 180%-240%. See NGFA Opening Comments Fauth V.S. at 19 tbl. 7. Thus, lowering the threshold would potentially triple the number of grain shippers petitioning for forced switching before the Board. Others commenters report significant expansions as well. ACC’s study estimates that an additional 500,000 chemical carloads have R/VC ratios between 180%-240%. See ACC Opening Comments Appendix at 7 tbl. 1. USDA’s data estimates nearly a 60% increase in agricultural carloads under a 180% R/VC presumption. See USDA Opening Comments at 10-11, tbl. 1, 2 (162,000 versus 102,000 carloads).

proposal would negatively impact those left out by the regulatory intervention.<sup>27</sup> *See, e.g.,* USDA Opening Comments at 18 (“For completely captive shippers, their rates are likely to rise by the amount not recaptured by the railroads through increased traffic volumes.”). NGFA went as far as to guess that NITL’s proposal would be a “net negative” for its members if railroads sought to offset some of the lost revenues with rate increases on ineligible shippers. *See* NGFA Opening Comments at 22. Although these costs are recognized by some, no commenter outside of NGFA attempted to quantify the precise impact on ineligible shippers.<sup>28</sup>

Rather, even when recognizing negative effects most commenters seemed quick to minimize the concerns of such shippers. On rates, USDA asserted without support that the effect on ineligible shippers “would likely be minimal” even if railroads succeeded in recapturing all of the revenue declines attributable to forced switching from the subset of “captive” shippers not covered by the proposal. USDA Opening Comments at 18. Setting aside the feasibility of such recapture, it is simply incredible that USDA would not expect railroads and the Board to face massive resistance from ineligible shippers to such a blatant redistribution of profits and rates increases.

**B. Comments Confirm Effects on Railroad Operations Would Be Substantial, Depend on Location, and Would Affect All Customers.**

The Board specifically requested information on how “rail network efficiency” would be affected in response to the deficiency of information on that point in NITL’s original Petition.

---

<sup>27</sup> Statements like USDA’s and NGFA’s completely undermine NITL’s conclusory statements like “regulatory and economic impacts on captive shippers not covered by the CSP would be nil,” NITL Opening Comments at 56, and ACC’s unsupported statement that “[i]t would be unfounded to assume that remaining captive shippers would be broadly harmed.” ACC Opening Comments at 6.

<sup>28</sup> NS strongly disagrees with NGFA’s assumption that rates on all ineligible traffic could somehow be raised to a 239% R/VC if NITL’s proposal was adopted, and therefore does not credit its quantification. *See* NGFA Opening Comments at 21-22; *supra* at 21-22.

Decision at 9. NS provided considerable information and data regarding the substantial operational issues that would be associated with the NITL proposal for forced access. NS Opening Comments at 59-80. Among the more significant points, NS showed that operational issues are location specific, *see id.* at 63-71, and that the NITL proposal would decrease velocity by injecting unnecessary, extra intermediate handlings and increasing dwell. *See id.* at 75-79. Other railroads and the AAR presented scores of similar evidence on opening.

Even supporters of the NITL proposal cannot contradict this fact; instead, they confirm it.<sup>29</sup> Shippers concede that transit times will increase if single-line traffic must be interchanged because introducing a switch increases transit times. *See, e.g.*, NITL Opening Comments at 49 (recognizing that, “at the end of the day the transportation provided by the accessing carrier is unlikely in all cases to be as timely as the service provided by the carrier actually serving the shipper’s facility, *because of the need for the switch*”) (emphasis added).<sup>30</sup> Indeed, commenters recognize that NITL’s proposal will consume railroad resources, increasing costs. *See* Highroad Consulting Opening Comments Thurston V.S. at 27 (“From a purely task-oriented perspective, switching rail cars between railways at interchange points or within rail yards for train-building or shipper placement objectives is a more time consuming and resource demanding activity than simply hauling trains along a mainline operation.”). For these very reasons, the ICC and the Board consistently have found that interchanging traffic increases costs and decreases efficiency. *See, e.g., Restructured Rates on Grain and Grain Products, Conrail*, 365 I.C.C. 635, 640 (1982) (“It is generally recognized that single-line routings are normally more time- and cost-efficient than joint-line ones, simply because no interchange costs are involved.”); *id.* at 641 (holding that

---

<sup>29</sup> Other commenters simply ignore the Board’s request for information on operational impacts. *See, e.g.*, USDA Opening Comments; DOT Opening Comments.

<sup>30</sup> *See also* NITL Opening Comments Roman V.S. at 36 (“Movements impacted by the CSP will by definition require a switch, likely increasing transit times. . .”).

such single-line routing “is clearly in the public interest”); *see also* NS Opening Comments at 61-63. Nothing has changed about the nature of railroad operations or service to undermine these prior agency findings.

Thus, the undisputed record here is that operations would be less efficient under forced access. And the record is clear that those operating inefficiencies have consequences. NS explained that “additional capacity -- track, cars, locomotives, and crews – would be needed to maintain current service levels.” NS Opening Comments Ehlers V.S. at 24. However, due to individual factors at each interchange and the vague and incomplete nature of NITL’s proposal, no party could accurately estimate the precise cost of its implementation. *See* NS Opening Comments at 65.

Yet even relatively small increases in costs alone would quickly outweigh any theoretical, limited benefits of NITL’s proposal. Academic studies have found “that it takes only a modest increase in coordination costs to offset the benefits of even fairly significant increases in competition.” *See* Jose A. Gomez-Ibanez, *The Simple Analytics of Open Access with Illustrations from Railroads*, at 1 (July 19, 2010) [hereinafter *Gomez-Ibanez, Simple Analytics*]. Gomez-Ibanez estimated the equilibrium point at which the increase in costs begins to exceed the limited benefits accruing to shippers, resulting in a negative net impact on society as a whole. At an elasticity of demand of -1.0,<sup>31</sup> even a 2% increase in costs would offset any benefits associated with a 20% reduction in revenue. *See id.* at 4, 20; *cf.* John D. Bitzan, *Railroad Costs and Competition - The Implications of Introducing Competition to Railroad Networks*, *Journal of*

---

<sup>31</sup> Moreover, if the rail traffic eligible under NITL’s proposal is relatively inelastic, even fewer benefits would be associated with the same level of rate reduction, and even smaller cost increases would overwhelm any public benefit. *Cf.* USDA Opening Comments at 15 (speculating that “it is reasonable to assume the elasticity of demand for rail service by captive shippers would be less than -1. . .”).

Transport Economics and Policy, Vol. 37, Part 2, at 224 (May 2003) (“[The study’s] findings suggest that policies introducing railroad competition through “open access” or on bottleneck segments would not be beneficial from a cost perspective. Moreover, the price decreases necessary for the introduction of such competition to be beneficial would be large.”).

Importantly, the rate reductions on existing traffic touted as “benefits” by NITL and other proponents would be a simple wealth transfer between railroads and shippers, with no benefit for society as a whole, and therefore are not public benefits. See *Gomez-Ibanez, Simple Analytics* at 3; Mark Fagan, *Introducing Competition into Natural Monopoly Industries: An Evaluation of Mandatory Access to Australian Railroads*, Working Paper 2008-01, Taubman Center for State and Local Government, Kennedy School of Government, Harvard University, at 41 (2008) [hereinafter *Fagan, Introducing Competition*].

Thus, from a public interest perspective, there are few potential public benefits but large public costs. The *Christensen Report* estimated the increase in cost due to the loss of length-of-haul economies caused by interchanging previously single-line traffic to be between 5%-40%. See *Christensen Report* at 22-7. Even restricting switching to 20 miles from the shipment’s origin would increase costs by up to 7%. *Id.* The NITL proposal’s presumption exceeds that distance by 50%, and shippers would be able to petition for even greater distances. And “lost economies of length of haul are only one of the potential costs of lost coordination.” *Gomez-Ibanez, Simple Analytics* at 5 n.3. Thus, the net impact on the railroads is the combination of both the lost contribution from the wealth transfer due to rate reductions and the resulting increased costs to railroads along with the inefficiency penalty that would result for many other customers. See Robert E. Gallamore & John C. Panzar, *When is Competition Not Good? The Case of Compelled Access and Maximum Rate Regulation for Railroad “Captive Shippers,”*

Northwestern University Transportation Center, at 28 (2004) [hereinafter *Gallamore & Panzar*]

("[I]n the long run, mandated access would result in increased operating expenses, decreased railroad revenues, reduction in capital stock, loss of traffic through diversion, and greater costs to society as a whole.").

These negative impacts are not just a cost issue for railroads; NITL's proposal would negatively impact service across NS's system for other customers. As Fred Ehlers, NS's Vice President Network & Service Management, explained:

We know that the NITL proposal will increase number of handlings, which will decrease velocity and most likely will be accompanied by a decrease in our service composite metric because we understand the relationship between the number of intermediate handlings and LHMpD [line haul miles per day]. We also know that inefficiencies introduced at various interchange locations throughout the system will affect all traffic handled in the vicinity of the affected interchange locations and will ripple through the network. Thus, the decreases in LHMpD that would result from NITL's proposal would affect many customers across the system- not just customers in the immediate vicinity of the complainant.

NS Opening Comments Ehlers V.S. at 24. AAR expert William Rennie also provided a detailed explanation of all of the inefficiencies caused by NITL's proposal and then demonstrated how those inefficiencies could result in system-wide effects. *See* AAR Opening Comments Rennie V.S. at 40-112.

DOT has confirmed the vulnerability of the rail system to such ripple effects in other forums:

The rail network operates 24 hours a day, 7 days a week. Delays in one part of the network can set off another type of delay later on in the network, which creates a "ripple" effect. . . . It can take up to 5 days, and sometimes up to 1 month, to restore service to normal operations after an unplanned disruption. Unlike the aviation system, which allows planes to be repositioned overnight, there is no "down time" within which trains can be repositioned.

DOT, Office of Inspector General, *Root Causes of Amtrak Train Delays*, CR-2008-076, at 19 (Sept. 8, 2008). The record is clear that other shippers across the railroad – not just near the

location of the forced switching – could be affected. Conveniently, NITL and others do not acknowledge the problems its proposal foists on so many other shippers or explain how those shippers would be held harmless.

Other consequences could arise from changes in a railroad’s ability to plan and identify with certainty projects capable of generating returns, resulting in a decline in capital investment. As AAR expert Rennie demonstrated, “[g]iven that traffic flows could be less stable than historic traffic flows, it could be difficult for the railroad to justify investments in additional capacity” under NITL’s proposal. *Id.* at 78. USDA recognized the natural consequences of these economic incentives when combined with rate reductions, concluding that “it is likely that competitive switching would reduce [capital] expenditures by the amount not recovered from other captive shippers.” USDA Opening Comments at 19; *cf.* ARC Opening Comments at 8-9 (recognizing that “it is possible to conceive of situations” in which NITL’s proposal would lead to “unsafe operations” or “inadequate investment”). The record clearly shows that decreased investment would further degrade network efficiencies and service for all shippers.

**C. As a Result, Excluded Shippers Will Be Disadvantaged in the Marketplace.**

The combination of these effects means that for those excluded, regardless of whether they are excluded because of their traffic type, rate level, or distance from an interchange, implementation of forced switching can only make them worse off. Christensen Associates summarized this effect:

While both sets of shippers would be adversely affected by service declines, covered shippers would at least have the [potential] benefit of lower rates created by the mandatory switching proposal that would allow them to compete more effectively against excluded shippers. The change in competitive conditions between covered and excluded shippers could lead to an unintended reallocation of resources and markets, with excluded shippers being competitively disadvantaged in the product markets in which they participate.

AAR Opening Comments Christensen Associates V.S. at 5. Nowhere in the opening comments do proponents of NITL’s proposal account for the consequences on ineligible shippers – other than where they ask for expansions of the NITL proposal to ensure they are not among the “losing” shippers.

When put in this proper context by considering all of the service impacts and real costs of forced switching on the various parties, rather than focusing solely on any rate reductions, adoption of NITL’s proposal can only harm the public interest.<sup>32</sup>

#### **IV. SHIPPERS’ COMMENTS AND PROPOSALS CONTINUE TO IGNORE THE CONSTRAINTS OF THE LAW.**

Not one shipper commenter or government agency addressed the legality of the NITL proposal. While NITL continues to claim breezily that “the Board has clear authority and broad discretion to adopt new rules on competitive switching,” NITL Opening Comments at 6, that is simply not the case. Starting in *Ex Parte 705* and continuing through opening comments here, NS, the AAR, and other railroads have repeatedly explained that the statutory scheme does not permit the Board to adopt a forced switching regime. While these arguments have not changed, and therefore are only briefly summarized here, they remain unchallenged by proponents of NITL’s proposal. Importantly, these legal issues are dispositive for the NITL proposal.

##### **A. Forced Access Is Aimed at Impermissibly Getting Lower Rates.**

The Board, as affirmed by the D.C. Circuit, has repeatedly found that the existing statute does not permit adoption of proposals like the NITL Petition. *See Midtec Paper Corp. v. United*

---

<sup>32</sup> In addition to the record at hand, independent studies examining this area support the same conclusion. *See, e.g., Fagan, Introducing Competition* at 41 (“[I]n weighing the benefits of competition versus the costs of coordination, the net impact of mandated access appears to be negative.”); *Gallamore & Panzar* at 28 (“We conclude that while “Open Access” would help some specific shippers realize lower rail rates, it is difficult to see what this radical change in American transport and regulatory policy would accomplish for the public interest.”).

*States*, 857 F.2d 1487, 1507 (D.C. Cir. 1988) (“If the [Board] were authorized . . . to prescribe reciprocal switching or terminal trackage whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the [Board] in this way to conform the industry more closely to a model of perfect competition.”); NS Opening Comments at 22; *see also* KCS Opening Comments at 26-34 (explaining statutory problems).

Far from demonstrating a legal basis for a forced switching regime, shipper commenters make clear that all they want is lower rates. NITL cautioned the Board that it intended its proposal “to operate as a supplement to” filing rate cases, and that “shippers should retain their choice of remedy.” NITL Opening Comments at 16. ACC described the purposes of NITL’s proposal as “promot[ing] competitive rates for a greater number of shippers.” ACC Opening Comments at 5. Roanoke Cement Company supports NITL’s proposal as part of their efforts to “control our costs.” Roanoke Cement Opening Comments at 7. ARC in fact was critical of the Board’s assumptions about NITL’s proposal because “[t]he ability to shift freight from the original railroad to a potential competitor does not guarantee *any* reduction in rail rates, much less a reduction in rail rates to a reasonable level.” ARC Opening Comments at 8. In short, the common thread to all these comments is a desire for lower rates.

However, it is well settled that Section 11102 is not a “supplement” or an alternative to rate regulation. The D.C. Circuit rejected the use of forced switching and access as “an alternative means of obtaining rate relief” twenty-five years ago. *Midtec Paper Corp.*, 857 F.2d at 1505. Similarly, the Board has stated “[t]he competitive access rules were promulgated not to provide shippers with an alternative form of rate relief . . . .” *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1068 (1996). Shippers’ clear attempts to use forced switching as a

new method to obtain lower rates is simply impermissible under the statute and long-standing case law.

**B. Congress Has Ratified Longstanding Interpretation of Section 11102.**

Further, Congress has repeatedly ratified the current regulatory regime. *See* NS Opening Comments at 23-28; CSX Opening Comments at 11-21. When passing the Interstate Commerce Commission Termination Act, Congress was aware of the *Midtec* decision as well as the ICC's interpretation of its forced access and forced interchange authority and chose to readopt the access provisions without altering the ICC's preexisting interpretation. *See* NS Opening Comments at 23-28. The Board lacks the authority to rewrite fundamental policies that Congress has explicitly endorsed and repeatedly refused to revise.

**C. Access Price Proposals Are Unlawful and Arbitrary.**

All studies that even proposed a specific access fee used some simplification of the access fees used in Canada. Setting aside the vast differences between Canada and the United States that are addressed in the AAR's Reply Comments by AAR witnesses Phil Ireland and Rodney Case,<sup>33</sup> the Board does not have the authority to establish an access fee. Rather, the rail carriers must agree to the terms of access under 49 U.S.C. § 11102(c), and only if they cannot agree may the Board "establish such conditions and compensation." 49 U.S.C. § 11102(c). Without an impasse between switching railroads, the Board cannot interject itself into the matter of compensation.

Even parties supporting the NITL proposal generally acknowledge that the operating characteristics and uniqueness of each interchange will result in a complicated and time consuming process if and when the Board gains jurisdiction over an access fee about which the

---

<sup>33</sup> No party attempted to show that that these costs would at all be representative of costs of forced switching in the United States.

two carriers cannot agree. *Cf.* Highroad Consulting Opening Comments at 15 (“Development of an access pricing model should involve in-depth analysis and careful consideration to confirm that the objectives set forth by the Board are met.”). Thus, the assumptions on access fees made by NITL and others are both unlawful and completely arbitrary<sup>34</sup> as applied to rail operations in the United States.

**D. Some Shippers Want to Ignore Section 10707 so They Can Have Their Cake and Eat It Too.**

NITL and shippers commenting on opening were also quick to ignore legal constraints on the Board in other areas. As previously mentioned, NITL and other shippers clarified that the NITL proposal should be a “supplement” to the Board’s current rate regulation. *See* NITL Opening Comments at 16. In doing so, many shippers argued that the Board should not take the availability or even active use of forced switching into account when assessing market dominance in a rate case under 49 U.S.C. § 10707.<sup>35</sup>

---

<sup>34</sup> NITL attempts to argue that Canadian access pricing is suitable because it “is within the range of reciprocal switching fees published by all four major Class I rail carriers.” NITL Opening Comments at 33. Setting aside the dramatic difference between forced access and voluntary, reciprocal operations, NITL’s statement is blatantly false for NS, a point that is obvious from NITL’s own recitation of U.S. switching fees. NITL Opening Comments at 24. NITL recognizes in its comments that “most charges [in the East are] published in the \$400 to \$500 range.” *Id.* In contrast, NITL’s proposed switching fee is \$300 per car for fewer than 60 cars, a 25% to 40% reduction. For larger blocks, the fee drops to \$89 per car, a whopping 77% to 82% reduction.

<sup>35</sup> *See, e.g.,* Olin Chemicals Opening Comments at 7 (“[A]ny final rules based on the NITL proposal must specifically provide that where an otherwise captive shipper [captive prior to getting access to a second carrier via forced access] utilizes the revised rules to obtain two rates from railroads, the existence of the non-litigated rate shall not be considered as ‘effective competition’ for purposes of 49 U.S.C. § 10707; accordingly the shipper would retain its right under 49 U.S.C. § 10701(d)(1) to challenge the reasonability [sic] of any rate offered by either railroad . . . .”); Joint Coal Shippers Opening Comments at 2 (“The Joint Coal Shippers respectfully submit that captive coal shippers would be adversely affected if the Board were to rely on the existence of a novel and untested competitive switching remedy as a basis for limiting a shipper’s ability to obtain origin-to-destination rate relief.”); Chlorine Institute Opening Comments at 2 (finding it “troubling” that the “Board feels it might be able to simply rely on

Such action would violate the constraints imposed on the Board by § 10707.

Specifically, under § 10707(b), the Board cannot consider the reasonableness of a rate if the rail carrier does not have market dominance over the transportation to which the rate applies.

Providing a shipper with the ability to force its traffic to be switched to another rail carrier would terminate market dominance over that traffic, because access to a second rail carrier would provide effective competition for the move.<sup>36</sup> Even the NITL proposal is predicted on the timeless fact that there is no market dominance if the customer has access to two carriers. *See* NITL Petition at 35 (restricting eligibility to shippers served by one railroad). This leaves the Board with no authority to impose NITL's proposal while simultaneously maintaining that such action would have no impact on the Board's jurisdiction over rate reasonableness cases.

---

presumed competitive market forces" and "only regulate the access prices within the 30-mile interchange point radii" to obtain "a reduced role in regulating the reasonableness of rates"); USDA Opening Comments at 7 ("Finally, the availability of competitive switching should not affect a railroad's market dominance for rate appeals . . ."); ARC Opening Comments at 14 ("[C]aptive shippers will require continued recourse to the Board for regulatory remedies even if current competitive remedies are expanded to include competitive switching."); NGFA Opening Comments at 17.

<sup>36</sup> Many shippers attempt to create a distinction by arguing that two railroad service might not constitute competition. However, participants in competitive markets do not have to offer a price the customer likes or even provide service at all to constitute effective competition, so long as a second entrant will enter the market if prices rise above a certain level. DOJ has been clear that "a potential entrant . . . can constrain the ability of an actual competitor . . . to exercise market power." *Canadian National Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co., and the Pittsburgh & Conneaut Dock Co.*, STB Finance Docket No. 34423 (Apr. 8, 2004). Likewise, shippers and the Board have consistently recognized these economic facts and sought to create or preserve two railroad access for effective competition in past merger discussions, and nothing calls into question that doctrine here. *Cf. Major Rail Consolidation Procedures*, STB Ex Parte 582, 2001 STB Lexis 546, at \*17 (STB served June 11, 2001) ("Since 1980 at least, we have consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis. The overall result, so far, has been that railroads have continued to face effective competition, either from other railroads or other modes . . .").

**E. The Record Here Reinforces Prior Board Decisions that R/VC Ratios Are Not a Proxy for the Absence of Competition.**

In its opening comments, NS explained that the agency has already found that simplistic presumptions are not accurate or appropriate to use to determine whether intramodal or intermodal competition exists. NS Opening Comments at 41-43. Indeed, the agency years ago terminated the use of rebuttable presumptions to determine whether competition existed:

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.

*Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981). More specifically, NS noted that the agency has long rejected presumptions based on revenue to variable cost (“R/VC”) ratios: “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.” *Id.* at 122.

The comments submitted on opening reinforce the fact that R/VC ratios are not “indicative of true market power on the part of the railroad.” NITL and others assume that traffic that has an R/VC < 180% is by definition subject to competition, whereas traffic eligible due to the 240% presumption in the NITL proposal lacks competition. NITL Opening Comments at 47; USDA Opening Comments at 8 (“Only R/VCs less than 180 were included in the competitive benchmarks.”). However, shippers ascribe false meaning to R/VC ratios and in doing so further discredit their own results. Although an R/VC of 180% is a jurisdictional threshold for the Board, the Board knows well that it says nothing of the actual competition of any movement. As

NS already demonstrated on opening, the Board has recently found that traffic with R/VC ratios well above 180% and even well above 240% faced effective competitive options.<sup>37</sup> See NS Opening Comments at 44. The reverse is also possible – commenter Roanoke Cement claimed on opening its traffic was “captive” to one railroad yet had average R/VC ratios under 180%. See Roanoke Cement Company Opening Comments at 5 (stating “[a]ll of our rail lanes are captive lanes,” then reporting R/VC ranges from 158%-198% in railroad cars and 154%-232% in private cars). Proponents of NITL’s proposal unsurprisingly offer no compelling counter to this long-standing precedent. After all, even some of them highlight that the presumptions in the NITL proposal “are, in the end, arbitrary . . . .” NGFA Opening Comments at 8.

#### **F. Switching the Burden of Proof Would Be Illegal.**

Other commenters request that the Board institute a system in which all shippers are presumed to be eligible for forced switching. For example, USDA expresses concern “that the NITL proposal places much of the burden of proof on the shipper, which could cost the shipper considerable time and effort.” USDA Opening Comments at 6. As a result, USDA recommends that “[t]he process should be simplified by a rebuttable presumption that the shipper is eligible for competitive switching and leave it to the railroad to show why not.” *Id.* Highroad

---

<sup>37</sup> In the *M&G Decision* – as to which NS offered comments and criticisms in its amicus submission filed on November 28, 2012 – the Board concluded that CSX lacked market dominance over rates in six lanes: Apple Grove-Columbus, Apple Grove-Lynchburg, Belpre-Columbus, New Orleans-Clifton Forge, New Orleans-Orlando, and Apple Grove-Clifton Forge. See *M&G Decision* at 21. However, *all* of the challenged lanes governed by those rates had R/VC ratios greater than 240%. For example, the Apple Grove-Columbus rate governed three lanes: Apple Grove-Fremont, Apple Grove-Hebron, and Apple Grove-Nicholasville. See *M&G Decision*, Appendix at 42-43. The first quarter 2011 R/VC ratios for those three lanes were 386%, 282%, and 386%, respectively. See CSX Reply Market Dominance Evidence, Ex. II-A-2, *M&G Polymers USA, LLC v. CSX Transp. Inc.*, STB Docket No. 42123 (July 5, 2011). Similarly, the Belpre-Columbus rate governed one lane, Belpre-Fremont. See *M&G Decision*, Appendix at 49. The first quarter 2011 R/VC ratio for that lane was 402%. See CSX Reply Market Dominance Evidence, Ex. II-A-2 (July 5, 2011).

Consulting looks at shippers in Canada and notes that “they do not have to prove anything,” so it asks “why should we not consider similar rules and methodology for pricing competitive switching in the U.S.?” Highroad Consulting at 20.

While the question appears rhetorical, the answer is simple: 49 U.S.C. § 11102 places the burden of proof on the party seeking relief. Ultimately, this is the statute NITL invokes. But under that statute, the Board must make affirmative findings that the use by a second carrier is “practicable” and “in the public interest,” and would not substantially impair the ability of the owning rail carrier to handle its own business. 49 U.S.C. § 11102. The Board cannot presume these things unless a rail carrier shows otherwise – as some parties suggest it should. It must “find” them affirmatively, which places the burden of proof on the party requesting the action under this provision.

**V. SHIPPER COMMENTS DEMONSTRATE CONCLUSIVELY THAT THE NITL PROPOSAL WOULD MASSIVELY INCREASE REGULATORY ACTIVITY AND LITIGATION BEFORE BOARD.**

The Board speculated in its Decision that one benefit of NITL’s proposal would be a reduction in government intervention and litigation over rates. *See* Decision at 6. In its opening comments, NS warned that “the Board’s assumption that the NITL proposal might reduce government intervention is simply incorrect,” and highlighted many of the areas of litigation already expressly contemplated by the NITL proposal as well as numerous others left unaddressed. NS Opening Comments at 56-59. However, after reviewing other parties’ submissions, it appears that even NS may have underestimated the massive increase in litigation and governmental intervention necessary to implement forced switching.

**A. Shipper Comments Show Proposed “Supplemental” Forced Switching Not Intended to Decrease Board’s Involvement or Litigation.**

First and foremost, shipper comments show that they have no intention of decreasing litigation and governmental activity through NITL’s proposal. Contrary to the Board’s speculation in its Decision, numerous commenters strongly disavowed any notion that forced switching should impact the availability of current rate reasonableness procedures.<sup>38</sup> Even NITL, which in its original Petition claimed forced switching would “reduce the need for complex and expensive litigation,” NITL Petition at 6, backtracked and stated it “did not intend to limit or foreclose captive shipper’s options to address railroad market power.” NITL Opening Comments at 16. So, NITL has now revised its view of its proposal and termed it “a supplement to, and not a replacement for, the existing remedies to shippers.” *Id.*

“Supplementation” of the current regulatory regime by definition can only add to the government activity and litigation. Rather than refocusing the resources of parties and the Board, adding a vague, incomplete, and untested procedure cannot “reduce the need for complex and expensive litigation” and government activity. Thus, the NITL proposal would only create more government activity and litigation and add to the Board’s current docket, which makes promises of less government activity and litigation ring hollow.

**B. Regulatory Activity to Implement A Canadian Style System Would Require Substantial Governmental Resources.**

Although the Board lacks the power to establish an access rate unless the two carriers cannot agree, NITL supporters invoke the Canadian pricing model. Canada is no model for the United States given the substantial differences in the history of their rail network, the scope of

---

<sup>38</sup> See *supra* Section IV.D. While complete ignorance of forced switching in a rate case would clearly violate the market dominance restraint of 49 U.S.C. § 10707, the comments belie any indication that NITL or its supporters seek less governmental intervention into the transportation market.

their rail network, and other factors discussed by AAR witnesses Phil Ireland and Rodney Case. But, if the Board chose to undertake a similar methodology to the Canadian Transportation Agency (“CTA”) in the event that two carriers could not agree on an access price, that methodology would require substantial government resources.

The CTA conducts audits at “each yard at which interswitching is performed.” NITL Opening Comments at 27. Such an examination is necessary because operations at each interchange vary and there are many factors that could affect the access fee at each location, including what infrastructure is needed across the system to hold other customers harmless, whether the Board imposes labor conditions, local operating issues, and costs created by forced access. NS Opening Comments at 65-71. Indeed, the comments confirm the point NS made in its opening comments – no two interchange operations are the same. For example, Highroad Consulting observes:

Whatever pricing method, there are a number of factors to consider including railroad costs (switching minutes can vary depending on geography, e.g., metropolitan vs. rural areas). Costs can also be impacted by the number of cars switched, car ownership, frequency of service (per diem), and loading/unloading times.

Highroad Consulting Opening Comments at 15.

The scope of the United States rail system means auditing would be a much greater undertaking for the Board. According to NITL’s expert, Thomas Maville, CN and/or CP only switch traffic at 70 interchange locations in Canada. *See* NITL Opening Comments Maville V.S. at 23. In contrast, NS reported it had over 150 interchanges with CSX alone in 2011. *See* NS Opening Comments Ehlers V.S. at 11. NITL’s own study identified over 400 interchange locations eligible for forced switching across the country, a total which likely understates potentially eligible locations. *See supra* Section II.A.1.

Thus, if the Board attempted to establish a table of access fees similar to Canada's, the audit process would carry the threat of swamping the Board's resources. With far more potentially eligible interchange locations in the United States – which parties have admitted are each unique – the Board could quickly find itself in a perpetual state of auditing. However, even if the access fee was explored on a case-by-case basis, the audit process and the legal fight over the scope of the audit, what costs were included, what was excluded, and other issues would similarly consume substantial resources of the parties and the Board.

**C. Comments Further Illustrate Conflicts Among Parties Over Issues Left Ambiguous by NITL Proposal.**

NITL's proposal expressly contemplates litigation in front of the Board for each forced switching request. *See* NS Opening Comments at 56-59. Indeed, even requests attempting to take advantage of the proposed conclusive presumptions would produce litigation regarding R/VC ratios, rail and other transportation movements over the past twelve months, the existence of a terminal, and more. *See id.* NGFA further confirmed that the NITL proposal would generate substantial litigation. It lamented the litigiousness, recognizing that a shipper unable to take advantage of the presumptive conclusions would have “to incur the cost and expense of litigation before the STB on the market dominance and ‘reasonable-distance’ components of the new rules, *in addition to litigation over other aspects of the test.*” NGFA Opening Comments at 23 (emphasis added).

In addition to the express admission by parties – railroad and NITL supporters alike – that the NITL proposal will require costly litigation, the various assumptions that parties had to make to conduct studies (because of the vagueness and incompleteness of the NITL proposal) demonstrate additional issues that would need to be resolved through further regulatory action, litigation, or both.

## **1. NITL's Undefined Fourth Criterion – Safe and Feasible Operations.**

NITL gives passing mention of barely more than a paragraph to the fourth and final criterion of its proposal, which purports to limit switching in instances in which the carrier demonstrates “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 own customers.” NITL Opening Comments at 64. NS noted the complete lack of clarification on any aspect of this inquiry, as well as the absence of any defensible foundation for NITL’s assertion that “the very large majority” of requests would satisfy the undefined inquiry. *See supra* note 17. Even setting those issues aside, NITL contemplates that each forced switching request will include an evaluation, “on a case-by-case basis,” of whether “any adverse operational effects” could result from the request. *Id.* As with many aspects of NITL’s proposal, at this time all that is clear is that this process would generate substantial litigation for parties and the Board, both to ascertain the (omitted) meaning of this element and to evaluate the complex evidentiary submissions that would be necessary in each individual case.

## **2. Disagreement over Treatment of Exempt Traffic and Contract Traffic.**

The empirical studies advanced on opening show that parties struggled to rationalize the ambiguity in NITL’s proposal concerning the inclusion of exempt and contract traffic. NITL again ignored the issue entirely, making no references or adjustments based on whether traffic was exempt or under contract. The AAR, USDA, and NGFA stuck to the letter of the NITL proposal and included the traffic in their studies.<sup>39</sup> *See* AAR Opening Comments at 13 (including contract and exempt traffic “because the NITL proposal does not appear to exclude such traffic,” while excluding intermodal); USDA Opening Comments at 14 (discussing need to

---

<sup>39</sup> These parties presumably recognize that contracts expire and exemptions can be revoked.

offset results because of contract traffic); NGFA Opening Comments at 12 (only excluding exempt TOFC/COFC traffic). DOT split the baby, removing “exempt trailer-on-flatcar and container-on-flatcar (TOFC/COFC) traffic, as well as other exempt commodity traffic,” while retaining some exempt equipment and contract traffic. DOT Opening Comments at 4 (noting “neither comes under the Board’s jurisdiction”).<sup>40</sup>

These discrepancies in treatment of exempt and contract traffic foreshadow disputes that the Board will need to confront under the NITL proposal. KCS argued in its comments that such traffic would ultimately be ineligible for forced switching. See KCS Opening Comments at 34-36. But, the ambiguity of NITL’s proposal and the parties’ assumptions on opening show that it is at best unclear what traffic is encompassed by the plain language of the NITL proposal.

### **3. NITL Itself Does Not Seem to Know Whether Its Own Proposal Contemplates Rail Miles or Air Miles.**

NITL’s proposal contemplates a conclusive presumption that a working interchange exists within a “reasonable distance” of a shipper if the shipper’s facilities are within 30 miles of an interchange between a Class I and another carrier at which cars are regularly switched. NITL Petition at 36. However, at no point in the proposal does NITL clarify whether the 30 mile distance is rail miles or air miles. Although employing an air mile approach can lead to absurd results, see NS Opening Comments at 51-52 (highlighting the Hampton Roads area), this does not resolve the question.

Unsurprisingly, commenters again took different approaches. Compare AAR Opening Comments at 11 (using air miles), with DOT Opening Comments at 9 (using track miles); USDA

---

<sup>40</sup> It is not clear from the plain language of the NITL proposal that intermodal is excluded. Indeed, could intermodal be eligible under the ignored 75% “conclusive” presumption? NITL excluded intermodal traffic in conducting its study because “[i]ntermodal movements originate or terminate on trucks and are therefore not captive to a single rail carrier,” and because “they are not likely to meet the 240% R/VC test in CSP.” NITL Opening Comments at 38. NITL did not exclude them because its proposal specifies that intermodal traffic would be ineligible.

Opening Comments at 5 (same). As for NITL, nowhere in its opening comments does NITL specify the use of rail miles, nor does it foreclose consideration of radial miles. Instead, NITL attempts to obscure the effects of its omission. To be sure, NITL's expert used rail miles rather than radial miles to conduct its study, but NITL's expert simply asserted that *he* chose rail miles because it "was more equitable to railroads," NITL Opening Comments Roman V.S. at 16, which really means it produced the understated numbers NITL sought. He did not do so because the NITL Petition requires the use of rail miles.

While in some cases, such as Hampton Roads, the equities might clearly favor the use of rail miles, in other cases shippers may argue specific circumstances favor their inclusion in the presumption based on radial miles. Even if NITL were to clarify that its proposal relied on rail miles, or the Board eventually settled on one method, the underlying question would not dissipate, because the presumption is only conclusive in favor of the shipper – shippers falling outside the limit could and would still litigate that they are nonetheless within a "reasonable distance" of an interchange. Many of the absurd results NS highlighted, such as circuitous routings and insufficient infrastructure at interchanges, similarly would remain valid.

#### **4. Eligibility of Joint-Line Traffic for Forced Switching.**

NITL's proposal does not expressly differentiate between single-line and joint-line service, and indeed appears to contemplate inclusion of both types of traffic. *See, e.g.*, NITL Petition at 49 (employing an example that could be "either a single line rate or a joint through rate"). The Board's Decision, however, speaks primarily in terms of alternatives to single-line rates. *See* Decision at 3. In evaluating the NITL proposal, DOT limited its empirical analysis on opening "to single-line Class I moves, which preserve[d] the NITL proposal of examining the 'transportation rate charged by the Class I carrier from origin to destination' that meets the R/VC

≥ 240 condition for the move.” DOT Opening Comments at 5. NGFA did the same. *See* NGFA Opening Comments at 11. Conversely, NITL and USDA clearly analyzed both single and joint line movements, while other respondents did not identify any separate treatment. *See* NITL Opening Comments at 42; USDA Opening Comments at 8. KCS squarely raised this ambiguity in its own comments, disputing the application of forced switching to joint-line service. *See* KCS Opening Comments at 21-23 (stating if implemented, “it would be both appropriate and legally sufficient to limit the proposal to single-line service and not apply the proposal to rates and services involving joint-line service”). Thus, the studies demonstrate an underlying ambiguity that results in multiple interpretations of whether the NITL proposal would apply to joint-line moves. This issue represents another area of likely litigation.

#### **5. Other Conflicting Assumptions.**

The issues discussed above are only the largest of the persisting ambiguities exposed by the differing assumptions made in the opening comments. But there are others. In another example, NITL’s proposal already contemplates a Board finding in each case to determine whether “regular switching” occurs at an interchange, but the parties disagree over how many interchanges actually exist. *Compare* Roman at 16-17 (identifying 407 interchanges), *with* USDA Opening Comments Appendix at 3 (applying a similar methodology, yet identifying 500 interchanges). And neither discussed the additional locations that “can” exist under NITL’s proposal. *See* NITL Petition at 52-53; discussion *supra* at 12. Further still, different parties took different approaches to shipments originating or terminating out of the United States. These divergences are unsurprising given the incomplete and ambiguous nature of NITL’s initial proposal, but begin to show the burden any implementation of the proposal will bring.

#### **D. Comments Ignore Other Issues That NS Observed Remain Unaddressed or Unanalyzed.**

Numerous other issues remain that have not been addressed by supporters of the NITL proposal or by the studies submitted. NS raised this point in its opening comments, laying out an inexhaustive list of over twenty issues unaddressed by NITL's proposal that would need to be litigated in forced switching cases. *See* NS Opening Comments at 58-59. Nothing in the opening comments mitigated the potential for litigation in these areas. *See also* KCS Opening Comments at 18-20 (raising similar concerns); CSX Opening Comments at 46-57 (same). As KCS put it, "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." KCS Opening Comments at 20. Here are just a few of the issues that have been completely ignored by most commenters.

##### **1. Labor Protections.**

As NS and CSX covered in detail in their respective opening comments, the statute authorizes the Board to impose labor protections when imposing mandatory switching. *See* 49 U.S.C. § 11102; NS Opening Comments at 37-38; CSX Opening Comments at 55-56. It is unclear how the Board would address employees whose positions were impacted by changes in traffic flows from forced switching, or whether the customer or one of the railroads would bear financial responsibility should any protections be imposed.<sup>41</sup> However, the United Transportation Union-New York State Legislative Board ("UTU-NY") has already filed comments advising the Board to make labor protections for employees mandatory should it adopt NITL's proposal. UTU-NY Opening Comments at 4. UTU-NY argues railroad

---

<sup>41</sup> To be clear, NS believes the party seeking forced access should bear all costs to hold non-parties, including labor and other customers, harmless.

employees should be allowed to “seek redress at the Board for any perceived unlawfulness in administration of the provisions.” *Id.* at 5. What is clear is that this area would be subject to involved litigation in each case and require detailed consideration by the Board if the NITL proposal was adopted. Moreover, resolution of this issue would affect the access price.

## **2. Environmental Review.**

Similarly, environmental impact is another foreseeable area of litigation that would arise out of implementation of the NITL proposal. The Board would have to consider both the impact of individual forced switching requests as well as the overall impact of the change in its regulatory regime. *Cf.* CSX Opening Comments at 56-57. NITL’s proposal provides no help in this area, even on something as relatively simple as which party would conduct and pay for the environmental review. NS Opening Comments at 59. This area has the potential to require significant resources and spawn litigation, both during initial consideration of the rule and on an ongoing, case-by-case basis.

## **3. Hazardous Traffic and Toxic-by-Inhalation (“TIH”) Traffic.**

Commenters ignore the application or impact of the NITL proposal on hazardous or TIH traffic in their studies and comments. Yet as NS raised in its opening comments, such traffic is subject to strict federal regulations, and there are numerous conflicts that would need to be resolved. *See* NS Opening Comments at 54-55. The NITL proposal could result in numerous unintended consequences, including more traffic passing through High Threat Urban Areas, longer shipment times with corresponding increased risk, routing over lines not designated for PTC (or, conversely, potentially stranding PTC investments), and many others. In practice, the NITL proposal is inconsistent with the regulations promulgated by at least the Pipeline and Hazardous Material Safety Administration (“PHMSA”) for the handling and routing of TIH and

other hazardous materials. NS Opening Comments at 54. To be sure, the Chlorine Institute supports the NITL proposal, *see* Chlorine Institute Opening Comments at 1, but even it ignores these substantial issues regarding the routing and handling of TIH traffic. Although NS does not credit the studies' specific findings due to their flaws and limitations discussed above, several commenters concluded that chemical shipments are one of the most affected commodity groups, which would only heighten these concerns. But they too do not mention the conflict between the NITL proposal and other government regulation regarding the transportation of TIH traffic. *See* DOT Opening Comments at 8.

\* \* \* \* \*

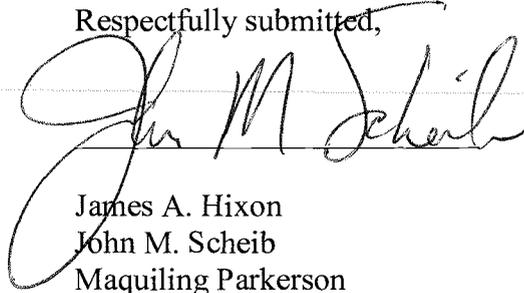
In sum, the opening comments confirm that the Board's hope that NITL's proposal could reduce government intervention is sorely misplaced. NITL and other shippers commenting have made clear that forced switching is intended to "supplement," not streamline, current regulatory procedures. The ambiguity and uncertainty that continues to surround NITL's proposal guarantees that this "supplementation" will include significant amounts of litigation, with numerous issues required to be addressed on a case-by-case basis. Compounding this effect will be the push from ineligible shippers to relax the few definitive requirements so that, whatever the potential benefits of the NITL proposal are, they will not be left with only a share of the costs. Thus, forced switching will expand the scope of governmental intervention, and the accompanying burdens it places on the parties and the Board, even further.

## VI. CONCLUSION.

NITL's Petition was unsupported and unlawful when filed and remains so today. In addition, NITL's proposal cannot meet the Board's test for whether to initiate a rulemaking proceeding. As shown by the Board's decision in *Ex Parte 717*, the burden is on the party filing a petition to show that it has presented a "practical framework" and that its proposal can overcome identified practical difficulties. *See Ex Parte 717 Decision at 7.* The NITL Petition failed this test on the day it was filed, which is proven by the fact that there was so little information provided that the Board had to initiate this inquiry.

Having conducted this inquiry, it is even clearer that the Board must reject the NITL Petition. Even after being given a second opportunity, NITL could not answer the Board's legitimate questions about NITL's own proposal. Whatever NITL and other parties attempted to model, it was not the NITL proposal because so many significant elements of that proposal – such as the 75% presumption and the "terminal" presumption – were completely ignored. Additionally, the significant unresolved issues – such as whether the NITL proposal encompasses exempt and contract traffic; whether it encompasses TIH traffic, and, if so, how forced access will be resolved with other regulations; the implications on labor; and the implications on environmental review – demonstrate that NITL's proposal is not practical or workable. In contrast, NS and other commenters have shown that forced switching would introduce increased costs and inefficiencies into network operations, affecting service for all customers. As a result, NITL's proposal perversely risks significant negative impacts to the entire rail network in its attempt to reallocate some rate reductions to a limited group of favored shippers. Accordingly, the NITL Petition is not in the public interest. NS respectfully submits that the time has come to reject the NITL Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib". The signature is written in a cursive style with a large initial "J" and "S".

James A. Hixon  
John M. Scheib  
Maquiling Parkerson  
Garrett D. Urban  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, VA 23510  
(757) 629-2657

*Counsel for Norfolk Southern Railway Company*

May 30, 2013