

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**RECIPROCAL SWITCHING
FOR INADEQUATE SERVICE**

DOCKET NO. EP 711 (Sub-No. 2)

REPLY COMMENTS ON BEHALF OF CN

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INTRODUCTION

The U.S. rail operating subsidiaries of Canadian National Railway Company (hereafter “CN”) respectfully submit these reply comments in response to the opening comments submitted by interested parties on November 7, 2023. CN also joins in the reply comments submitted by the Association of American Railroads (“AAR”).

The NPRM in this proceeding raises a number of complex issues for comment.¹ On opening, CN addressed various aspects of the NPRM, including the new proposed process for obtaining forced switching, the three new performance metrics, and the proposal to require disclosure of what amounts to pre-litigation discovery prior to the initiation of a proceeding. CN explained its concerns with certain aspects of these proposals while also offering potential solutions to align the NPRM with the statutory standard and the agency’s stated goals. CN also urged the Board to allow for additional engagement and collaborative refinement on the proposed performance metrics in particular, both in its opening comments and in ex parte meetings. A technical conference or conferences could be convened promptly and would allow for in depth discussion on how to craft standardized metrics in light of the comments in this proceeding and variations in operating practices and data collection and recordkeeping methods across Class I carriers.

¹ Notice of Proposed Rulemaking and Closure of Subdocket No. 1, *Reciprocal Switching for Inadequate Service*, Docket No. EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (“NPRM”).

Such additional engagement would be a judicious step in ensuring well-crafted and meaningful metrics, and may also ameliorate one of the central concerns CN identified in its opening comments: the fact that, as currently proposed, the performance metrics would not necessarily indicate any service inadequacy at all.² If the Board intends to consider metrics in ordering forced switching, fine-tuning those metrics to ensure that they reliably indicate service inadequacy is an important step because the public interest standard requires that there be actual necessity and compelling reason for a forced switching order to remedy a current service inadequacy. More broadly, the Board can align the NPRM with the statutory standard by ensuring that it issues appropriate findings based on a qualitative assessment of the allegations of service inadequacy in an individual case.

CN addresses these themes in Section I below, explaining why proposals from shipper interests, such as adopting more stringent performance thresholds, are not consistent with the governing legal standard, which requires a finding of a current service inadequacy. Similarly, CN explains why the Board's proposed transit time metric does not reliably indicate a service inadequacy based on a study provided by the AAR.

In Section II, CN addresses comments relating to the NPRM's proposed affirmative defenses, and offers suggestions on how the Board could provide needed

² See CN Opening Comments (filed Nov. 7, 2023), at 10–11.

clarity if it chooses to proceed with its proposed approach to pre-define certain categories of defenses.

Finally, in Section III, CN responds to shipper interests that ask the Board to regulate the performance of traffic under contract in violation of 49 U.S.C. § 10709. CN explains that the unequivocal language of the statute prohibits the Board from imposing liability for service quality provided under a contract.

I. THE BOARD SHOULD REJECT PROPOSALS THAT ARE NOT CONSISTENT WITH THE STATUTORY STANDARD AND ENSURE IT MAKES APPROPRIATE FINDINGS IN EACH PROCEEDING

CN explained in its opening comments why the performance metrics and thresholds, as well as the proposed framework for ordering switching, are not currently formulated to ensure that a forced-switching order would be in the public interest as required by 49 U.S.C. § 11102(c). An order for forced switching is in the public interest when there is “some actual necessity or some compelling reason” that establishes agency intervention is required to remedy a current service inadequacy.³ CN also offered various suggestions that would align the NPRM with the statutory standard.

Notably, shipper interests that offered opening comments on the NPRM did not engage with the meaning of the public interest standard beyond a mere recitation of the statutory language, nor did they engage with agency precedent applying the public interest standard. As CN explained on opening, the Board is

³ *Jamestown, N.Y. Chamber of Com. v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933); see *Mfrs. Assoc. of York, Pa. v. Pa. R.R.*, 73 I.C.C. 40, 50 (1922).

not writing on a clean slate when it comes to the statutory standard. Yet many commenters seek various adjustments to the NPRM’s proposed switching framework and performance metrics that would in most cases exacerbate aspects of the NPRM that currently diverge from the statutory standard. These adjustments include increasing the minimum thresholds for each performance metric (or decreasing in the case of transit time),⁴ decreasing the period of time over which performance would be measured,⁵ and changing how the metrics are measured,⁶ all to make it easier to trip the metrics without any evidence as to whether the metrics would indicate a service inadequacy. They also include extending the duration of a switching order’s term or even making it permanent.⁷

These modifications are not consistent with the remedial nature of the statute, nor are they geared toward ensuring a Board finding that there is actual necessity or compelling reason for agency intervention to remedy a current service

⁴ See, e.g., National Stone, Sand & Gravel Association Opening Comments (filed Nov. 7, 2023), at 7 (urging an 80% OETA threshold); American Fuel & Petrochemical Manufacturers (“AFPM”) Opening Comments (filed Nov. 7, 2023), at 11 (arguing that a 15% increase in transit time should trip the metric).

⁵ See, e.g., AFPM Opening Comments at 6, 9, 12 (filed Nov. 7, 2023), at 6 (asking the Board to reduce the 12-week measuring window to 6 weeks); Glass Industry Supply Chain Council Opening Comments (filed Nov. 7, 2023), at 5 (suggesting four to six weeks).

⁶ See, e.g., Olin Corporation Opening Comments (filed Nov. 7, 2023), at 5 (recommending the Board to measure OETA for railcars arriving more than 24 hours late *and* more than 24 hours early).

⁷ See, e.g., Diversified CPC International, Inc. Opening Comments (filed Nov. 7, 2023), at 11 (suggesting a term of five to ten years); Coalition Associations Opening Comments (filed Nov. 7, 2023), at 56–58 (calling for the Board to make a prescription for forced switching permanent in certain situations).

inadequacy.⁸ For example, the Coalition Associations urge the Board to issue a permanent switching order if a carrier reduces service to a shipper without shipper consent or Board permission.⁹ Such a proposal is untethered to the governing legal standard, bearing no relation to whether a switching order would remedy a current service inadequacy.

Indeed, many shipper interests urge more stringent thresholds to trigger a forced switching order, but provide no empirical basis for why the more stringent thresholds would provide reliable evidence of a genuine and present service inadequacy. Many of these stakeholder proposals are based on anecdotal evidence or simply no evidence at all.¹⁰ The Coalition Associations rely on data reported in Docket No. EP 770 (Sub-No. 1),¹¹ but as CN explained on opening, those are system-wide, average metrics reported weekly on a temporary basis by the Class I railroads, each of which tracks, collects, and utilizes performance data differently.

CN has already explained why the NPRM's proposed metrics and thresholds do not necessarily indicate *any* inadequacy in rail service at all. Modifying the metrics and thresholds to be even more stringent would likely result in even more

⁸ *Jamestown*, 195 I.C.C. at 292; *see Mfrs. Assoc. of York, Pa.*, 73 I.C.C. at 50.

⁹ Coalition Associations Opening Comments at 58.

¹⁰ *See, e.g.*, AFPM Opening Comments at 9–10; Coalition Associations Opening Comments at 23; Essential Minerals Association Opening Comments (filed Nov. 7, 2023), at 6.

¹¹ *See, e.g.*, Coalition Associations Opening Comments at 22, 36 (premising their request for OETA and transit time thresholds on Class I reporting in Docket No. EP 770 (Sub-No. 1)).

potential “false positives”—situations where a railroad is providing adequate service but the metric is nonetheless triggered.

The transit time metric is especially problematic from the perspective of inaccurately signaling a service inadequacy. CN noted on opening its significant concerns with this metric, including the fact that the NPRM’s proposed threshold (20% or 25%) was not grounded in any prior data reporting or analysis.¹² CN also explained its concern that a simple year-over-year comparison of the average transit time would disproportionately and unreasonably impact shorter haul movements, where an increase in average delay of just a few hours from the previous year would trip the transit metric threshold even though a difference in transit time of a few hours is unquestionably not evidence of a service inadequacy.¹³

The analysis of FTI Consulting (“FTI”) submitted by the AAR further underscores the significant deficiencies in the transit time metric. Using nationwide carload traffic over a four-year period, FTI’s study demonstrates that the majority of Class I carload traffic would trigger the transit time metric and that nearly all Class I carload traffic was likely to experience an increase or a decrease in transit time of 20% over at least one rolling 12-week period in each year between 2020 and 2023.¹⁴ The results from FTI’s analysis in Table 1 are replicated below.

¹² *Id.* at 14.

¹³ *Id.* at 46–47.

¹⁴ AAR Reply Comments (filed Dec. 20, 2023), Reply Verified Statement and Written Testimony of M. Baranowski and N. Zebrowski (“Baranowski & Zebrowski V.S.”) at 7, Table 1.

FTI Table 1: Likelihood that a Given Carload in the Stated Year Traveled on a Lane With Year-Over-Year Transit Time Changes Over 20% in at Least One Rolling 12-Week Period Compared to the Prior Year Average

Year End September 30	20% Transit Time Increases	20% Transit Time Decreases	Transit Time Increases and Decreases	Transit Time Increases and/or Decreases
2020	53.9%	76.7%	38.5%	92.1%
2021	76.6%	53.7%	38.9%	91.5%
2022	82.5%	41.9%	31.3%	93.1%
2023	65.5%	62.3%	38.9%	88.8%

The results above reveal that the transit time metric does not indicate service inadequacies, but rather captures natural fluctuations given the variability of rail operations. Some commenters on opening had suggested using a multi-year average baseline.¹⁵ This constructive proposal was worthy of serious consideration to attempt to account for the typical variability in transit time that is not indicative of a service inadequacy. However, empirical evidence shows that it cannot rehabilitate the proposed transit time metric. As reflected in Table 3 of FTI’s statement, the use of a three-year average still results in the majority of Class I carload traffic triggering the metric. Indeed, using nationwide carload traffic for October 1, 2022 to September 30, 2023, with a 12-week comparison interval and a

¹⁵ See AFPM Opening Comments at 11 (recommending transit time be “compared against the average transit time over that lane the previous three years”); AAR Opening Comments (filed Nov. 7, 2023), at 57 (similar); Coalition Associations Opening Comments at 4 (recommending the Board adopt a “second threshold” for forced switching “if transit times increase more than 25% over three years”).

20% threshold, FTT's analysis shows that there is not a meaningful difference between using the prior year average (65.5% of traffic would trip the metric) and the prior three-year average (69.0% of traffic would trip the metric).¹⁶

Indeed, this multi-year-average proposal underscores the importance of grounding any performance metric and threshold in empirical evidence and analysis to ensure the metric's application would result in *reliable* evidence of a service inadequacy (or lack thereof). FTT's study demonstrates that the transit time metric is prone to incorrectly indicating a service inadequacy. It may be that additional study and engagement with stakeholders could help guide the Board to a potentially useful metric based on transit or cycle time, but at this time it should not be adopted. The Board can instead simply allow parties to present evidence relating to transit time or cycle time and any other evidence they believe supports their position in a case alleging service inadequacy.

However the Board proceeds, the results highlight the importance of ensuring a qualitative approach to determining whether forced switching is practicable and in the public interest. Even if the Board fine-tunes its proposed metrics, simple reliance on those metrics could still result in situations where switching would be ordered when there is no service inadequacy and in the absence of actual necessity or compelling reason for regulatory intervention. For this reason, the Board should clarify that, in any proceeding brought under new part 1145, the Board must make a finding that there is a current service inadequacy and

¹⁶ AAR Reply Comments, Baranowski & Zebrowski V.S. at 8–9, Tables 2 and 3.

that there is actual necessity and compelling reason for the Board to impose forced switching. Implementing this suggestion, CN proposes the following regulatory language for proposed § 1145.6(a).

§ 1145.6 Prescription.

(a) The Board will prescribe a reciprocal switching agreement under part 1145 if it finds that all the conditions in this paragraph (a) are met.

(1) For the lane of traffic that is the subject of the petition, the petitioner is a terminal-area shipper or receiver that has practical physical access to only one Class I carrier that could serve that lane.

(2) The incumbent rail carrier is currently providing inadequate rail service to the petitioner that will be remedied by the proposed switching agreement. In determining whether there is a current service inadequacy, the Board may consider the rail carrier's failure to meet one or more of the performance standards in § 1145.2 with regards to the petitioner's shipment and all other evidence submitted.

(3) Actual necessity or compelling reason for the reciprocal switching arrangement exists. In making this determination, the Board will consider the interests of other shippers, carriers, and the general public.

(4) The switching agreement is safe and practicable and will not unduly impair either rail carrier's operations.

* * *

II. THE BOARD SHOULD PROVIDE NEEDED CLARITY IF IT PURSUES AN APPROACH TO PRE-DEFINE AFFIRMATIVE DEFENSES

On opening, CN raised concerns with proposed § 1145.3, which enumerates four narrow affirmative defenses. CN explained that the NPRM omitted a number of other scenarios where a railroad may be able to show that a switch should not be

ordered, including normal aspects of railroad operations that may cause temporary impacts to service, such as periodic maintenance.¹⁷

Other interested parties identified additional situations that were omitted from the NPRM's list of affirmative defenses, but which would render a switching order inappropriate. These situations include capital improvement projects; third-party conduct outside the incumbent carrier's control; valid embargos; or situations where the service inadequacy has been cured.¹⁸ CN agrees that these would likewise be situations where a forced switching order would be inappropriate.

While the Board states that it "will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section," the NPRM does not explain the standard by which the Board would find a non-specified defense to be valid.¹⁹ Further, by enumerating just a few narrow defenses, the NPRM would create significant uncertainty for rail carriers about situations that are not specified in the regulations. For example, the regulations would provide a defense for severe weather events that cause unforeseen track outages, but as CN explained on opening, severe weather events need not cause trackage outages to impact a railroad's service.²⁰

¹⁷ CN Opening Comments at 23–25.

¹⁸ *See, e.g.*, AAR Opening Comments at 75–80; BNSF Railway Company ("BNSF") Opening Comments (filed Nov. 7, 2023), at 10–11; Union Pacific Railroad Company ("UP") Opening Comments (filed Nov. 7, 2023), at 14; CSX Transportation, Inc. ("CSXT") Opening Comments (filed Nov. 7, 2023), Verified Statement of C. Albright ("Albright V.S.") at 6–9.

¹⁹ *See* NPRM at 41 (proposed § 1145.3).

²⁰ CN Opening Comments at 11, 23–24.

CN continues to believe that, just as it is not “possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times,”²¹ likewise it is not possible to circumscribe in advance the full universe of factual scenarios that might inform whether a regulatory remedy is appropriate.

As such, if the Board nonetheless proceeds with an approach to pre-define certain categories of defenses, it should reject calls to limit the defenses that can be invoked.²² CN’s opening comments and the opening comments of AAR and others provide examples of additional situations where a forced switching order would be inappropriate and should be reflected in any rule attempting to define such situations in advance.²³

Importantly, though, if the Board adopts a pre-defined list in proposed § 1145.3, it should make clear that no inferences can be drawn as to the validity of other defenses that are not specified based on the list of defined affirmative defenses. For example, if the Board adopts the pre-defined affirmative defense at proposed § 1145.3(a), which states that an incumbent carrier does not fail a performance metric when a severe weather event causes track outages, there should be no negative inference that a defense about a severe weather event that does *not*

²¹ *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. 968, 975 (1998).

²² See AFPM Opening Comments at 15.

²³ See CN Opening Comments at 23–25; BNSF Opening Comments at 10–11; UP Opening Comments at 14; AAR Opening Comments at 75–80; CSXT Opening Comments, Albright V.S. at 6–9.

cause a track outage is invalid. Similarly, if the pre-defined defense at proposed § 1145.3(b) regarding a surge in petitioner’s traffic is adopted, there should be no negative inference for a defense raised relating to a surge in *non*-petitioner traffic.

Additionally and more fundamentally, the Board should make clear that any other defense that demonstrates there is no service inadequacy or there is no actual necessity or compelling reason for a switching arrangement would also serve as a valid defense.

Implementing the suggestions above, CN proposes the following regulatory language for proposed § 1145.3.

§ 1145.3 Defenses.

The Board will consider any defense relevant to whether there is a service inadequacy for which there is actual necessity or compelling reason for a switching agreement, including, but not limited to, the defenses listed in this section. The defenses specified in this section are not exclusive and shall not create a presumption as to the validity of any other defense raised by a rail carrier.

* * *

III. THE BOARD CANNOT ORDER FORCED SWITCHING BASED ON THE PERFORMANCE OF CONTRACT TRAFFIC

As CN explained on opening, Congress removed contract traffic from any Board regulation under Title 49, Subtitle IV, Part A, which encompasses the forced reciprocal switching provision at 49 U.S.C. § 11102(c).²⁴

The Coalition Associations and some other shipper interests acknowledge, as they must, that § 10709 “excludes from the Board’s jurisdiction contracts between a

²⁴ 49 U.S.C. § 10709(c)(1); Decision, *Ameropan Oil Corp. v. Canadian Nat’l Ry.*, Docket No. NOR 42161, at 3 (STB served Apr. 17, 2019) (citation omitted).

shipper and a carrier and the transportation under such contracts.”²⁵ Yet some of these same commenters seek to circumvent this clear congressional directive by contending that the Board can order forced switching to commence upon termination of a contract based on railroad performance that occurred while the contract was in effect.²⁶ According to the Coalition Associations, the Board’s consideration of evidence that “includes contract movements is not the same as regulating [contract traffic] or the contracts themselves,” noting that a shipper “remains subject to the terms of any contract until it terminates.”²⁷ In other words, the Coalition Associations suggest that so long as the Board waits until the contract expires *before* the agency imposes liability for the service quality that occurred during the contract period on the basis of contract performance data, the agency is not regulating contract traffic in violation of § 10709.²⁸

That view is incorrect. Under the NPRM, the Board would impose forced switching based solely on whether the data indicates a failure of one of the Board’s three new performance standards.²⁹ The imposition of standards of conduct to

²⁵ *E.g.*, Coalition Associations Opening Comments at 10 (describing § 10709’s “jurisdictional limit” as “clear and longstanding”); Western Coal Traffic League (“WCTL”) Opening Comments (filed Nov. 7, 2023), at 2–3 (explaining that a “vast majority of unit train coal traffic occurs pursuant to contracts that are outside the Board’s jurisdiction”).

²⁶ *E.g.*, Coalition Associations Opening Comments at 10, 19–20; WCTL Opening Comments at 3–5.

²⁷ Coalition Associations Opening Comments at 10, 13.

²⁸ *See id.*

²⁹ *See* NPRM at 42 (proposed § 1145.6(a)).

which private parties must conform to avoid potential liability is a classic form of regulation. The Board describes the proposed regulations at part 1145 as providing an incentive for carriers to conform their service to the performance standards in the NPRM, with forced switching as the potential form of regulatory intervention.³⁰ If forced switching could be imposed based on service performance while moving under contract, railroads would have to conform their conduct under the contract to the NPRM's performance standards even during the contract period.³¹

This outcome would be in direct contravention of § 10709. Section 10709 expressly provides that a party to a transportation contract “shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract”; that such a contract “shall not be subject to” the statutory provisions at Part A; that the transportation under such a contract “may not be subsequently challenged before the Board”; and that “[t]he exclusive remedy” for any alleged breach of a contract is an action in an appropriate court, unless the parties otherwise agree.³² As Congress explained, the statute excludes rail transportation contracts and “the service provided under th[ose] contract[s] . . . from *all regulation* and all of the requirements of the Interstate Commerce Act.”³³

³⁰ *Id.* at 5 (describing the proposal as providing “appropriate regulatory incentives to Class I carriers to achieve and to maintain higher service levels on an ongoing basis”).

³¹ *See Union Pac. R.R. v. Chi. Transit Auth.*, 647 F.3d 675, 679 n.2 (7th Cir. 2011) (regulation is the “act or process of controlling by rule or restriction.” (quoting Black’s Law Dictionary (9th ed. 2009), *regulation*)).

³² 49 U.S.C. § 10709(b), (c)(1), (c)(2).

³³ H.R. REP. NO. 96–1430, at 100 (1980) (Conf. Rep.) (alterations and emphasis

Despite the clear language of the statute, and the agency's long-standing precedent regarding its jurisdictional limits,³⁴ shipper interests in this proceeding ask the Board to regulate the performance of traffic under contract based on a handful of agency decisions, none of which can bear the weight of their arguments. The Coalition Associations, for example, point to *Midtec II* and *Vista Chemical*, but those cases only made observations about the existence of contracts in the context of considering anticompetitive conduct.³⁵ They did not assess the performance of contract traffic, or attempt to impose a federal remedy based on the performance of such traffic. Moreover, neither case acknowledges or addresses former § 10713 (now § 10709).³⁶

These shipper interests also point to agency decisions requiring the submission of system-wide traffic data to the Board, but there is a vast difference

added); see CN Opening Comments at 50 n.88.

³⁴ See, e.g., *Ameropan Oil Corp.*, Docket No. NOR 42161, at 2, 4–5 & n.6 (the agency “lacks regulatory authority over the terms and conditions related to [contract] transportation, whether or not explicitly addressed in the contract,” including over issues concerning the “failure to provide adequate rail service”); see also Decision, *Cross Oil Refin. & Mktg, Inc. v. Union Pac. R.R.*, Docket No. FD 33582 (STB served Oct. 27, 1998) (“Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction”); Decision, *Union Pac. R.R.—Petition for Declaratory Order*, Docket No. FD 35021, at 2 (STB served May 16, 2007) (“[U]nder 49 U.S.C. 10709 we have no authority to regulate rail rates and services that are governed by a contract.”).

³⁵ See generally *Midtec Paper Corp., et al. v. Chi. & Nw. Transp. Co. (Use of Terminal Facilities & Reciprocal Switching Agreement)*, 3 I.C.C.2d 171 (1986) (“*Midtec II*”); *Vista Chem. Co. v. The Atchinson, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331 (1989).

³⁶ See *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1074–75 (1996) (finding unpersuasive decisions that “did not squarely address” the “jurisdictionousting language of 49 U.S.C. § 10709(c)(1)”).

between regulating specific traffic based on its performance while under contract and receiving system-wide data to “gain a better understanding of and insight into the general flow of traffic on the system.”³⁷ The Board’s adoption of demurrage billing regulations likewise says nothing about the ability to regulate contract traffic, as the Board’s decision did not address contract traffic or include any discussion of § 10709 whatsoever.³⁸

Finally, the Board should reject the Coalition Associations’ request that a shipper be permitted to file a petition a year in advance of a contract’s expiration.³⁹ Not only would a forced switching order based on the performance of traffic under contract be impermissible regulation under § 10709, but such an order would be inconsistent with the public interest standard at § 11102(c), which requires actual necessity or compelling need to remedy a current service inadequacy. A petition filed 12 months before the forced switch remedy becomes available will have no bearing on whether service to that shipper is inadequate one year later—the time of

³⁷ See Final Rule, *United States Rail Service Issues—Performance Data Reporting*, Docket No. EP 724 (Sub-No. 4), at 18 (STB served Nov. 30, 2016).

³⁸ See generally Final Rule, *Demurrage Billing Requirements*, Docket No. EP 759 (STB served Apr. 6, 2021). The Coalition Associations also cite to the final rule in Docket No. EP 628, where the Board suggested that it might be able to impose a regulatory remedy in situations where no transportation is being provided. See *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 980. Regardless of the merits of that suggestion, the scenario where no transportation is being provided is not contemplated by the NPRM and as the Board correctly recognized in that decision, it “cannot enforce, interpret, or disturb the contracts themselves, nor can [it] directly regulate transportation that is provided under such a contract.” *Id.* at 976.

³⁹ Coalition Associations Opening Comments at 20 (arguing that nothing prevents the Board from allowing a shipper to file a petition “more than a year prior to contract expiration.”).

the future forced switching period.⁴⁰ Consequently, the Coalition Associations’ approach would improperly permit Board-ordered switching that would be untethered from a present service inadequacy in contravention of § 11102(c)’s public interest standard.

CONCLUSION

CN appreciates the Board’s careful consideration of CN’s opening comments and these reply comments. CN respectfully requests that the Board expeditiously convene a technical conference or conferences to discuss how to craft standardized metrics, and that the Board amend the NPRM as recommended by CN and the AAR to ensure that any rule adopted by the Board aligns with the statutory standard.

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⁴⁰ See CN Opening Comments at 16–17 (explaining that the 12-week period “must be close in time to the filing of the petition” because a “metric based on stale data cannot indicate a current service inadequacy”).