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SURFACE TRANSPORTATION BOARD**

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RECIPROCAL SWITCHING

REPLY COMMENTS OF INEOS USA LLC

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I. Introduction and Summary

Pursuant to the Surface Transportation Board's ("STB" or "Board") Notice of Proposed Rulemaking issued herein on July 27, 2016¹ (and the Notices extending the procedural schedule issued on September 1, 2016 and December 27, 2016), INEOS USA LLC ("INEOS") hereby submits its Reply Comments on the NPRM. INEOS submitted Initial Comments in this proceeding on October 26, 2016. INEOS appreciates the opportunity to file Reply Comments in response to the positions advocated by other participants.

As stated in its Initial Comments, INEOS applauds the STB's efforts to enhance competitive switching.² INEOS is a prime example of a shipper for whom competitive-switching relief is appropriate, because it ships large volumes of chemicals to and from various locations within the United States, many of which have access to only one Class I railroad. At such locations, INEOS typically lacks effective rail-to-rail competition, and other modes of transportation are not competitive with the rail mode where railroads are used. Competitive switching is a tool for mitigating railroad monopoly market power and would lead to operational and economic efficiencies in our business.

Except to the extent discussed herein, INEOS's Reply Comments incorporate and adopt the Reply Comments submitted in this proceeding by The Shipper Coalition for Railroad Competition ("Shipper Coalition").

INEOS reiterates the importance of simplifying and streamlining the process for obtaining competitive-switching relief and for establishing a fair and efficient timeline for resolving such proceedings. As noted in its Initial Comments (at 14), an expedited approach is particularly appropriate in the competitive-switching context because refunds are not available to prevailing applicants. With respect to the first statutory prong, the "practicable and in the public interest" test, the STB should clearly define factors that a shipper can use to establish a *prima facie* case for competitive-switching relief, with the burden then shifting to the railroad to demonstrate why relief should not be granted. With respect to the second statutory prong, the "necessary to provide competitive railroad service" test, there is no statutory basis for the Board's proposal to impose the "market dominance" test, which is required for obtaining rate relief, as a prerequisite for obtaining competitive-switching relief. There also is no statutory basis for the Board's proposal to exempt short-line railroads from the competitive-switching rules. Finally, INEOS believes that the competitive-switching fee should be set no higher than the incumbent railroad's fully allocated costs, both as a matter of economics and so as to avoid making the competitive-switching remedy of no value if the shipper were required to pay a rate that includes not only the costs (including a reasonable return) of the competitor railroad, but also the lost profits of the incumbent railroad in the competitive-switching fee paid to the incumbent railroad by the competitor railroad.

¹ Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching*, slip op. (Aug. 3, 2016) ("NPRM").

² As INEOS explained in its Initial Comments (at 1 n.2), it regards "competitive switching" as a more accurate description of the Board's proposed rules than "reciprocal switching," because there is nothing reciprocal involved in the Board's proposal. We therefore refer to "competitive switching" throughout these Reply Comments.

II. Incorporation and Adoption of Shipper Coalition Reply Comments

INEOS hereby incorporates and adopts the Reply Comments filed in this proceeding by the Shipper Coalition, except to the extent discussed below. INEOS is a member of the American Fuel and Petrochemical Manufacturers, which is part of the Shipper Coalition.

III. The STB Should Establish the Elements of a *Prima Facie* Case for Relief Under the “Practicable and in the Public Interest” Prong That Shippers Can Rely on to Establish a Rebuttable Presumption for Relief

INEOS agrees with the concerns expressed by the Shipper Coalition in its Initial Comments that the proposed rules are likely to lead to “lengthy, complex and expensive litigation” that would make it difficult for many shippers to obtain competitive-switching relief.³ As stated in its Initial Comments (at 5), INEOS believes that requiring each shipper to be forced to litigate in an open-ended, multi-faceted proceeding under the “practicable and in the public interest” prong would unduly complicate and delay the proceeding. The problem is profound, and could effectively gut the Board’s proposed rules.

The history of Interstate Commerce Commission and STB proceedings, ever since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, in which shippers seek relief from anti-competitive circumstances, leaves no doubt that the railroads, when presented the opportunity to litigate every issue identified by the Board as potentially relevant, as well as having been presented with the opportunity to litigate still more issues that a railroad may conjure up to further complicate and delay a proceeding, will do so. Why would they not, especially if they may be able to prevent useful precedent that other shippers could then cite? Surely, the Board does not intend every proceeding involving a request for competitive-switching to bog down the agency and its limited staff. Yet, that is exactly what will happen if the Board does not strictly prescribe the necessary elements to make a *prima facie* case entitling a shipper to relief.⁴

Instead, the STB should establish a *prima facie* case with clear elements that a shipper can use to create a rebuttable presumption in favor of relief. If a shipper presents evidence and arguments meeting the *prima facie* threshold, the burden should shift to the incumbent railroad to rebut (if it chooses to do so) the presumption in favor of relief. If the incumbent railroad successfully rebuts the shipper’s *prima facie* case, the shipper should have an opportunity to conduct discovery and rebut the incumbent railroad’s case.⁵

³ Comments by The Shipper Coalition for Railroad Competition at 21-23, STB Ex Parte No. 711 (Sub-No.1), *Reciprocal Switching* (Oct. 26, 2016) (“Shipper Coalition Initial Comments”).

⁴ INEOS later demonstrates why competitive-switching relief is not a substantial threat to railroad industry revenues. See Section VII, *infra*.

⁵ If the Board sets out a few clear elements to establish a *prima facie* showing entitling the shipper to relief unless adequately rebutted by the railroad, shippers will likely not need discovery to present such an initial showing. Typically, the incumbent railroad would not need discovery, because it will be familiar with both the petitioner shipper’s circumstances and the circumstances of its other customers. But the petitioner shipper will not have the same

IV. There Is No Statutory Basis for Requiring a Showing of “Market Dominance” As a Prerequisite to Obtaining Competitive-Switching Relief

As stated in INEOS’s Initial Comments (at 9-10), there is no statutory basis for requiring a shipper to prove market dominance as a prerequisite to obtaining competitive-switching relief. Market dominance is a jurisdictional prerequisite to obtaining relief from an unreasonable rate under the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”),⁶ *see* 49 U.S.C. §§ 10701, 10707, but not to obtaining competitive-switching relief under 49 U.S.C. § 11102. The STB in the NPRM acknowledges as much,⁷ yet nevertheless proposes to engraft this test on the “necessary to provide competitive railroad service” prong. The best evidence that a showing of market dominance is not necessary to obtain relief under 49 U.S.C. § 11102 is that the statute itself does not so provide under either prong. Consistent with that reading, the Board’s proposed rules do not require a showing of market dominance to obtain relief under the first statutory prong (“practicable and in the public interest”).

The STB proposed to require a showing of market dominance, notwithstanding its lack of statutory foundation, with respect to the second prong (“necessary to provide competitive rail service”), ostensibly on grounds that market dominance is an established test well-known to litigants before the STB. NPRM at 22. Although it is an established test and is well-known to certain litigants, that does not justify engrafting it onto a section of the statute to which Congress did not apply it. Satisfying that established and well-known test is expensive and time-consuming (and is unnecessary here, because a shipper would not seek competitive-switching relief if it has effective transportation competition, as we discuss *infra*). Moreover, and contrary to the Board’s view (*id.*) that it is free to apply the market-dominance test to requests for competitive-switching relief, the fact that Congress applied the market-dominance test to challenges to the reasonableness of a rate, but not to requests for competitive-switching relief, demonstrates that Congress did not intend that shippers have to prove market dominance to obtain such relief.

It seems obvious that the Board’s real reason for engrafting the market-dominance test onto requests for relief under the second statutory prong was because of the presumed revenue impact of its proposals on the railroad industry.⁸ But, as we demonstrate herein, the revenue

information as does the incumbent railroad, which is why the petitioner shipper may need discovery to rebut the incumbent railroad’s presentation.

⁶ Pub. L. No. 104-88, 109 Stat. 803 (codified at 49 U.S.C. §§ 10101, *et seq.*).

⁷ NPRM at 22 (citing *Midtec Paper Corp. v. Chicago & N. W. Trans. Co.*, 3 I.C.C.2d 171, 180 (1986)).

⁸ Requiring a showing of market dominance to obtain competitive-switching relief would preclude otherwise-deserving shippers from seeking such relief, if their rate does not exceed 180 percent of variable costs (as determined on a system-average cost basis, in accordance with the methodology the STB has employed in calculating market dominance in rate-reasonableness challenges). *Compare* Initial Comments of Sandy Creek Energy Associates, *et al.*, at 2, Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching* (Oct. 26, 2016) (noting that Union Pacific sets coal rates at 180 percent of variable costs, on a system-average basis, even though such rates are actually much higher, if actual costs were used to calculate the revenue/variable cost ratio). If the Board adheres to the requirement that market dominance be shown as a prerequisite to

impact on the railroad industry of the Board's proposed rules should be slight, and may even benefit railroads. Accordingly, there is no legal or policy justification for making proof of market dominance a prerequisite to obtaining competitive-switching relief.

Even railroads and railroad associations that submitted Initial Comments in this proceeding argue against application of the market-dominance test in the competitive-switching context, in part due to lack of statutory foundation.⁹

Further, use of the market dominance test would likely add significant cost, complication, and delay in competitive-switching proceedings, and undermine ICCTA's mandate of "expeditious handling and resolution of all proceedings."¹⁰

Finally, not only is the market-dominance test devoid of statutory support in the competitive-switching context, but it is also superfluous. As stated in INEOS's Initial Comments (at 10), when a shipper is served by only one rail carrier, the fact that the shipper is seeking access to a second carrier is obvious evidence that it is not receiving reasonable rates and service from the incumbent.¹¹ Otherwise, why would a shipper incur the expense and delay associated with pursuing regulatory relief, when it has effective competition in the real world? Therefore, if a shipper demonstrates that it has access to only one carrier at a given site, that should prove a lack of competition sufficient to satisfy the second prong of 49 U.S.C. § 11102. If the incumbent railroad disagrees, it can present evidence to show effective competition that is sufficient to obviate the necessity of prescribing such relief. The shipper would have the opportunity to rebut the railroad's showing. In that way, the issue would arise only if there were any basis for concluding that effective competition exists, rather than forcing the expense and delay associated with demonstrating market dominance.¹²

obtaining relief under the second statutory prong, it should at least allow the R/VC ratio to be calculated using actual costs, not system-average costs, so that otherwise-deserving shippers are not precluded from seeking relief to which they are entitled under the statute.

⁹ Opening Comments of the Ass'n of American Railroads at 15-19, STB Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching* (Oct. 26, 2016); Opening Comments and Evidence of Union Pacific Railroad Co. at 28-31, STB Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching* (Oct. 26, 2016); Opening Comments of CSX Transportation, Inc. at 13-20, STB Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching* (Oct. 26, 2016) ("CSX Initial Comments"); Opening Comments of Norfolk Southern Railway Co. at 30-36, STB Ex Parte No. 711 (Sub-No. 1), *Reciprocal Switching* (Oct. 26, 2016).

¹⁰ NPRM at 16 (citing 49 U.S.C. § 10101(2), (15)) (providing for "fair and expeditious handling of issues" when regulation is required).

¹¹ The railroads admit this. See, e.g., CSX Initial Comments at 15 ("One is hard pressed to find recent examples of sole-served shippers in rate cases where the Board found a lack of market dominance, even in the face of evidence that the shipper had access to alternative transportation . . .").

¹² In the Board's decision served January 4, 2017 in Finance Docket No. 42121, *Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc.*, the Board recounted the fact that it took *more than three years* just to resolve the issue of market dominance in the proceeding! While, to be fair, that proceeding involved multiple lanes of traffic, experience

V. The Competitive-Switching Fee Should Be Set No Higher Than the Incumbent Railroad's Fully Allocated Costs

The competitive-switching charge must be reasonable and not defeat the effectiveness of the competitive-switching remedy. As stated in its Initial Comments (at 12), INEOS believes that the competitive-switching fee should be limited to, at most, the incumbent carrier's fully allocated costs (which include a reasonable return); in no case should a "lost contribution" or "opportunity costs" element be added to the switching charge. Allowing the incumbent railroad to keep some or all of its existing monopoly profits as part of the prescribed competitive-switching fee would result in the shipper being double-charged for profits to which one railroad (not both) is entitled, thereby defeating the main purpose of competitive-switching relief and violating ICCTA's overriding policy goals to promote effective competition.

INEOS's position is consistent with the modified SSW Compensation Methodology advocated by the Shipper Coalition in their Initial Comments (at 50-54; *see also id.* at Exh. 2, Verified Statement of Thomas D. Crowley and Daniel L. Fapp at 14-27 (Oct. 26, 2016)).

VI. There Is No Statutory Basis for Exempting Short-Line Railroads from the Competitive-Switching Rules

There is no statutory or practical justification for exempting short-line railroads from the competitive-switching rules. As stated in INEOS's Initial Comments (at 13), ICCTA's competitive-switching provisions apply to all railroads, not just Class I carriers. Indeed, because short-line railroads are often the "last mile" at the origin or destination in a captive shipping arrangement, an exemption would encourage Class I railroads to further rely on short-line railroads as a way to avoid competitive-switching requirements. As stated in INEOS's Initial Comments (at 13), this loophole would essentially nullify the STB's efforts to promote competitive switching on a significant segment of the national rail grid, and would contradict the Rail Transportation Policy.¹³

The claim made by the American Short Line & Regional Railroad Association ("ASLRRA") in its Initial Comments,¹⁴ to the effect that application of the competitive-switching rules to short-line railroads will adversely affect the financial viability of short-lines, is neither substantiated nor legally relevant. ASLRRA appears to assume that the rules will reduce traffic, and therefore revenues, for short-line carriers. Yet in INEOS's experience, as noted in its Initial Comments (at 13), short-line railroads typically benefit when their customers' facilities

demonstrates that it will take at least several months, and perhaps a year or more, to resolve market-dominance issues in any STB proceeding. If the incumbent railroad is given an invitation to delay relief to a deserving shipper by litigating the market-dominance issue even where the shipper does not have effective competition (or else, to repeat ourselves, it would not seek competitive-switching relief), experience also teaches that the incumbent railroad will raise the issue unless it is frivolous, just to delay prescription of the switching remedy. Why would it not, if the Board allows it to delay a remedy it opposes?

¹³ 49 U.S.C. § 10101.

¹⁴ Comments of the American Short Line & Regional Railroad Ass'n at 8-11, STB Ex Parte No. 711 (Sub-No.1), *Reciprocal Switching* (Oct. 26, 2016).

have access to rail-to-rail competition, and many short-line railroads already provide switching service because it benefits them financially. Additionally, reciprocal switching and the competition it would create would not necessarily lower volumes shipped at competitive rates, but may even lead to increased or new volumes and opportunities for growth in revenues via improved demand due to improved global competitiveness for our products.

In any event, as discussed in the next section of these Reply Comments, the Board's apparent reason for exempting Class II and Class III railroads from its competitive-switching proposal was because of concern over the financial impact of the proposals on the railroad industry. Yet, as INEOS also shows, the proposals are likely to have only a very modest, probably insignificant, impact on the revenues of the railroad industry.

Indeed, if Class II and Class III railroads are freed of arbitrary restrictions on which railroad they can interchange with, Class II and Class III railroads should actually benefit from the Board's proposals.

VII. Revenue Impact

The Board's proposed rules will not have a significant impact on the gross revenues of the railroad industry, and may even improve those revenues. The reason that is so is that the competitor railroad will, obviously, set the rate it charges sufficiently high to (a) at least cover not only its costs, including at least a fair return (or else it would make no economic sense to provide the service), and (b) also recover the competitive-switching fee charged by the incumbent railroad to provide the switching service. It should be obvious that the competitor railroad will, therefore, typically charge a rate that is not substantially below that currently charged by the incumbent railroad, if it can even charge a lower rate than the incumbent despite the burden of paying the competitive-switching fee. Moreover, the loss of revenue to the incumbent railroad is necessarily offset, on an industry-wide basis, by the gain in revenue to the competitor railroad. So, the net impact to the industry should be slight.

In any event, the estimates of significant revenue loss to the railroad industry from the Board's proposals appear to assume that many, if not all, shippers who are entitled to seek such relief will do so. That is obviously wrong; most shippers avoid seeking relief from the STB if they can solve their own problems in the commercial world.¹⁵ Instead, the impact of the Board's proposed rules is likely to make the commercial playing field more level, allowing shippers to resolve their present problems with lack of competition without incurring the expense and delay associated with seeking regulatory relief. But, when shippers do so, the rates paid to the

¹⁵ In its Initial Comments, the U.S. Department of Transportation ("DOT") cited its earlier estimate that the revenue loss to the railroad industry from the Board's proposals would be approximately 2.1 percent of gross revenues, but DOT forthrightly conceded that "the analysis depended heavily upon the assumptions that were employed, and that other reasonable assumptions or parameters could lead to very different results for the Board to consider." Opening Comments of the United States Department of Transportation at 2, STB Ex Parte No. 711 (Sub-No.1), *Reciprocal Switching* (Oct. 26, 2016). We demonstrate herein that the assumptions underlying that, and similar estimates (Board Member Begeman's separate opinion used the DOT 2.1 percent estimate of gross revenues (NPRM at 34-35)), are simply incorrect.

competitor railroad are unlikely to be much below the rates paid to the incumbent railroad, for the reasons stated herein.

For all of those reasons, the revenue impact of the Board's proposals is likely to be slight, rather than significant, as the Board Members seemingly assumed.¹⁶

VIII. Conclusion

INEOS is a large chemical shipper that would benefit greatly from the operational and economic efficiencies of rail-to-rail competition. INEOS supports the STB's efforts to revise its competitive-switching rules to afford all shippers and their customers a meaningful opportunity to obtain competitive switching. INEOS encourages the STB to simplify its proposed competitive-switching rules; the overly complicated rules proposed by the Board would only add unnecessary costs and delay proceedings seeking such relief. As a result, few shippers may be able to seek such relief, even if they are otherwise entitled to it.

The necessary showing to obtain relief under the "practicable and in the public interest" statutory prong should be simplified and streamlined, setting out limited and well-defined elements that a shipper can rely on to establish a rebuttable presumption in favor of relief.

There is no statutory basis for requiring shippers to demonstrate market dominance as a prerequisite to obtain relief under the "necessary to provide competitive railroad service" statutory prong. If a shipper demonstrates that it has access to only one railroad carrier at a given site and is seeking competitive-switching relief from the Board, then it is obvious that the shipper lacks effective rail-to-rail competition (or else it would solve its problems much faster in the commercial context).

The competitive-switching fee must be set so that it does not double-charge the shipper for profit and thereby deny the very relief supposedly being made available. The access charge should be limited to, at most, the incumbent railroad's fully allocated costs; a "lost contribution" or "opportunity costs" element is wholly inappropriate and would defeat the usefulness of the Board's proposals.

The STB's proposal to exclude short-line railroads from the revised competitive-switching rules is contrary to law. Moreover, short-line railroads are often the "last mile," so exempting short-line railroads from the proposed rules would essentially nullify the STB's efforts to promote competitive switching in many portions of the national rail grid.

¹⁶ Board Member Begeman's separate opinion (NPRM at 34-36) stated that DOT's estimated impact of the proposed rules on the railroad industry's revenues—a 2.1 percent reduction in the industry's gross revenues—was considered "significant inside the agency." *Id.* at 34. So, obviously, that estimate had a significant impact on the Board's thinking about what to propose.

INEOS appreciates this opportunity to provide Reply Comments on the NPRM and commends the STB's efforts to revise its competitive-switching rules in order to promote rail-to-rail competition. INEOS urges the Board to modify its proposed rules as proposed in the Comments filed by INEOS and, to the extent not inconsistent with INEOS's Comments, those of the Shipper Coalition.

Respectfully submitted,

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