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Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

REPLY COMMENTS

submitted by

THE SHIPPER COALITION FOR RAILROAD COMPETITION

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Alliance of Automobile Manufacturers
American Chemistry Council
American Fuel & Petrochemical Manufacturers
American Petroleum Institute
Chlorine Institute
The Fertilizer Institute
Glass Packaging Institute
National Association of Chemical Distributors
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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY OF THE SHIPPER COALITION REPLY COMMENTS.....	2
II. THE BOARD’S PROPOSAL IS LAWFUL.....	13
A. In Analyzing the Railroads’ Arguments, the Board Should First Focus on Three Basic Principles	14
1. Congress intended for the Board to use reciprocal switching to increase rail-to-rail competition.....	14
2. The Board has extremely broad discretion to change its rules.	17
3. Substantially changed circumstances in the rail industry justify changes to the Board’s reciprocal switching rules.....	19
B. Reciprocal Switching Is A “Right” To Be Enforced By The Board Based On An Exercise of Its Discretion; and the Board’s Proposal Properly Implements The Need for Reciprocal Switching As Required By The Statute	20
1. The Board’s Prong 1 Benefits/Detriments Analysis properly encompasses a “need” for reciprocal switching.....	24
2. Under Prong 2 of the statute, the only “need” that must be shown is the need for competitive rail service.....	27
C. The Board’s Proposal Is Consistent With the Rail Transportation Policy and the Overall Thrust of the Staggers Act.....	37
D. The Railroads’ Claimed “Reliance” On the Existing Rules Does Not Forbid the Board From Changing Its Rules.....	43
E. Reciprocal Switching is Not Backdoor Rate Regulation Since Switching Arrangements Allow the Competitive Market, Not Regulation, to Work Effectively.....	46
F. Congress Did Not Ratify the Current Reciprocal Switching Rules in ICCTA Or In the STBRA	49
III. THE BOARD’S PROPOSAL IS THE PRODUCT OF REASONED DECISION-MAKING	55
A. The Board Has Articulated a Rational Connection Between the Board’s Reasons For Acting and the Rules That It Has Proposed	55
1. The effects of rail consolidations justify changes in the reciprocal switching rules.	55
2. The Board is correct that the dearth of cases indicates the bar for reciprocal switching is unattainably high, which justifies a change in the rules.....	62

3.	The Board is correct that the railroads’ improved financial health and productivity and technology enhancements support changes to the current reciprocal switching rules.	65
B.	The Board’s Standards Are Not Impermissibly Vague	68
C.	Congress Did Not Restrict Reciprocal Switching To Terminal Areas	75
1.	The plain language of § 11102(c) tellingly omits any reference to terminal areas.	76
2.	Numerous authorities, including the railroads’ own public statements, fail to limit reciprocal switching to terminal areas.	78
3.	Reciprocal switching is not barred by railroads’ long-haul rights.	81
4.	Perverse incentives would be created by adding a terminal area limitation to the Board’s reciprocal switching authority.	82
D.	The Board Is Not Required To Perform A Cost-Benefit Analysis	83
E.	No Environmental Impact Statement Is Needed.....	84
IV.	THE RAILROAD ATTACKS ON THE BOARD’S PROPOSED CASE-BY-CASE ADJUDICATION ARE WRONG.....	86
A.	The Board’s Proposed Case-By-Case Approach Is Consistent With the Statute and the Board is Fully Equipped to Assess the Impact of Its Decisions.....	86
B.	The Railroads Vastly Overstate the Potential Scope Of Impact of the Proposed Rules.....	89
C.	The Board Is Correct That There Should Be No Litigation of Broad Policies In Individual Reciprocal Switching Cases	95
V.	THE PROPOSED RULES WILL NOT HARM RAILROAD OPERATIONS	96
A.	Railroad Predictions Of Reduced Efficiencies And Operational Mayhem Are Wrong.	98
B.	The Board’s Case-By-Case Approach Allows It To Assess And Mitigate Effects Upon Operational Efficiency.....	107
C.	The Canadian Experience Shows That Reciprocal Switching Does Not Harm Railroad Operations	110
VI.	THE PROPOSED RULES WILL NOT INHIBIT INVESTMENT	116
VII.	THE BOARD SHOULD REJECT OTHER RAILROAD CRITICISMS	123
A.	The Board’s Proposal for the Duration of a Reciprocal Switching Order Is Valid.....	123
B.	The Railroad’s Generalized Complaints About Disparate Impacts Are Incorrect, and the Board Can Address These and Other Railroad Concerns In the Context of An Individual Case	125
C.	The Board Is Correct That the Existence of a Reciprocal Switching Remedy Should Not Automatically Mean That a Market Is Competitive.....	126

D.	The Board Is Not Required To Deal With Labor Protective Conditions or Labor Impacts At This Time.....	127
E.	The Board Is Correct To Eliminate the Current Standing Rule.....	128
F.	The Board’s Proposed Rules Clearly Apply Only to Shipper-Owned Facilities.....	129
G.	The Board Should Not Completely Exempt Short Lines From the Proposed Rule	130
VIII.	THE BOARD’S ACCESS FEE PROPOSALS ARE LAWFUL AND THE BOARD SHOULD NOT INCLUDE LOST CONTRIBUTION IN ITS DETERMINATION OF AN ACCESS PRICE	131
A.	Lost Contribution Should Not Be Included In the Access Price	131
B.	The Board’s Proposed Access Price Methodology Is Not Impermissibly Vague	133
C.	The Constitution Does Not Require An Access Price That Includes Lost Contribution	134
1.	A shipper’s captive status is not a property interest.	134
2.	Even if a property right exists, the issuance of any reciprocal switching order is not a “taking.”	136
IX.	CONCLUSION.....	139

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THE SHIPPER COALITION FOR RAILROAD COMPETITION

These Reply Comments are submitted by the Shipper Coalition for Railroad Competition (“Shipper Coalition”)¹ in response to the Opening Comments submitted by the Association of American Railroads (“AAR”) and individual Class I railroads, as well as the American Short Line and Regional Railroad Association (“ASLRRA”) in opposition to the Board’s proposed reciprocal switching rules. In support of these Reply Comments, the Shipper Coalition submits the Reply Verified Statements of Henry J. Roman (“Roman R.V.S.”) (Exhibit 1), John Orrison (“Orrison R.V.S.”) (Exhibit 2), and Dr. Kevin W. Caves (“Caves R.V.S.”) (Exhibit 3). Further, pursuant to the Board’s decision issued in this proceeding on January 12, 2017, the Shipper Coalition also incorporates by reference (without the need to attach hereto) the filings submitted

¹ The Shipper Coalition is comprised of a group of associations that represent a cross-section of manufacturers, producers and receivers across a broad array of American industry, including chemicals, petroleum, agricultural retailers, fertilizer, glass producers, and many others, who require competitive and efficient rail service in the receipt of raw materials and distribution of their products across the United States and abroad. Statements of interest for each of the organizations in the Shipper Coalition were provided in Exhibit 1 to the Shipper Coalition Comments submitted to the Board on October 26, 2016.

to the Board in its predecessor proceeding, Docket No. EP 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, that are listed in Exhibit 4.²

On October 26, 2016, the Shipper Coalition submitted Opening Comments (“Shipper Coalition Comments”) to the Surface Transportation Board (“Board” or “STB”) in response to the Board’s decision served on July 27, 2016 in Docket Nos. EP 711 and EP 711 (Sub-No. 1) (“Decision”), which granted in part a petition for rulemaking filed by the National Industrial Transportation League (“NITL”) on July 7, 2011 (“NITL Petition”). In its Decision, the Board proposed regulations that would allow a party to obtain a prescription for reciprocal switching under 49 U.S.C. § 11102(c) if it shows that the requested switching arrangement is either “practicable and in the public interest,” or “necessary to provide competitive rail service.” Decision at 16.

I. INTRODUCTION AND SUMMARY OF THE SHIPPER COALITION REPLY COMMENTS

In these Reply Comments, the Shipper Coalition responds to the false legal claims and exaggerated operational and investment concerns asserted by the rail industry in opposition to the Board’s proposed rule. The railroads’ filings have a single purpose—to squash the potential introduction of even a modicum of rail-to-rail competition through expanded reciprocal switching. The railroads have over-reacted to the Board’s reasonable reciprocal switching proposal, which was carefully derived from the very words of the statute and incorporates a measured case-by-case approach that allows the Board to monitor the implementation and impacts of the rule. The railroads have mounted a multi-layered attack against the proposed reciprocal switching rule on legal, policy and operational grounds; but, when their arguments and concerns are boiled down to their core, they evaporate one-by-one, exposing the carriers’

² Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Jan. 12, 2017).

desperate attempt to preserve the regulatory status quo and, thus, their rail monopolies over captive shippers.

However, retaining the reciprocal switching rule adopted in 1985 (“1985 Switching Rule”), which is obsolete in light of the modern-day rail industry, is inconsistent with the intent of Congress in adopting the Staggers Act, which authorized the Board to facilitate rail competition through reciprocal switching arrangements that are “practicable and in the public interest” **or** “necessary to provide competitive rail service.”³ The law is crystal clear that the Board has broad discretion to change its 1985 Switching Rule and its Decision explains the sound reasons that justify the Board’s proposal. Indeed, the Board is to be commended for taking the important step to modernize its competitive access policy in light of the rail industry’s remarkable transformation over the past thirty years. There is no dispute that the rail industry that suffered from over-capacity, inefficiencies and bankruptcies in the 1970s has evolved into a highly concentrated and profitable industry.⁴ Perhaps the most stunning revelation gleaned from the thousands of pages of railroad filings is not what is said but, rather, what is conspicuously missing: **any** serious acknowledgement that the rail industry of 1985 looks, operates, and performs nothing like the rail industry of 2017. The railroads’ filings present a picture intentionally designed to confine the Board in a time warp that serves only the carriers’ self-interest and not the public interest.

In these Reply Comments, the Shipper Coalition cuts sharply through the noise and obfuscation of the railroads’ comments and makes clear that change to the 1985 Switching Rule

³ 49 U.S.C. § 11102(c).

⁴ See Modernizing Freight Rail Regulation, Special Report 318, Transportation Research Board, National Academy of Sciences (2015), pp. 10-13 (describing the instability in the rail industry in the 1970s leading to passage of the Staggers Rail Act) and pp. 18-22 (describing the substantial market changes that have occurred in the post-Staggers environment, including productivity gains, consolidation, capacity reductions, and, more recently, rising rail rates).

is badly needed, and that the Board's proposed switching rule is lawful, rational, justified, and workable. The Shipper Coalition also debunks the railroads' exaggerated claims that the proposed rule will wreak havoc on the rail network and discourage investment, and summarily dispatches multiple inchoate attacks based on vagueness, environmental, labor, and constitutional grounds.

- **There Is a Need for the Board's Rule and the Rule Itself Defines the Showing of Need Required to Obtain a Switching Prescription.**

The railroads assert that there is no "need" for the proposed rule that supports changing the 1985 Switching Rule. But both the record in this and prior Board proceedings, as well as the law, contradict their assertion. Numerous companies and their representatives from a broad cross-section of industries, including chemicals, petroleum, agricultural, fertilizer, automobile, food, glass, cement, and manufacturing have expressed their need for reform of the current reciprocal switching policy to the Board, to help counter the loss of rail competition in the United States over the past decades. Attached as Exhibit 5 are numerous statements from government, company, and industry group filings at the Board in this proceeding, the Board's related Ex Parte 711 proceeding, and its prior Ex Parte 705 proceeding on the state of rail competition in the U.S.⁵ that demonstrate that changing the 1985 Switching Rule is needed.

Further, in Section II.B of this Reply, the Shipper Coalition establishes that no matter how loudly the railroads "bang on the table" in asserting that the Board's proposal permits switching to occur without a need, in reality, the Board's Decision expressly addresses the "need" requirement. Decision at 19. More importantly, the law provides the Board with broad discretion to define (or redefine) the showing of "need" that is required when enforcing a shipper's right to reciprocal switching established in the statute, which the Board has done in its

⁵ See STB Docket No. Ex Parte 705, Competition in the Railroad Industry (2011).

proposed rule. As explained herein, both of the Board’s proposed Prong 1 and Prong 2 criteria and burdens of proof already account for a showing of need. The Prong 1 need is consistent with the requirements of the statute and with pre-Midtec legal precedent; and the Prong 2 need is established by the very wording of the statute—“necessary to provide competitive rail service.” Further, the Board’s decision to replace the current insuperable “competitive abuse” standard with a showing of market dominance under Prong 2, i.e. a showing that there is no effective intramodal or intermodal competition, is consistent with the statutory language.

All of the railroads’ window dressing over the “need” requirement cannot disguise their true objective, i.e., to defend and preserve the existing and unworkable competitive abuse standard in the 1985 Switching Rule as the **only** standard to be applied by the Board.

- **The Proposed Reciprocal Switching Rule is Lawful.**

In Section II of this Reply, the Shipper Coalition discusses one-by-one the various other legal challenges asserted against the proposed reciprocal switching rule by the railroads. The Shipper Coalition begins by setting forth the proper framework for assessing the legality of the proposed rule, including an analysis of the statute, its legislative history, and case precedent, which shows that **(1) Congress intended for the Board to use reciprocal switching to increase rail-to-rail competition; (2) the Board has extremely broad discretion to change the 1985 Switching Rule; and (3) the proposed rule is justified in light of the rail industry’s transformation since 1985.**

Specifically, the Shipper Coalition shows in Section II that:

- o The proposed reciprocal switching rule is consistent with multiple elements of the Rail Transportation Policy (“RTP”) and the Board has properly performed its

obligation to reach “a reasonable accommodation of the conflicting policies set out in its governing statute.”⁶

- o The proposed reciprocal switching rule is not inconsistent with differential pricing and revenue adequacy, and railroad claims that reciprocal switching violates a railroad’s right to its long haul are expressly contradicted by the reciprocal switching exception at 49 U.S.C. § 10705(a)(2)(A).
- o The railroads’ attempts to narrow the Board’s discretion to change the 1985 Switching Rule based on their alleged “reliance” on single line service misconstrues the law. Even if a valid “reliance” interest existed (which it does not), the Board is still entitled to change its existing switching rule as long as “the new policy is permissible under the statute, there are good reasons for it, and the agency believes it to be better....”⁷
- o The railroads’ claim that the proposed reciprocal switching rule is “backdoor rate regulation” is meritless. This attempt to limit shippers’ ICCTA remedies solely to complex, costly and time-consuming rate cases is belied by Congress’ establishment of two completely separate rights and remedies to address, on the one hand, a need to increase rail competition via reciprocal switching (49 U.S.C. § 11102(c)) and, on the other, a remedy for addressing unreasonably high rail rates in the absence of effective competition (49 U.S.C. § 10701(d)). The irony of the railroads’ own claim is that it contradicts their touted preference for deregulation. In fact, the carriers’ clear preference for rate cases over switching prescriptions would actually require the

⁶ Baltimore Gas and Electric Co. v. United States, 817 F.2d 108, 115 (D.C. Cir. 1987) (“BG&E”).

⁷ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

Board to regulate the price charged for line-haul rail service as opposed to allowing the competitive market to set the line-haul rate.

- o The Board has properly determined that Congress did not ratify the 1985 Switching Rule and associated legal precedent in the ICC Termination Act of 1995⁸ (“ICCTA”) or the STB Reauthorization Act⁹ (“STBRA”). Notwithstanding the Board’s clear rejection of this argument in the Decision, the railroads reassert it yet again in their comments; but the Shipper Coalition shows in this Reply that there is simply no evidence (let alone compelling evidence) that Congress intended to eliminate the Board’s discretion to change the 1985 Switching Rule through any ratification of the present policy in subsequent legislation.
- **The Proposed Reciprocal Switching Rule is Rational and Consistent with the Administrative Procedure Act.**

Recognizing the weakness of their legal arguments aimed at restricting the very broad discretion afforded to the Board under the statute, the railroads’ present a second line of attack in an effort to discredit the Board’s exercise of its discretion, and also challenge the proposed rule as being procedurally deficient under the Administrative Procedure Act (“APA”). However, in Section III of this Reply, the Shipper Coalition establishes that the Board has more than adequately justified the proposed rule and that the articulated reasons supporting the change – the substantial consolidation of the rail industry since 1985; the unattainably high bar set by the 1985 Switching Rule (as evidenced by the dearth of switching cases before the Board); and the rail industry’s substantially improved financial health and technological enhancements – are entirely

⁸ Pub. L. 104-88, 109 Stat. 803 (1995).

⁹ Pub. Law 114-110, 129 Stat. 2228 (Dec. 18, 2015).

rational. There is no question that the Board has satisfied the longstanding rule that a federal agency may change an existing policy as long as it explains its reasons supporting the change.¹⁰

In Section III, the Shipper Coalition shows that the railroads' assertion that the proposed rule is unduly vague is nonsense. The specific criteria included in Prong 1 and Prong 2 of the proposed rule contradict this assertion. Furthermore, the vagueness doctrine only requires that the rules "mark out the rough area" as to when reciprocal switching is practical and in the public interest or necessary to provide competitive rail service.¹¹

The railroads' claim that the proposal is flawed because it would improperly authorize switching to occur outside of terminal areas is inconsistent with the very text of the switching statute, which never even mentions the word "terminal." Agency precedent also belies any such restriction.

Finally, the Shipper Coalition shows in Section III that the Board acted properly in not performing a cost-benefit analysis on its proposal because one is not required by the statute. Neither was the Board required to perform an environmental impact analysis of its proposal because there is no foundation for concluding that the proposal would "affect significantly the quality of the human environment."

- **The Case-By-Case Approach in the Proposed Reciprocal Switching Rule is Completely Workable.**

In Section IV of this Reply, the Shipper Coalition discredits the railroads' opposition to the Board's case-by-case approach by showing that it is consistent with the Board's discretion to implement the switching statute. The Coalition exposes the railroads' exaggerated concerns over the alleged impacts of the Board's proposal, based on the simple fact that case-by-case

¹⁰ Nat'l Cable & Telecommunications Assn. v. Brand X Internet Services, 545 U.S. 967, 981-82 (2005).

¹¹ U.S. Telecom Ass'n v. FCC, 825 F.3d at 674, 736 (D.C. Cir. 2016).

adjudication of requested switching prescriptions is a measured approach, especially when compared to the automatic right to inter-switching that exists in Canada or the NITL proposal which would have permitted switching orders to be issued if a shipper could satisfy certain conclusive presumptions. Further, the members of the Board and its staff are capable and qualified to assess any cumulative impacts of switching prescriptions in the context of individual switching cases.

Moreover, the railroads' concerns as to the impacts of the proposed rule are based on a faulty analysis as to the scope of carloads eligible for switching under the proposed rule. Mr. Jay Roman, President of Escalation Consultants, has reviewed the carload analysis conducted by the AAR's consultant, Mr. Michael Baranowski, and discovered errors and omissions that vastly inflate Mr. Baranowski's estimates of potentially impacted carloads.¹³ Mr. Roman's Reply Verified Statement, which details his analysis and findings, is attached hereto as Exhibit 1.

- **The Proposed Reciprocal Switching Rule Would Not Harm Railroad Operations or Investment Incentives.**

In Section V, the Shipper Coalition exposes the railroads' claims that implementation of the proposed switching rule will lead to severe service failures and network disruptions as scare-mongering designed to frighten the Board into indecision and, ultimately, inaction. In responding to the railroads' doomsday predictions as to rail operations, the Shipper Coalition relies upon the experience and insights of rail operations expert, Mr. John Orrison, who previously held operating positions with CSX and BNSF, and has over 40 years of experience in the switching of rail cars and service plans for switching movements. His extensive experience includes substantial familiarity with reciprocal switching operations in the Shared Assets Areas created by the Conrail acquisition and switching conditions imposed in the UP/SP merger

¹³ AAR Comments, p. 33 and Baranowski V.S., p. 5.

proceeding. In his Reply Verified Statement, attached hereto as Exhibit 2, Mr. Orrison explains that railroad operating plans are highly adaptable and are routinely adjusted in response to changing volumes and traffic patterns, and that interchanging railroads routinely coordinate to minimize extra steps and inefficiencies associated with such moves.¹⁴ The railroads ignore the reality that, in some cases, reciprocal switching may increase efficiencies, and their concerns about speculative cumulative impacts lack credibility. Orrison R.V.S., p. 18.

The railroads' operational concerns are further belied by the experience in Canada which employs a far broader automatic right to inter-switching for any traffic within 30 kilometers of an interchange. The experience in Canada shows that the amount of traffic actually switched is but a small fraction of the traffic that is eligible to be switched, which further reduces the railroads' already inflated risk of adverse operational impacts. The Shipper Coalition references the expert testimony provided to the Board in the EP 711 proceeding by Mr. Thomas Maville, who has substantial experience with the Canadian inter-switching law and regulations. Mr. Maville's statement to the Board showed that, despite broad inter-switching rights, the Canadian carriers are among the most efficient and productive on the continent and in the world,¹⁵ and that the expansion of inter-switching in Canada has not resulted in any adverse impacts on productivity, efficiency, or financial performance of the Canadian railroads.¹⁶

In Section VI of this Reply, the Shipper Coalition explains that the railroads have grossly overstated the investment risks associated with reciprocal switching, and questions whether those are even legitimate risks. Mr. Orrison explains that the railroads' assumption that reciprocal

¹⁴ Orrison R.V.S., pp. 5-6, 13.

¹⁵ Verified Statement of Thomas Maville, submitted with the Opening Submission of The National Industrial Transportation League, Docket No. Ex Parte 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, March 1, 2013 ("Maville V.S.") pp. 37-44.

¹⁶ Maville V.S. pp. 35-39.

switching will consume more terminal capacity of the incumbent is highly improbable in most reciprocal switching scenarios.¹⁷ Indeed, in many cases, reciprocal switching will merely change the location of interchange but will not add an interchange. In others, the additional activity associated with reciprocal switching occurs on the alternate carrier, not the incumbent.

Also, the Shipper Coalition's economist, Dr. Kevin Caves, has submitted a Reply Verified Statement, attached hereto as Exhibit 3, which deflates the railroads claims that reciprocal switching will inevitably lead to reduced investment, diminished efficiency, and degraded service. Dr. Caves makes the key point that competition spurs investment and insufficient competition diminishes investment incentives. Caves R.V.S. at ¶¶ 38-42. By expanding reciprocal switching, alternative carriers would obtain the incentive to make investments needed to attract formerly captive traffic and the incumbent will be incentivized to make investments needed to keep the traffic. Dr. Caves refutes one railroad economist's notion that reciprocal switching could drive rates below competitive levels by clarifying such notion is unfounded in an oligopoly model and pointing to the completely opposite effect that has occurred in the indisputably competitive rail intermodal market, where railroads have invested billions. Caves R.V.S. ¶¶ 31-32. The Shipper Coalition explains why the railroads' claims that reciprocal switching will reduce investment by destroying differential pricing are overblown, and Dr. Caves explains why analogies to the forced access regime in the telecommunications industry are inapposite and misleading. Caves R.V.S. ¶¶ 34-37.

- **Other Railroad Claims Lack Merit.**

In Section VII, the Shipper Coalition shows the Board why a series of other complaints lodged against the proposed rule should be rejected. The railroads oppose the Board's decision

¹⁷ Orrison R.V.S., pp. 10-13.

to permit a switching order to remain in place for as long as the Prong 1 and Prong 2 criteria are met. However, this criticism is supported by the statute and is analogous to how other access orders work, such as trackage rights. Any concerns over disparate impacts that may occur due to the size of a carrier or the nature of the traffic (e.g. TIH), as well as any labor protection concerns or issues, would be best evaluated in the context of a particular case.

Also, the Shipper Coalition shows that the Board correctly proposed to eliminate its current “standing” rule. In response to the request of the ASLRRRA to completely exempt shortline railroads from the rule, the Shipper Coalition reiterates its position expressed in its opening Comments that short line railroads should be allowed to serve as the competing carrier but not the incumbent carrier in a switching case. The Shipper Coalition strongly believes that the ASLRRRA’s request that the Board limit the application of the rule to situations in which no Class II or III railroad participates at **any** point in the movement of traffic, is an improper overreach. The Board must reject the ASLRRRA’s requests to avoid creating incentives for Class I carriers to spin-off captive short lines for the purpose of frustrating reciprocal switching requests.

- **The Board’s Access Fee Proposals are Lawful and Access Price Determinations Should Not Include Lost Contribution.**

Finally, in Section VIII, the Shipper Coalition rebuts the specious claim that the Board’s access price proposals are impermissibly vague for the same reasons noted above as to why the Board’s Prong 1 and Prong 2 proposals are not vague. The railroads ignore the fact that many existing Board rules are far less detailed and that it is common for the Board (and other regulatory agencies) to provide more regulatory guidance through adjudications of individual cases. Any vagueness claim as to the proposed access fee methodologies is also premature given

that the Board is right in the middle of its process of collecting comments on its proposals which may lead to subsequent changes or clarifications.

In Section VIII, the Shipper Coalition also strongly objects to the Board's consideration of lost contribution in establishing an access price, since lost contribution locks in an incumbent railroads' monopoly rent, in the absence of stringent assumptions that do not apply to the rail industry. The impact of including lost contribution in the access price is explained by Dr. Caves, who also refutes the railroad economists view that rates set under Stand Alone Cost principles would constrain rates to competitive levels. Lastly, the Shipper Coalition explains why a reciprocal switching order is not a "taking" of private property that requires "just compensation" under the Fifth Amendment of the Constitution.

II. THE BOARD'S PROPOSAL IS LAWFUL

In Sections II and III of these Reply Comments, the Shipper Coalition addresses, point by point, the wide assortment of legal arguments presented by the AAR and the individual Class I railroads against the Board's proposal. The carriers' grab-bag of legal arguments runs through contentions regarding the underlying meaning of the words of the statute; the claimed inconsistency of the proposal with the Rail Transportation Policy; the railroads' alleged "reliance" on the current rules; the alleged weakness of the Board's reasoning; the extent of the Board's discretion; and numerous lesser arguments. Indeed, the very number, breadth and variety of the railroads' attacks suggests the weakness of the carriers' legal position, rather than its strength: it indicates the existence of a desperate hope by the carriers that if they "throw enough mud on the wall," perhaps some of it will stick.

A. In Analyzing the Railroads' Arguments, the Board Should First Focus on Three Basic Principles

In responding to the railroads' wide-ranging legal challenges, the Board should first focus on three basic "principles": (1) Congress intended for the Board to use reciprocal switching to increase rail-to-rail competition; (2) the Board has extremely broad discretion to change its reciprocal switching rules; and (3) substantially changed circumstances in the rail industry justify the rule changes proposed by the Board.

1. Congress intended for the Board to use reciprocal switching to increase rail-to-rail competition.

The first principle involves the words and purpose of the reciprocal switching provision of the statute. Congress added that provision to the Staggers Rail Act of 1980 ("Staggers Act"),¹⁸ legislation that was drafted in light of the precarious financial situation of the railroad industry thirty-six years ago.¹⁹ Congress intended the Staggers Act to lessen decades of direct regulation of railroad prices and service, and focus agency regulation on areas where the market was not competitive.²⁰ Increased competition was to play an important role in this new structure because competition allowed the agency to withdraw from the direct regulation of railroad

¹⁸ Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) ("Staggers Act").

¹⁹ H. Report No. 96-1035, 96th Congress 2d Session ("House Report"), p. 34 ("The Committee is concerned about the financial plight of the railroad industry Current earnings are inadequate to meet existing or anticipated capital needs"); S. Report No. 96-470, 96th Congress 1st Session ("Senate Report"), p. 1 "It is the purpose of this bill to promote the revitalization of the railroad industry in the United States"; H. Report No. 96-1430, 96th Congress 2d Session, p. 80 ("Conference Report") ("The specific goals of this Act are to assist the industry in the rehabilitation and financing of the rail system; to reform Federal Regulation to preserve a safe, adequate, economical, efficient, and financially stable rail system, to assist the rail system to remain viable . . . ; and to provide a regulatory process that balances the needs of shippers, carriers and the public.")

²⁰ See, e.g., Senate Report, pp. 1-7 (see, e.g., "The bill takes steps to provide the railroads with greater pricing flexibility while retaining protection for captive shippers . . .", p. 1; and p. 7, "This bill provides continued protection for shippers where such protection is necessary in the public interest"). See also House Report, p. 38 ("The Committee has attempted to strike the proper balance between protecting shippers who are truly subject to the market power of railroads and providing sufficient rate flexibility to the railroads to allow them to compete effectively with other modes and earn adequate revenues.")

service and prices: competition would permit the market, rather than the government, to rule. As the Senate Report directly stated:

The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition . . . As the Government moves toward significantly less regulation of the services offered by railroads, the Government should encourage, rather than discourage, competition among railroads. Competition among railroads, or at least the realistic threat of competition, can serve as an important safeguard against inadequate service or unreasonably high prices.”²¹

It is most important to note that the above-quoted words of the Senate Report did not focus on competition as a way to right a “wrong” or as a “remedy” for competitive abuse that had occurred (as the railroads argue and as discussed in these Reply Comments); rather, the Senate Report stated that competition was to be an “important safeguard.” And a “safeguard,” by its very definition, looks to the **future** – “a measure taken to protect someone or something or to prevent something undesirable”²² – in this case, a protection against possible future monopolistic practices.

The reciprocal switching provision of the Staggers Act was consistent with this overall purpose. It is crystal clear that the Staggers Act’s specific new provision on reciprocal switching was intended to increase rail-to-rail competition, one of the Act’s overall purposes. The House Report declared that the new section dealing with reciprocal switching “empowers the Commission to approve reciprocal switching agreements . . . upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, **it provides competition to the benefit of shippers served. . . . The Committee intends for the Commission to permit**

²¹ Senate Report, p. 41 (emphasis added).

²² Oxford English Dictionary, definition of the word “safeguard”:
<https://en.oxforddictionaries.com/definition/safeguard>.

and encourage reciprocal switching as a way to encourage greater competition.”²³

Similarly, the Senate Report noted that reciprocal switching agreements were already in use in wide areas of the country, and where reciprocal switching is feasible, “it provides an avenue of relief for shippers served by only one railroad where service is inadequate.” Senate Report, p. 42. The Senate Committee inserted the reciprocal switching provision in the bill because the agency’s power in this area was not clear. *Id.* The Conference Committee underscored the purpose of the reciprocal switching provision to increase competition when it noted that “[a] **number of provisions [in the bill] are included to foster greater competition by** simplifying coordination, minor merger procedures, entry and **reciprocal switching agreements.**”²⁴ Again, the Congressional emphasis is to “foster” greater competition, not just to right a past wrong or correct for competitive abuse.

Moreover, the agency and the courts have confirmed that the purpose of the reciprocal switching provision in the statute was not simply as a remedy for a wrong, but rather was to increase competition, as a way to permit the agency to recede from the direct regulation of railroad prices. For example, in the conclusion to its decision in *Ex Parte 445* (Sub-No. 1), Intramodal Rail Competition, 1 I.C.C.2d 822, 837 (1985) (“Intramodal Rail Competition”), the ICC expressed the agency’s expectation that its new rules would “give shippers more routing alternatives while promoting competition among railroads.”²⁵ The court reviewing the agency’s Intramodal Rail Competition decision noted the Staggers Act’s “strong emphasis on preserving and enhancing competition.” BG&E, 817 F.2d at 115 (emphasis added). The court also

²³ House Report, p. 67. (emphasis added).

²⁴ Conference Report, p. 80 (emphasis added).

²⁵ Commissioner Strenio, in commenting on the decision, gave voice to the view that the agency’s decision “substantially liberalized the conditions under which we will grant competitive access to shippers and competing carriers when requested.” Intramodal Rail Competition, 1 I.C.C.2d at 838.

observed that, when the Congress enacted the reciprocal switching provision, it had, in contrast to the generally deregulatory thrust of the Staggers Act, “**increased** the ICC’s regulatory power.” Id. at 113 (emphasis in original).²⁶

Similarly, the Seventh Circuit, in its review of the ICC’s decision in Central States Enterprises, noted that “[t]he purpose of the Staggers Act was to encourage, under the appropriate circumstances, but not require, the Commission to approve railroad switching agreements.” Central States Enterprises v. ICC, 780 F.2d 664, 679 (7th Cir. 1985) (“Central States Court Review”). That court also declared that the legislative history of the reciprocal switching provision “reveals that Congress sought, in part, to encourage increased competition between railroads.” Id. at 669. Likewise, the reviewing court in Midtec Paper Corp. v. U.S., 857 F.2d 1487, 1500-01 (D.C. Cir. 1988) (“Midtec Court Review”), noted that the legislative history of the Staggers Act indicated that the reciprocal switching provision was enacted to “permit **and encourage reciprocal switching as a way to encourage greater competition.**” (emphasis in original in part and added in part).

2. The Board has extremely broad discretion to change its rules.

The second principle involves the breadth of the Board’s discretion to change its reciprocal switching rules. Despite the railroads’ attempt to drastically circumscribe the Board’s discretion in the area of reciprocal switching by positing all sorts of spurious “reliance,” “rational connections,” “vagueness,” and other constraints on the Board’s power to change its own rules, the fact of the matter is that this is an area where the Board has a clear and broad ability to act.

²⁶ See also, Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement, 367 I.C.C. 718, 727 (quoting Congressional Report) and 728 (1983): “The new railroad transportation policy established by this bill emphasizes the need for increased intramodal and intermodal competition and section 203 deals with intramodal competition among railroads,” and that “the reciprocal switching section is concerned with increasing rail competition . . .”

The reciprocal switching statutory language is extremely broad: the Board “may require” reciprocal switching where it finds such agreements to be “practicable” and in the “public interest”; or where it finds that such agreements are “necessary to provide competitive rail service.” The statute nowhere defines these terms, and thus leaves it up to the Board to do so.²⁷ As the Board correctly noted in its Decision, the agency has broad discretion under Section 11102(c)(1) of the statute, and its primary duty in exercising that discretion is to ensure that it does so in a matter that is not “manifestly contrary” to the statute, citing Midtec Court Review, 857 F.2d at 1500. Decision at 10. Indeed, **every** court that has looked at an agency decision under the reciprocal switching provision of the statute has noted the agency’s wide discretion and/or the court’s own narrow scope of review. See, BG&E, 817 F.2d at 115; Midtec Court Review, 857 F.2d at 1496-1497; Central States Court Review, 780 F.2d at 674. Finally, and perhaps most importantly, the court review of the agency’s decision in Midtec specifically noted that the agency had narrowed its discretion when adopting the 1985 Competitive Access Rules. Midtec Court Review, 857 F.2d at 1500. But if the agency “narrowed” its discretion in its Intramodal Rail Competition decision thirty-one years ago, it can manifestly decide to **broaden** its discretion under the very different circumstances that exist today in the rail industry.

²⁷ See, Vill. of Barrington v. STB, 636 F.3d 650, 667 (D.C. Cir. 2011) (upholding a statutory interpretation by the STB because courts “owe an agency great deference” when reviewing an agency interpretation of an ambiguous statute); AT&T Corp. v. FCC, 220 F.3d 607, 621 (D.C. Cir. 2000) (affording “substantial deference” to an agency’s interpretation of an ambiguous statute “because ‘the responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency’s greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated.’”) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000), superseded by statute, The Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776, as recognized in Bullitt Fiscal Court v. Bullitt City Bd. of Health, 434 S.W.3d 29 (Ky. 2014)).

3. **Substantially changed circumstances in the rail industry justify changes to the Board’s reciprocal switching rules.**

The third principle flows from the second. Specifically, when the Interstate Commerce Commission attempted to exercise its discretion and weigh the conflicting policies under the Staggers Act, it was faced with a very different situation than the STB confronts today. In 1985, when the ICC initiated its consideration of its competitive access rules, there were 32 Class I railroads; of those 32 Class I railroads, **not a single Class I railroad had been determined to be “revenue adequate”** in the agency’s 1983 determination of revenue adequacy, the revenue adequacy determination that existed as the Board was considering its proposed rules in Ex Parte 445.²⁸ Given the Staggers Act’s concern with the financial plight of the rail industry at that time, it was natural – and understandable – that the agency would decide to narrow its discretion by deemphasizing competition in favor of revenue adequacy when it promulgated its reciprocal switching rules.

The situation today could not be more different. Where there were 32 Class I railroads in 1985, now there are only seven, with just four carriers – two in the East and two in the West – dominating ninety percent of the market. Where the very multiplicity of rail carriers in 1985 created competitive options for shippers, now the dominance of the market by a very few industry players has reduced shippers’ choices and heightened the need to enhance competition. Where no railroad was revenue adequate in 1985, three of the four major Class I rail carriers were revenue adequate in 2014, with the fourth just under the standard, and the rail industry’s overall rate of return was well above the Board’s calculation of the industry’s cost of capital. See Shipper Coalition Comments, pp. 11-14. Revenue, operating income and profitability are rising, and the railroad industry is posting record earnings-per-share figures. Id. There is a need

²⁸ Railroad Revenue Adequacy – 1983 Determination, 1 I.C.C.2d 734 (1984).

to adjust the regulatory scales by giving more emphasis to enhanced competition. Most importantly, if in 1985 there was a need to be particularly careful of the financially fragile rail industry, if American manufacturing is to expand and meet the challenges of foreign competition today, the rail industry upon which American manufacturing depends must be sharply competitive.

B. Reciprocal Switching Is A “Right” To Be Enforced By The Board Based On An Exercise of Its Discretion; and the Board’s Proposal Properly Implements The Need for Reciprocal Switching As Required By The Statute

The AAR, and the individual railroads, criticize the Board for omitting any requirement to show a “need” for reciprocal switching in the proposed rules, despite the Board’s recognition in the text of the Decision that “shippers would be required (as is the case today) to initiate a proceeding with the Board and bear the burden of showing that reciprocal switching is needed.”²⁹ The premise for the Board’s requirement that there be some shipper showing of “need” was clearly intended to clarify that “[u]nder the Board’s proposal, reciprocal switching would not be ‘open’ to any party ‘on demand,’ and any request under this section would be subject to detailed review.”³⁰ The Shipper Coalition does not dispute the requirement to show “need ;” but objects to the rail industry’s claim that the only way to demonstrate such “need” is the current “competitive abuse” standard. Indeed, Congress itself contemplated different and alternative demonstrations of “need” in the statute and granted the Board broad discretion to define the requisite showing of “need” supporting requests for reciprocal switching in each. The Decision proposes new rules for determining “need” that are less restrictive than the current rules

²⁹ Decision, p. 19. AAR Comments, p. 12-13. The rail industry comments allege, through various different arguments, that Prong 1 lacks any required showing of “need” whereas Prong 2 uses an inappropriate test of “need.” AAR Comments, pp. 12-19; BNSF Comments, pp. 3-9; CSX Comments, pp. 10-20; NS Comments, pp. 28-36; UP Comments, pp. 25-31.

³⁰ Decision, p. 19.

while remaining consistent with the different Prong 1 and Prong 2 standards in the statute. Thus, contrary to railroad claims, the Board’s proposed standards do not grant reciprocal switching “on demand” or merely because it would be “more convenient.”

The rail industry’s insistence upon preserving the current “competitive abuse” standard as the only way to demonstrate “need” is predicated upon the requirement to show “harm” and a parochial definition of the term “remedy” used by the carriers. At least two rail industry commenters explicitly focus on the definition of “remedy” only as the redress of a wrong.³¹ Others tacitly do so through assertions that the Board can only grant reciprocal switching upon a demonstration that the incumbent carrier has engaged in anti-competitive behavior or is providing inadequate service.³² But in addition to redressing a wrong, a “remedy” is also defined as “enforcing a right.”³³ Reciprocal switching is a statutory right.

CSX argues that “[i]f Congress’s [sic] intent was to provide virtually all sole-served shippers with involuntary switching as a ‘right,’ it would have made that kind of sea change abundantly clear.” CSX Comments at 15. First, CSX grossly overstates the scope of the proposed rule as providing reciprocal switching to “virtually all sole-served shippers.” But under both the Prong 1 and Prong 2 standards, there are four sets of criteria that must be met before any shipper is entitled to reciprocal switching. Second, as discussed in Section II.A., above, Congress did want to encourage the use of this right, and both the agency and the courts have so

³¹ See AAR Comments, p. 13 (“the omission of the requirement of need from the rules allows...regulatory intrusion into markets when there is no harm to be remedied...”); UP Comments, p. 24 (“[T]he Board proposes to order reciprocal switching under circumstances in which there is no wrong to remedy.”).

³² E.g., CSX Comments, p. 13 (“the Board may compel reciprocal switching—only when...the existing rail service is inadequate.”); NS Comments, p. 28 (“before the agency may require reciprocal switching, the party seeking such switching must show that the existing service is inadequate.”).

³³ Although the AAR quotes the full Black’s Law Dictionary definition of “remedy” to include “[t]he means of enforcing a right,” the AAR only discusses “remedy” in terms of its alternative definition as “[t]he means of...preventing or redressing a wrong.” AAR Comments, p. 13 (n. 25).

held. But Congress also gave the agency broad discretion to determine when and how to enforce this “right” within the context of various competing, and often conflicting, rail transportation policies. For various reasons, the agency has chosen to enforce this “right” only to remedy a wrong for most of the past 36 years. But that does not preclude the Board from recognizing, as it has in the Decision, that changed circumstances warrant a less restrictive enforcement of the “right” to reciprocal switching in today’s rail transportation markets.

ICC Commissioner Lamboley described the “right” to reciprocal switching in Midtec when he dissented from the ICC majority’s decision to apply a more narrow standard than the statute required:

Terminal trackage rights and reciprocal switching are **pro-competitive statutory remedies**, and are to be liberally construed for those purposes. While Ex Parte No. 445 represents a Commission effort to address “competitive access”, it **is not**, however, **co-extensive with the remedial provisions of Section 11103 [recodified in Section 11102]**. It is in fact, more narrow.

* * *

In my view, Ex Parte No. 445, while referencing “all relevant factors” in its rule, nevertheless **singularly operates on the negative side of the equation by focusing on negative conduct**; that is to say, by requiring a finding of anti-competitive acts **as the only premise for remedy**. I do not believe 445 rules should be so confined. And more importantly, **neither Section 11103 nor its precedent are so limited**. In my view, **the statutory remedy is positive**. It seeks to ensure, protect and encourage a competitive market environment by either or both price and/or service options **and is quite properly focused on the pro-competitive aspects of the national transportation policy**.

Midtec at 190-91 (emphasis added). Although the courts have upheld the agency’s discretion to focus on negative conduct as a predicate for reciprocal switching, they also have recognized that

the statute does not require the agency to do so, effectively agreeing with Commissioner Lamboley's assertion that anti-competitive acts are not the only premise for remedy.³⁴

The statute establishes a right to reciprocal switching in two enumerated circumstances, but grants the agency wide discretion as to when it should enforce that right. For most of the 36 years since the Staggers Act first established a right to reciprocal switching, the agency has defined the circumstances in which it would grant reciprocal switching very narrowly. It did so in large part because of the dire financial condition of the rail industry and the rail transportation policy to allow railroads to earn adequate revenues.³⁵ 49 U.S.C. § 10101(3). By restricting the right to competitive rail service through reciprocal switching to demonstrated instances of competitive abuse or inadequate service, the agency provided rail carriers with more opportunities to differentially price their captive traffic over longer distances.

Over the decades since the agency elected to narrow its exercise of discretion under Section 11102, the financial condition of the rail industry has improved dramatically. In addition, rail industry consolidation has reduced competitive routing options and extended the distances over which captive shippers are subject to differential pricing as a result of their captivity. These two factors together have created both a greater opportunity and a greater "need" for reciprocal switching. The opportunity arises from the substantially improved financial condition of the rail industry, which allows the Board to more evenly balance the

³⁴ See, e.g., Midtec Court Review, 857 F.2d at 1500 ("These rules narrow the agency's discretion under section 11103 by describing...the circumstances in which it would not grant discretionary relief—where there is no reasonable fear of anticompetitive behavior."); BG&E, 817 F.2d at 115 (While appellant's position might reflect sound economics and be a reasonable interpretation of the statute, "it is not the *only* reasonable interpretation, because...the statutory directives under which the ICC operates do not all point in the same direction.").

³⁵ Central States Court Review, 789 F.2d at 670 (the ICC concluded that switching was not in the public interest because of the incumbent's history of inadequate revenues), 676-77 (the ICC's concern with the incumbent railroad's potential loss of revenue from reciprocal switching was justified); BG&E, 817 F.2d at 115 (affirming the current reciprocal switching standard on grounds that they "assist[] railroads' efforts to earn adequate revenues.").

conflicting rail transportation policies of revenue adequacy and enhanced competition. The “need” arises because captive shippers have lost competitive options over portions of their transportation routes as incumbent rail carriers have extended their bottlenecks, and thus their long-haul rights, over longer distances through mergers.

These changed circumstances justify a change in the Board’s standards for determining the “need” for reciprocal switching. As discussed in the following subsections, Prong 1 allows a shipper to demonstrate “need” consistent with pre-Midtec precedent, and Prong 2 does so consistent with the goal of the Staggers Act to allow competition to establish rate and service terms to the maximum extent possible.

1. The Board’s Prong 1 Benefits/Detriments Analysis properly encompasses a “need” for reciprocal switching.

Contrary to railroad claims, Prong 1 of the proposed rules requires a showing of “need” that is appropriate and consistent with pre-Midtec precedent. As the AAR and each Class I railroad points out, Congress intended that the “practicable and public interest” language in Section 11102(c) have the same meaning as identical language in Section 11102(a) for granting terminal trackage rights.³⁶ Moreover, as the ICC declared in one of the very first terminal trackage rights and reciprocal switching cases after passage of the Staggers Act, “the public interest requires a showing of ‘some actual necessity or compelling reason,’ meaning that ‘more than a mere desire on the part of the shippers or other interested parties for something that would be convenient or desirable to them’ must be shown.” D&H, 367 I.C.C. 718, 720 (1983), quoting Jamestown, N.Y., Chamber of Commerce et al. v. Jamestown, W. & N.W.R. Co., 195 I.C.C. 289, 291 (1933). While the Shipper Coalition does not dispute the foregoing points, it disagrees

³⁶ AAR Comments, pp. 8-12; BNSF Comments, p. 4; CSX Comments, pp. 11-12; NS Comments, pp. 28-29; UP Comments, pp. 26-27.

strongly with the unduly narrow definition of “some actual necessity or compelling reason” that the rail industry has advanced.

The Board’s proposed Prong 1 “practicable and public interest” standard closely adheres to the very same criteria the ICC applied in D&H to determine whether the proposed switching service was practicable and in the public interest. In D&H at 720-21, which the ICC decided prior to Ex Parte No. 445 and Midtec, the ICC applied the following four criteria:

1. the interchange and switching must be feasible;
2. the terminal facilities must be able to accommodate the traffic of both competing carriers;
3. the presence of reciprocal switching must not unduly hamper the ability of either carrier to serve its shippers; and
4. the benefits to shippers from improved service or reduced rates must outweigh detriments, if any, to either carrier.

The Prong 1 criteria closely parallel this precedent. Specifically, the requirements that the proposed switching be feasible, safe, and not unduly hamper the ability of a carrier to serve its shippers cover the first three D&H factors, which address practicability. Decision at 18. In addition, the requirement that the potential benefits from the proposed switching arrangement outweigh the potential detriments covers the fourth factor dealing with the public interest. Id. In D&H at 723-24, the ICC closely analyzed the situation and found that Philadelphia shippers captive to Conrail had a need for more efficient and responsive rail service; that there were several instances where shippers cited the need for improved equipment utilization; that one shipper cited a need for an adequate supply of hopper cars that Conrail was not able to provide; that local shippers needed access to certain grain supplies not served by the incumbent; and that in general the incumbent’s monopoly had diverted traffic to ports and plants in other cities. Id. The agency’s comparison of these benefits to detriments in D&H provided the framework for establishing a “compelling public need” for reciprocal switching in the agency’s decision. Id.

The benefits/detriments analysis in Prong 1 of the proposed rules serves the same objective. Indeed, the “relevant factors” identified by the Board in its Decision name several of the very same factors that the ICC identified in D&H as establishing a compelling need: for example, the “efficiency of the route,” the “access to new markets,” and the “impact on service quality.” Decision at 18.

Thus, Prong 1 determines whether there is a “need” for reciprocal switching under the “practicable and public interest” standard by applying the same test that the ICC employed in D&H, prior to adopting the current competitive access regulations which require a showing of anti-competitive conduct. The current “competitive abuse” standard effectively replaced the D&H criteria when the ICC adopted the competitive access rules by rulemaking in Ex Parte No. 445. Through this rulemaking proceeding, the Board now proposes to repeal the competitive access rules adopted in Ex Parte No. 445 and, in essence, codify the D&H criteria for Prong 1 in their place. It is particularly notable that, if the Board had proposed merely to repeal the competitive access rules without adopting a replacement, the D&H criteria would apply as the most current precedent interpreting the “practicable and public interest” language in the statute.

Finally, in recognition of the foregoing precedent and to address rail industry criticisms, the Shipper Coalition would support modifying the proposed rules to clarify that the benefits/detriments analysis provides the framework for establishing a “need” for reciprocal switching under Prong 1. Specifically, the Coalition proposes to modify the first sentence in the Board’s proposed Section 1145.2(a)(1)(iii) as follows:

(iii) The party seeking such switching shows a need for the switching based on ~~that the~~ potential benefits from the proposed switching arrangement that outweigh the potential detriments.

In all other respects, the Shipper Coalition rejects rail industry arguments that the proposed rules for Prong 1 lack a required showing of “need.”

2. Under Prong 2 of the statute, the only “need” that must be shown is the need for competitive rail service.

In their Comments, the railroads attempt to graft much of their arguments dealing with Prong 1, discussed above, onto the Prong 2 “necessary to provide competitive rail service” statutory requirement for reciprocal switching by arguing that reciprocal switching must only be used when there is a “wrong,” namely, competitive abuse or harm,³⁷ and/or there must be some evidence of affirmative “railroad misconduct.”³⁸ Then, the railroads present a plethora of arguments to the effect that the Board’s proposed Prong 2 standard, namely, that the shipper show that “intermodal and intramodal competition is not effective” (the Board’s current market dominance test) does not meet the statutory “necessary to provide competitive rail service” requirement.³⁹

But the railroads are wrong. The words of the statute and the legislative history reveal clearly that there is no “need” under Prong 2 to show competitive abuse or railroad misconduct. Prong 2 of the statute sets forth the clear and simple requirement that the shipper show reciprocal switching is “necessary to provide competitive rail service.” Those statutory words do not mention or even imply that competitive abuse or railroad misconduct is the only way of showing that there is a need for competitive rail service. Second, the railroads’ wide-ranging arguments against the Board’s simple proposition that that the current market dominance test (“intramodal

³⁷ See, AAR Comments, pp. 9-12. AAR Comments, p. 12, summarize the point: “The Board’s existing competitive harm standard . . . requires a showing of need and precludes the grant of a switching remedy on demand. The Board’s proposal to remove and replace that standard violates both principles.” See also, UP Comments, p. 29 (“a showing of market dominance provides no basis for concluding that a railroad is engaged in abusive conduct . . .”). See also, CSX Comments, p. 13; UP Comments, p. 23 (“Congress first required a showing of anticompetitive conduct that affects the adequacy of rail service before the agency could find that forced switching is ‘in the public interest’ or ‘necessary to provide competitive rail service.’”)

³⁸ See, NS Comments, p. 30.

³⁹ See, AAR Comments, pp. 15-19; CSX Comments, pp. 13-20; NS Comments, pp. 30-32; UP Comments, pp. 28-31.

or intermodal competition is not effective”) meets the statutory “necessary to provide competitive rail service” standard, are wrong.

- a. **Under Prong 2 of the statute, a petitioner must only show that reciprocal switching is “necessary to provide competitive rail service.”**

Both the AAR and several railroads argue that Prong 2 of the statute and the corresponding agency rules require a showing of some wrong, namely, some competitive abuse or railroad misconduct.⁴⁰ In effect, the railroads are grafting the current rule — that reciprocal switching may only be prescribed if a petitioner shows that it is “necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive” — onto the statute itself. But this is inappropriate and unnecessary: both the Prong 2 statutory standard and related legislative history do not require a showing of competitive abuse. Also, as noted above, the reviewing court in BG&E clearly indicated that the current standard is a product of a narrowing of the Board’s discretion. BG&E, 817 F.2d at 115. The reviewing court’s statement indicating that the Board could find that reciprocal switching could be “necessary to provide competitive rail service” in circumstances other than, and broader than, a case of competitive abuse.

The statutory words of Prong 2 are straightforward: “[t]he Board may require rail carriers to enter into reciprocal switching agreements where it finds such agreements. . . are necessary to provide competitive rail service.” No other finding is required. Competitive abuse or railroad misconduct is nowhere mentioned. Although the railroads suggest otherwise, competitive abuse or railroad misconduct is not impliedly required to find that a switching arrangement is “necessary to provide competitive rail service.” Black’s Law Dictionary indicates that, when

⁴⁰ See footnotes 28 and 29 above.

used in jurisprudence, the word “necessary” “does not always import an absolute physical necessity, so strong that one thing, to which another may be termed ‘necessary,’ cannot exist without that other. **It frequently imports no more than that one thing is convenient or useful or essential to another.**”⁴¹ Therefore, Black’s concludes that, to employ the means necessary to an end “is generally understood as employing **any means calculated to produce the end...**”⁴² Thus, if the Board finds, under its proposal, upon the petition of a shipper and after the submission of evidence, that a shipper does not currently have effective intermodal or intramodal competition, and the shipper’s rate is above 180 percent of the cost of service, then the Board can conclude that reciprocal switching is “necessary to provide effective competition;” provided, of course, that the other requirements of Prong 2 are met.

As also discussed in Section II.A. above, the legislative history gives no indication that some showing of competitive abuse or railroad misconduct is required to meet the statutory “necessary to provide competitive rail service” test. The Senate bill that comprised part of the legislative history of the Staggers Act did not even have the “necessary to provide competitive rail service” prong. Thus, there cannot be anything in the Senate Report that sheds light on that provision.⁴³ The House bill added the current “necessary to provide competitive rail service” Prong 2 to the reciprocal switching provision.⁴⁴ While the House Report’s explanation of the reciprocal switching provision does not mention anything specific about the Prong 2 “necessary to provide competitive rail service” standard, the House Report mentions nothing about any “competitive abuse” or “railroad misconduct” requirement either. To the contrary, the House

⁴¹ <http://thelawdictionary.org/necessary/> (emphasis added).

⁴² Id. (emphasis added).

⁴³ See, Senate Report, pp. 42, 72.

⁴⁴ See, House Report, p. 17.

Report suggests that the reciprocal switching provision should be used affirmatively by the agency to encourage competition:

This section empowers the Commission to approve reciprocal switching agreements . . . upon the request of a carrier or shipper. In geographic areas where reciprocal switching is feasible, **it provides competition to the benefit of shippers served. The Committee intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.**

House Report, p. 67 (emphasis added). The House Report plainly indicates that the reciprocal switching provision should be used broadly and affirmatively, not simply to correct a “wrong” or correct for past “competitive abuse.”⁴⁵

The railroads argue that the idea of “encouraging competition” does “not extend to the creation of artificial competition.” AAR Comments, p. 18. This is utter nonsense. Reciprocal switching is not “artificial” competition; reciprocal switching removes barriers to competition beyond an origin or destination bottleneck. It is clear from the discussion in the legislative history quoted in Section II.A that, when the Congress said that it wanted to “encourage competition” through reciprocal switching, it meant exactly that. See Senate Report, p. 41; House Report, p. 67.

b. The railroads’ arguments against the Board’s proposed standards in Prong 2 are wrong.

Beyond attempting to conflate the phrase “necessary to provide competitive rail service” solely with a showing of competitive abuse, the railroads raise a variety of arguments against the Board’s proposed adoption of its current market dominance test (i.e. no effective intermodal or

⁴⁵ Finally, the Conference Report says nothing about a need to show railroad misconduct or competitive abuse. See, Conference Report, pp. 84, 116-17.

intramodal competition) to fulfill the statutory Prong 2 standard, that reciprocal switching may be prescribed where it is “necessary to provide competitive rail service.”

The Board’s Prong 2 proposal is perfectly consistent with the statutory language. Indeed, unlike the Board’s power to adjudicate the reasonableness of a rate, the reciprocal switching provision of the statute contains **no** prohibition against acting based on a finding of no effective competition. This is a clear indication by the Congress that it gave the Board broader power under Section 11102(c)(1), **where the rate will be set by a competitive market**, as compared to the situation under Section 10707 in which the Board directly sets a price. Particularly in light of that fact, a Board determination that there is no effective intra- or intermodal competition plainly meets the statutory standard that reciprocal switching can be prescribed when it is “necessary to provide competitive rail service,” and is well within the Board’s discretion under the statute.

The railroads argue that the status of being the sole rail carrier serving a shipper facility was a common one back in 1980, and therefore “it would be contrary to years of precedent for the Board to assume that the status of being sole served creates the need for a regulatory remedy.”⁴⁶ But “being sole-served” is **not** the Board’s test under Prong 2. As the Board’s decision makes abundantly clear, a petitioner would have to prove both the quantitative and qualitative aspect of the Board’s market dominance test. In other words, a petitioner would have to prove both that the shipper’s rate with respect to the particular movement exceeds 180 percent of its variable cost and that intramodal (actual or potential competition from other railroads) and intermodal (actual or potential competition from trucks, pipelines, barges, etc.) competition are not effective. Decision at 22. The entire convoluted and exhausting history of the determination of market dominance in rate cases – the years and the tens of millions of dollars spent by

⁴⁶ See, AAR Comments, p. 15. See also, CSX Comments, pp. 14-15; UP Comments, p. 30.

individual shippers to prove it⁴⁷ – provides overwhelming evidence that being “sole served” has never been an automatic gateway to a finding of market dominance.

Then, the railroads argue that because the statute provides that a finding of market dominance alone cannot establish a presumption that a rate is unreasonable, it would be irrational for the Board to presume that a finding of market dominance is sufficient to establish that it is “necessary to provide competitive rail service.”⁴⁸ This is nonsense, and the Board dealt with this argument in its Decision.⁴⁹ The simple fact of the matter is that the Congress did not want the Board to directly regulate a railroad’s prices simply upon a finding that there is no effective competition to the railroad’s service; it also required the agency to find that the rate charged by the railroad was “unreasonable.” But a Board decision to grant reciprocal switching does not regulate the line-haul rates that the railroad may charge the shipper: it simply permits a competitive market to set the price. It is entirely rational for the Congress – and the Board – to set a lower bar for the grant of reciprocal switching, where a competitive market will set a price, than it is where a federal agency acts to set a price directly upon a finding that the rate being charged is “unreasonable.” In the former case, a finding of market dominance would simply permit the competitive market to work; while in the latter case, the agency would have to find not only that a competitive market is not effective, but also that the price charged by the railroad is too high, using some independent standard.

It is notable that the reciprocal switching provision of the statute does not, like the rate reasonableness provision, have a statutory presumption that a finding of market dominance alone

⁴⁷ Ironically, the American Short Line and Regional Railroad Association notes in its opening comments that “[m]arket dominance cases have proven to be long-drawn out expensive cases.” ASLRRA Comments, p. 8.

⁴⁸ See, AAR Comments, p. 16. See also, NS Comments, p. 30; CSX Comments, p. 17.

⁴⁹ See Decision at 22.

would not justify a grant of reciprocal switching.⁵⁰ This indicates that the Congress did not intend to impose this additional barrier upon Board action in a reciprocal switching context, in contrast to when the agency directly regulates a railroad's prices.

The wording of the statutory language for Prong 2, "necessary to provide competitive rail service," is similar to the "absence of effective competition" wording of 49 U.S.C. § 10707(a), except this Section 11102(c)(1) has no quantitative element and no statutory presumption that a finding of market dominance alone cannot justify a grant of reciprocal switching. But, the similarity of the statutory wording suggests that the Board is on sound ground in using the market dominance standard to inform its application of Prong 2. As the Board correctly noted in its Decision, the agency's market dominance standard "answers the same question that the Board would address under the competition prong of the proposed reciprocal switching analysis, i.e. whether effective competition exists for an individual movement or movements." Decision at 22.

The railroads also argue that the Board's proposed reliance on market dominance as the basis for reciprocal switching under Prong 2 is "irrational" because the Board has excluded product and geographic competition from its analysis.⁵¹ But the railroads fail to even mention the fact that the current reciprocal switching rules – which were approved by the courts – exclude the consideration of product competition, and place the burden of proving geographic

⁵⁰ NS argues that the Board's proposed standard is inconsistent with ICCTA, which the railroad argues prohibits any presumption of railroad misconduct from the bare fact that a railroad has market dominance. NS Comments, p. 30; see also, UP Comments, p. 29. But NS fails to note that the reciprocal switching provision of the statute does not even have the same restriction that is in the rate reasonableness provision of the statute. NS also argues that the Board cannot apply the "coercive remedy" of reciprocal switching solely on a finding that the railroad has market dominance "because the Board would be assuming that the rate is unreasonably high – which it may not do." NS Comments, p. 30. This is flatly wrong. In reciprocal switching, the Board is making no finding that the rate is unreasonably high: it is simply allowing a competitive market to establish the line-haul rate – exactly what the Congress wanted to encourage.

⁵¹ See, AAR Comments, p. 17. See also, CSX Comments, p. 16; UP Comments, pp. 30-31.

competition on the railroads. See, 49 C.F.R. § 1144.2(b)(1) and (2). If the exclusion of geographic competition is lawful under the current rules, why is it not lawful under the proposed rules? And, though the railroads note that product and geographic competition is excluded from the market dominance determination,⁵² the railroads do not even attempt to explain, if it is proper to exclude such forms of competition when the Board will **directly** regulate a railroad's prices, why is it not proper to do so when the Board is simply allowing the competitive market to set the price that a railroad will charge?

It is entirely proper and rational for the Board to exclude product and geographic competition from consideration in determining whether it is "necessary to provide competitive rail service" under reciprocal switching, just as it is when determining whether there is a "lack of effective competition" under the market dominance provision of the statute. The question of whether or not to exclude the consideration of product and geographic competition from the determination of market dominance under Section 10707(a) is within the Board's discretion. As the en banc U.S. Court of Appeals for the Fifth Circuit stated:

[R]efusing to set forth a rigid standard for determining when effective competition exists, Congress authorized the ICC to establish appropriate standards and procedures for determining when market forces suffice to regulate rail rates. The ICC is in the best position to determine whether product and geographic competition play a role in the day-to-day fluctuation of rail rates and whether consideration of such evidence is feasible within the requirements of the 4-R Act.⁵³

In addition to the Board's broad discretion, there is a statutory consideration in favor of excluding product and geographic competition. In ICCTA, Congress added a new statutory policy calling for the "expeditious handling and resolution of all proceedings," 49 U.S.C.

⁵² See, AAR Comments, p. 17.

⁵³ Western Coal Traffic League v. United States, 719 F.2d 772, 779 (5th Cir. 1983) (en banc).

§10101(15) . In considering whether to exclude product and geographic competition in rate cases, the STB determined, in light of the statutory emphasis on expedition in its proceedings, that it would limit its consideration of the kinds of competition to the kinds that were absolutely required by the wording of the statute.⁵⁴ In doing so, the Board explicitly found that “inclusion of product and geographic competition [in the market dominance determination], although permissible . . . is not required” and specifically concluded that Congress had left the question to the agency’s discretion.⁵⁵ The Board went on to determine that consideration of product and geographic competition imposes substantial burdens on the parties and on the agency; requires consideration of questions far removed from the agency’s expertise; limiting the market dominance determinations solely to intra- and intermodal competition would not harm the railroads; and including product and geographic competition in the market dominance determination would do “substantial and irreparable” harm to the shipper community.⁵⁶

The exact same considerations that led the Board in 1998 to exclude product and geographic competition in the determination of market dominance in rate cases justifies the Board’s determination in 2016 to exclude product and geographic competition from the determination of the Prong 2 “necessary to provide competitive rail service” statutory standard. The matter is well within the Board’s proper discretion, especially since, as the Board noted in its decision, the agency already has determined that market dominance is not even a jurisdictional requirement to obtaining relief in an access proceeding. Decision at 22, citing Midtec.

Some railroads also argue that the Board’s Prong 2 proposal is internally inconsistent because, on the one hand, the Board is proposing that a showing of market dominance will be

⁵⁴ See, Market Dominance Determinations – Product and Geographic Competition, 3 S.T.B. 937 (1998).

⁵⁵ Id. at 946.

⁵⁶ Id. at 946-949.

required under the “necessary to provide competitive rail service” Prong 2, but, on the other hand, access will not necessarily provide for a finding of effective competition in rate proceedings.⁵⁷ The railroad argument fails to hold up to even cursory analysis. In its Decision, the Board simply indicated that there is no need to issue a “blanket rule” as requested by the railroads that a reciprocal switching order would automatically preclude a finding of market dominance in a rate case. Decision at 23. For example, at one point in time, a shipper may prove that the rate the incumbent railroad is charging substantially exceeds 180 percent of the variable cost and that intra- and intermodal competition do not provide an effective check on the incumbent. Then, time passes – months, probably years – and things change: the rail market becomes further consolidated; changes in the accessing the railroad’s system create long-term inefficiencies over the new route; or a host of other changes occur. A Board determination at one point in time to grant reciprocal switching, should not automatically preclude a rate challenge when the situation may be entirely different.

Some railroads argue that application of the second prong would “restructure the industry.”⁵⁸ As discussed in more detail in Section IV below, the Board’s case-by-case proposal ensures that the Board would grant reciprocal switching only in individual cases where the Board finds under Prong 2 that existing intra- and intermodal competition are not effective. The case-by-case approach ensures that the Board can carefully monitor changes. The grant of reciprocal switching will not lead “to the greater intervention by the Board in the setting of rates . . .” or a finding by the Board that a rate is unreasonable.⁵⁹ Reciprocal switching simply allows the

⁵⁷ See, NS Comments, p. 31; CSX Comments, p. 14.

⁵⁸ See, CSX Comments, p. 18; UP Comments, p. 29.

⁵⁹ See, CSX Comments, pp. 16-17, 18.

competitive market to work, and in doing so eliminates the Board's jurisdiction to directly set a railroad's rates.

Finally, some railroads complain that the Board's existing market dominance test does a "poor job" of identifying when railroads actually face effective competition, specifically citing the Limit Price test.⁶⁰ The Shipper Coalition strongly disagrees with that assessment; if anything, the Limit Price test tends to exclude movements that should properly be under the Board's jurisdiction in rate reasonableness disputes. However, if the railroads believe that the Limit Price test is flawed, they are free to challenge the Board's adoption of that test and/or to petition the Board to change it.

C. The Board's Proposal Is Consistent With the Rail Transportation Policy and the Overall Thrust of the Staggers Act

At various points in their comments, the railroads complain that the Board's proposal is inconsistent with the Rail Transportation Policy ("RTP") and the overall thrust of the Staggers Act.⁶¹ Within this general argument regarding the RTP, the railroads argue that the Board's proposal is inconsistent with the statutory focus on differential pricing;⁶² the statutory policy on adequate revenues;⁶³ the Staggers Act's de-emphasis of open routing;⁶⁴ a carrier's alleged right to a long-haul;⁶⁵ and the agency's promotion of single-line service, especially in its merger decisions.⁶⁶ The railroads' claims are wrong.

⁶⁰ See, UP Comments, pp. 29-30; CSX Comments, p. 16.

⁶¹ See, AAR Comments, pp. 1, 2-3, 9, 11; CSX Comments, pp. 31-38; NS Comments, pp. 32-36; UP Comments, pp. 31-36.

⁶² See, CSX Comments, pp. 31-34; UP Comments, pp. 32-34.

⁶³ See, AAR Comments, p. 3; CSX Comments, p. 32.

⁶⁴ See, NS Comments, pp. 32-33; CSX Comments, pp. 36-37.

⁶⁵ See, CSX Comments, pp. 34-36.

⁶⁶ See, UP Comments, pp. 7-17; NS Comments, pp. 13, 34-36; CSX Comments, pp. 36-38.

In the first place, the Board and the courts have frequently noted the often-conflicting elements of the Rail Transportation Policy.⁶⁷ Despite these contradictions, the Board need only reach “a reasonable accommodation of the conflicting policies set out in its governing statute”⁶⁸ and there are numerous provisions of the RTP that strongly support the Board’s proposal.

- Section 10101(1) states that, in regulating the railroad industry, it is the policy of the U.S. Government “to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail” – exactly the purpose of the Board’s broadened reciprocal switching proposal.
- Section 10101(2) requires the Board to “minimize the need for Federal regulatory control over the rail transportation system . . .” – which would be a direct result of the encouragement of effective competition under reciprocal switching, because if competition is effective, the Board has no direct jurisdiction over railroad prices and service.
- Section 10101(4) demands that the Board “ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers . . .,” and Section 10101(5) obliges the agency “to . . . ensure effective competition and coordination between rail carriers . . .” Clearly, reciprocal switching would facilitate these Federal goals.
- Broadened reciprocal switching rules would also directly respond to the policy directive in Section 10101(7) to “reduce regulatory barriers to entry into . . .the industry,” and the competition engendered by reciprocal switching would

⁶⁷ See, e.g., BG&E, 817 F.2d at 115; Midtec Court Review, 857 F.2d at 1500.

⁶⁸ BG&E, 817 F.2d at 115.

advance the goal of Section 10101(9) of “encourag[ing] honest and efficient management of railroads.”

- By facilitating rail-to-rail competition, reciprocal switching would foster the goal of Section 10101(12), to “prohibit predatory pricing and practices, [and] to avoid undue concentrations of market power....”

Indeed, the Shipper Coalition strongly believes that the Board’s current rules, which have prevented **any** use of the reciprocal switching provisions of the statute for decades, are flatly inconsistent with the Rail Transportation Policy.⁶⁹

The railroads argue that the Board’s proposal is inconsistent with a variety of other policies. The AAR and some railroads, for example, claim that the Board’s proposal is inconsistent with the statutory policy on differential pricing and revenue adequacy.⁷⁰ But the Board’s proposal is not inconsistent with either. Reciprocal switching permits differential pricing, but in the context of the same competitive market in which the railroads operate for the majority of their traffic. Just as in other competitive situations, a railroad subject to reciprocal switching can price differentially based on the efficiencies of the incumbent railroad’s service and the strength and character of the competitive market in which the incumbent carrier operates. As discussed in Section VI of this Reply, the Board’s proposal will not inhibit railroad

⁶⁹ The AAR cites 49 U.S.C. § 10101(2), to “minimize the need for Federal regulatory control over the rail transportation system” as a justification for their position. See, AAR Comments, pp. 2-3, 9. But the reality is exactly the opposite: reciprocal switching would let the competitive market set line-haul rate, and thus reduce the need for the Board to directly regulate the rail rates being charged by the incumbent monopoly railroad.

⁷⁰ AAR Comments, p. 3; CSX Comments, pp. 31-34; UP Comments, pp. 32-34.

investment. Indeed, it is possible that the forces of competition created by reciprocal switching will lead the railroads to become even more efficient, as they have in the past.⁷¹

The railroads also argue that the Board's proposal is inconsistent with the statute's de-emphasis on "open routing."⁷² The simple answer is that reciprocal switching is not open routing. Reciprocal switching is limited to working interchanges within a reasonable distance of the origin or destination location, only if and when certain other criteria are satisfied under either Prongs 1 or 2 of the Board's proposal. In contrast, open routing would allow shippers to force an interchange at any point along the route of movement for no other reason than a shipper's desire. The Board's proposal does **not** require a railroad to keep all possible routes open or charge the same rate over all routes.

CSX also argues that the Board's proposal allegedly departs from Congressional and agency policy allowing railroads to protect their long haul, citing to the Bottleneck case and a mélange of other considerations.⁷³ The answer to CSX's argument is that the reciprocal switching provisions of the statute are an express statutory exception to the carrier's right to a long haul, and are unrelated to the administrative policies that the agency adopted in the Bottleneck case. See, 49 U.S.C. § 11102(c) and 49 U.S.C. § 10705(a)(2)(A) (reciprocal switching is an express exception to a railroad's right to a long-haul).

Finally, the individual railroads complain that the Board's proposed reciprocal switching policy reverses the Board's traditional policy favoring single-line service, particularly in merger

⁷¹ Moreover, revenue adequacy is one of a number of the policies in the RTP, and the Board has long held that revenue adequacy does not trump all other considerations. The Board, for example, has long held that a rate may be unreasonable even if the railroad has been determined to be revenue inadequate. Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 536 (1985).

⁷² See, NS Comments, pp. 32-33; CSX Comments, pp. 36-37.

⁷³ See, CSX Comments, pp. 34-36, citing Central Power & Light Co. v. Pac. Transp. Co., 1 S.T.B. 1059 (1998)

decisions.⁷⁴ As discussed further in the next section of these Reply Comments, the railroads are wrong. CSX, for example, cites to a 1988 agency merger decision that notes the benefits of single-line service, and then claims that the “forced switching” authorized by the proposed rule would “negate all the efficiencies of single-line operations” by “order[ing] potentially costly and unnecessary traffic exchange. . . .”⁷⁵ This is nonsense. An agency order authorizing reciprocal switching will not “order” the interchange of traffic: it permits a shipper to access another carrier, a decision that will be made by the shipper if that route is competitive and efficient. If as CSX posits, “the service at issue could be more efficiently provided on an end-to-end basis by a single carrier . . . ,”⁷⁶ then as long as that more efficient single line carrier competes for the business, it will win the business, at a profit. Of course, it is possible that single-line service is at times **less** efficient than competitive service obtained through a reciprocal switch, such as where the single line service is over a circuitous route. But if that is true, then system efficiency would be enhanced by a grant of reciprocal switching. More importantly, under the Board’s proposal, the market will make those determinations, exactly as the Congress desired in the Staggers Act.

Similarly, UP argues that the Board’s proposal would reverse policies favoring single line service and would “reintroduce the inefficiencies that agency decisions empowered the railroads to eliminate”⁷⁷ In an over-the-top assertion, UP argues that the Board cannot “now decide to re-Balkanize the rail network” and “engag[e] in baiting and switching”⁷⁸, and it touts the benefits of single-line service.⁷⁹ Certainly, single-line service can be a benefit to both

⁷⁴ See, UP Comments, pp. 7-17; NS Comments, pp. 13, 34-35; CSX Comments, pp. 36-38.

⁷⁵ CSX Comments, p. 38.

⁷⁶ Id. See similar arguments made by the NS at pp. 34-35 of its Comments.

⁷⁷ UP Comments, pp. 7-17, with quote at p. 8.

⁷⁸ Id. at 9.

⁷⁹ Id. at 10-17.

railroads and shippers. But a broadened regime of reciprocal switching would pose no harm: if the incumbent's single-line service is in fact more efficient than the competitor's, the benefits of such single-line service will enable the incumbent to retain the traffic.

The Canadian experience demonstrates just how exaggerated UP's claims are. As the NITL showed in its Opening Submission to the Board in March 2013, even in Canada where competitive switching is an automatic right of a shipper within a set distance of another competing carrier, and where 40 percent of all Canadian traffic is exposed to interswitching as a statutory right, just a small fraction of carloads in Canada were actually switched to another carrier. In other words, **even where the right to competitive switching is automatic, the large majority of carloads remain with the incumbent carrier.**⁸⁰

The Board's proposal, which sets forth a deliberate, case-by-case process, in which a shipper must fulfill numerous requirements before obtaining the right to a competitive switch, undoubtedly will cause far less diversion to a competing carrier. Moreover, as the NITL's submission in Ex Parte 711 also showed, the carriers themselves practice reciprocal switching over wide swaths of their system.⁸¹ Indeed, UP's own reciprocal switching tariff applies to over 100 different communities across the western United States and encompasses over 800 separate shippers' facilities in those communities.⁸² This shows that the benefits of reciprocal switching can co-exist with the benefits of single-line service – indeed, UP's own operations are a testament to that fact.

⁸⁰ Maville V.S., pp. 21 and 26.

⁸¹ See id. at 19-24.

⁸² See id. at 21.

D. The Railroads' Claimed "Reliance" On the Existing Rules Does Not Forbid the Board From Changing Its Rules

The railroads' alleged reliance on the current reciprocal switching rules do not prevent the Board from changing those rules in light of the transformation of the railroad industry over the past thirty years. Railroad commenters claim that the proposed rule would be unlawful because it alters a longstanding policy that has engendered serious reliance interests on single-line service that the Board has not addressed.⁸³ This assertion misconstrues the law and is both overblown and premature.

The railroads misconstrue recent Supreme Court decisions as applying a heightened standard to the Board's reasons for adopting a new reciprocal switching rule. Although these decisions would require the Board to address, in a final rule, whether any substantial reliance interest was engendered under its existing rules and policies, they do not apply a heightened standard to the Board's authority to change a policy or the reasons underlying a policy change.

In FCC v. Fox Television Stations, Inc., the Supreme Court articulated that, when an agency changes a policy that engendered serious reliance interests, it must provide a reasoned explanation for disregarding those interests.⁸⁶ But FCC v. Fox did not disturb the foundational principle that a court may not substitute its judgment for that of an agency concerning matters that Congress has entrusted to the agency.⁸⁷ Indeed, the Court recognized that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there

⁸³ AAR Comments, p. 40; CSX Comments, pp. 38-39; NS Comments, pp. 12-14; UP Comments, pp. 19-20.

⁸⁶ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009). (stating that a more detailed justification is necessary when an agency changes a policy that has engendered serious reliance interests).

⁸⁷ Id. at 515; SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (If the action rests upon . . . an exercise of judgment in an area which Congress has entrusted to the agency[,] of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.)

are good reasons for it, and that the agency **believes** it to be better, which the conscious change of course adequately indicates.”⁸⁸

The railroads have not cited decisions that disturb the standards for reasoned explanation that the Court articulated in Fox. In Encino Motorcars, LLC v. Navarro, the Court simply repeated the Fox rule that an agency must explain why a new policy disregards any serious reliance interests that the old policy engendered.⁹⁰ Indeed, Justice Ginsburg wrote a concurring opinion “to stress that nothing in [the majority] opinion disturbs well-established law” that “where an agency has departed from a prior position, there is no ‘heightened’ standard of arbitrary-and-capricious review.”⁹¹ In Perez v. Mortgage Bankers Ass’n,⁹² the Court underscored its Fox holding, without revising it.⁹³

Here, the railroads’ reliance interests are overstated and invalid. Essentially, the railroads claim that the proposed reciprocal-switching rule jeopardizes the investments they have made based on the Board’s existing competitive access policies and rail merger decisions, which promote single-line service.⁹⁴ However, the proposed rule does not necessarily eliminate single-line service; it merely facilitates a competitive alternative which may or may not affect the incumbent’s single-line haul since a determination to “switch” a shipment to the alternative carrier depends on the efficiency of the routing, the access fee, and other factors considered in

⁸⁸ Fox, 556 U.S. at 515.

⁹⁰ Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016)..

⁹¹ Id. at 2128 (Ginsburg, J., concurring).

⁹² Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199 (2015).

⁹³ Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199, 1209 (2015).. CSX’s cite to Perez is unavailing also because the issue in Perez was whether an agency must use notice-and-comment rulemaking when issuing an interpretation that conflicts with a past interpretation. Id. at 1203. The Court cited to the Fox standard concerning reliance interests as support for its position that adequate protection exists where notice-and-comment procedures are not used. Id. at 1209.

⁹⁴ AAR Comments, p. 40; CSX Comments, pp. 39-40; NS Comments, pp. 13-14; UP Comments, pp. 19-20.

the context of a switching case. Furthermore, some reciprocal switching scenarios change the location of an existing interchange, rather than add an interchange to an existing movement.⁹⁵

The railroads wrongfully assume that a grant of a right to reciprocal switching will always result in a less efficient movement when, in fact, it is possible that the alternative route would be more efficient.

Also, under the existing switching policy, investments in the rail network are still at risk, because the statute requires the Board to facilitate rail competition using reciprocal switching arrangements when “practical and in the public interest” or “necessary to provide competitive rail service.” Any reliance by the railroads on the existing switching policy in making their investments was simply not reasonable, since there never was any guarantee that single-line service would always be preserved. Under the structure of the Staggers Act as originally enacted and as amended, single-line service is not a panacea for rail regulation or operations if such service forecloses competition in a manner inconsistent with the switching statute and the NTP.⁹⁶

UP also contends that it has restructured its rail network in reliance on the ICC’s merger decisions which favored single-line service.⁹⁷ But these reliance interests are far too tenuous to usurp the Board’s authority to change its reciprocal switching policy. Neither UP (nor any other railroad) has cited to **any** evidence that directly connects the ICC’s decisions approving rail mergers to the Board’s existing reciprocal switching rules. Indeed, if the railroads’ reliance claims are found to be valid, they would dangerously hamstring the Board (and every other Federal agency) for decades to come by preventing it/them from ever adapting their policies to

⁹⁵ See Section V.

⁹⁶ See 49 U.S.C. § 11102(c) and 49 U.S.C. § 10705(a)(2)(A) (reciprocal switching is an express exception to a railroad’s long-haul).

⁹⁷ UP Comments, pp. 10-13.

change with the times. Further, as explained above, even if the railroads' reliance interests were legitimate — which they are not — the Board can still change its policy if the agency articulates good reasons for the change.⁹⁸ Clearly, the Board has satisfied its obligation in this respect as demonstrated in Section III of this Reply.

Finally and significantly, the railroads' concerns about reliance interests are premature. The Board need only address reliance interests in explaining its final rule, not a proposed rule, and the extent to which it must address reliance interests depends on the comments it receives in response to the Notice.⁹⁹ As shown above, the railroads' claimed reliance interests are exaggerated and tenuous at best. However, if the Board were to find that there is a legitimate reliance interest, it can address those interests in its explanation of the final rule.

E. Reciprocal Switching is Not Backdoor Rate Regulation Since Switching Arrangements Allow the Competitive Market, Not Regulation, to Work Effectively

NS makes the far-fetched claim that the Board's rules are unlawful because they are designed to circumvent the Board's existing rate regulation procedures.¹⁰⁰ CSX makes a similar argument ("The statutory protection for shippers without effective competitive options is rate regulation to ensure that their rates are 'reasonable,' 49 U.S.C. § 10701(d), not a competitive switching remedy so they can attempt to lower their rates to the 'competitive' rate or 'reduced competition' rate the shippers desire.").¹⁰¹ These claims are contradicted directly by ICCTA,

⁹⁸ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (stating that an agency can change position with good reasons); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2128 (2016) (Ginsburg, J., concurring) (noting that "reliance does not overwhelm good reasons for a policy change," even if the change would require systemic, significant changes by stakeholders).

⁹⁹ Encino, 136 S. Ct. at 2128 n.2 (Ginsburg, J., concurring).

¹⁰⁰ NS Comments, pp. 23-28.

¹⁰¹ CSX Comments, p. 42.

which includes entirely separate remedies for rate reasonableness challenges and reciprocal switching arrangements.

Specifically, The Board's authority to regulate the reasonableness of rates is set forth in 49 U.S.C. § 10704, whereas its authority to enhance rail competition via reciprocal switching is included in § 11102(c), which is a completely separate provision. If Congress never intended for the Board to use its reciprocal switching authority because it might result in lower rates, then it would not have created the switching remedy in the first place. It is a longstanding canon of statutory construction that "in interpreting a statute a court should always turn first to one cardinal canon before all others....that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."¹⁰² The very existence of the reciprocal switching statute and its clear separation from the rate reasonableness provisions belies the NS and CSX view that, if **any** ICCTA remedy has the potential to impact rates, then the **only** permissible remedy is a complex rate case before the Board. Acceptance of this preposterous position would improperly read the switching remedy, among a number of other statutory remedies, right out of the statute.¹⁰³ It is obvious that NS and CSX prefer that a captive shipper's only redress be a complex and costly rate case before the Board, but clearly Congress envisioned a separate statutory remedy to facilitate rail competition and, in doing so, allow the competitive marketplace to establish rates, improve service, and spur innovation.

¹⁰² Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); United States v. Goldenberg, 168 U.S. 95, 102-103, 42 L. Ed. 394, 18 S. Ct. 3 (1897).

¹⁰³ Many, if not most, of the Board's statutory authorities affect rates and fees paid by shippers in some manner. When a feeder application is granted (§ 10907) or conditions are attached to a merger (§ 11324), rates are affected. When a switch connection is ordered (§ 11103) or a railroad practice is upheld (§ 10702), rates are affected. Indeed, any time that the Board authorizes an abandonment, a grant of trackage rights, an acquisition, a merger, or any other railroad transaction, rail rates can be affected through lowering or raising railroads' costs of operations or by permitting changes to the competitive situation.

Additionally, the railroads present a far too myopic and self-serving perspective that the only desire of captive shippers is for lower rates, since the benefits of a competitive market extend well beyond the assessment of reasonable rates instead of monopoly rates. The railroads' preference for complicated rate regulation that very few shippers even try (or can afford) to challenge before the Board is ironic since rate regulation—where the federal government sets the price for service—is a substantially more intrusive remedy than allowing two competing rail carriers to bid for traffic and agree upon the switching price. A reciprocal switching remedy relies upon the competitive market to set rates, not the government, and thus is directly consistent with the National Rail Transportation Policy. See 49 U.S.C. § 10101(1) (“it is the policy of the United States Government—to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.”). Indeed, the carriers' clear preference for rate regulation over the workings of a competitive market flies in the face of their desire for the Board to focus on minimizing the need for Federal regulation.

NS claims that the proposed rule “provides shippers with relief under Section 11102(c) whenever they feel their rates are too high,”¹⁰⁴ but it completely ignores the specific standards and burdens of proof that must be satisfied to obtain a reciprocal switching prescription under the Board's proposal and that such standards address a number of factors other than rates. NS's attempt to conflate a reciprocal switching remedy and a rate reasonableness challenge ignores the obvious fact that enhancing competition results in benefits and impacts beyond rate levels since a more competitive rail environment will improve rail service, foster innovation, and promote growth and efficiencies. More importantly, whether or not reciprocal switching will actually result in a decrease in rates will depend upon the strength of the competition, the cost of service

¹⁰⁴ NS Comments, p. 24.

over the alternative route, the access fee, and a host of other factors. NS also improperly interprets Congress' recent directive to the Board to improve or study rate reasonableness procedures in light of well-known concerns over the workings of STB rate cases (especially large, complex, and costly Stand-Alone Cost proceedings) to mean that the Board cannot change its reciprocal switching policy.¹⁰⁵ But this argument wrongly assumes that the only benefit of competition is lower rates. Further, Congress' focus on problems with the Board's rate reasonableness procedures in no way constrains the existing authority and discretion of the Board to change its reciprocal switching policy in light of the substantially changed rail market.

F. Congress Did Not Ratify the Current Reciprocal Switching Rules in ICCTA Or In the STBRA

Both CSX and NS assert that the proposed rule is improper because the ICC's interpretation of the reciprocal switching statute in Midtec was "ratified" by Congress in the passage of ICCTA and/or the STBRA. See, e.g., CSX Comments, pp. 20-30; NS Comments, pp. 39-45. For the most part, these assertions are simply re-packaged versions of arguments previously made by the same two railroads in Ex Parte No. 711, to which NITL already responded.¹⁰⁶ In fact, those prior Reply Comments reveal that NITL already has distinguished all of the court decisions cited by CSX and NS in their October 2016 Opening Comments in this proceeding. Further, the Board has already rejected this ratification argument in its Decision. Decision at 12 ("Here, while Congress in ICCTA reenacted the reciprocal switching provision without change, CSXT and NSR do not cite any legislative history in which Congress even mentioned the agency's interpretation of former § 11103 (now § 11102), much less voiced approval for it. The absence of any such affirmation or discussion by Congress, combined with

¹⁰⁵ NS Comments, p. 27.

¹⁰⁶ See NITL Reply Comments, STB Ex Parte No. 711 at 44-51 (filed May 30, 2013).

judicial recognition that reciprocal switching is a matter of agency discretion, renders the ratification doctrine inapplicable here.”)

The new wrinkle in the ratification assertions of CSX and NS is that both railroads now claim to have found irrefutable proof that Congress knew about the ICC’s Midtec interpretation and intended to ratify it. See, e.g., CSX Comments, p. 22 (Congress was “well aware of” the ICC’s Midtec interpretation) and 26 (“legislative history...shows that Congress made an affirmative decision to ratify the interpretation of the reciprocal switching provision adopted by the ICC in Midtec”); NS Comments, p. 41 (“Congress made clear that it approved of and did not intend to alter the ICC’s...forced interchange and forced access standards and approach”). Both railroads also cite to shipper testimony regarding a desire for more rail competition, and CSX also cited to an ICC report given to Congress.¹⁰⁷

Evaluation of the various materials cited by CSX and NS in their Opening Comments reveals, however, that neither railroad has pointed to any evidence that Congress’ passage of ICCTA and/or STBRA was meant to address the real issue facing the Board right now – namely, whether the ICC’s implementation of § 11102(c) in Midtec was the **only** permissible use of the broad authority given to the agency in that statute.

Instead, the railroads’ alleged proof of Congressional ratification is capable of multiple reasonable interpretations. Despite an apparently exhaustive search of the legislative history, CSX and NS have only been able to find isolated snippets of ambiguous words and phrases used by Congress, like “market access” that may or may not be relevant in some fashion to the Board’s authority under § 11102(c).¹⁰⁸ The railroads’ most prized discovery, the House Report phrase “existing standards,” occurs at the end of a list titled “Various Intercarrier Transactions,”

¹⁰⁷ See, e.g., CSX Comments, pp. 23-25; NS Comments, pp. 41-42.

¹⁰⁸ See, e.g., CSX Comments, p. 26; NS Comments, p. 42.

which describes numerous agency duties (not just reciprocal switching) transferred from the ICC to the Board.¹⁰⁹

The belief that the phrase “existing standards” represented Congressional ratification of Midtec as the only permissible implementation of § 11102(c) is ridiculous, and should be rejected by the Board. If the railroads’ interpretation were accurate, then that would mean that (1) Congress had evaluated all ICC decisions implementing the agency duties included in the “Various Inter-carrier Transactions” list, which included the common carrier obligation, line sales, through routes, joint rate jurisdiction, car hire, car supply and car interchange, terminal trackage rights, and reciprocal switching jurisdiction; (2) Congress approved of the ICC’s use of its authority in all these areas; and (3) the ICC’s various decisions in these areas represented the Congress’ ratification of all of these decisions as the only permissible use of the authority given to the ICC under all relevant statutes. Obviously, the epic inferences drawn by CSX and NS are improbable, and the railroads do not offer any proof that this complex analysis was intended or performed by Congress. A better interpretation of the phrase “existing standards” is that ICCTA did not alter the relevant statutory language in these various areas. This interpretation is not only reasonable, but it correlates with the remainder of pages 83 and 84 of the relevant House Report, which summarize the statutory provisions in ICCTA.

There is no suggestion in the “existing standards” quotation that Congress intended to not only approve of the ICC’s implementation of § 11102(c), but also that Congress intended only one narrow interpretation of the phrase “practicable and in the public interest, or...necessary to provide competitive rail service,”¹¹⁰ At the most, the Congressional passage of ICCTA and

¹⁰⁹ H.R. Rep. No. 104-311 at 84 (1995).

¹¹⁰ From a broader perspective, the belief that Congress intended only **one** narrow interpretation of § 11102(c) is unlikely because the statutory language contains **two** options separated by the word “or”

STBRA reveals only that Congress believed the ICC's Midtec interpretation to be **one** permissible interpretation of § 11102(c).

Indeed, if Congress wanted to ensure that § 11102(c) could only be interpreted to mean situations where railroads engage in anti-competitive conduct, then Congress would have inserted that restriction in the language. Congress did not do this. Instead, Congress stated that reciprocal switching could be ordered whenever “practicable and in the public interest” or “necessary to provide competitive rail service.” The plain language of the statute must supersede strained exegesis of isolated words and phrases exhumed from the legislative history.¹¹¹

Courts are reluctant to employ the ratification doctrine,¹¹² and as the Board has recognized, “[a]pplication of the doctrine is particularly difficult when the legislative term is ambiguous or subject to an agency’s discretion.” Decision at 12 (citing Bernardo, 814 F.3d at 488). Here, the Board, once again, should reject the ratification assertions of CSX and NS. The words and phrases unearthed by the railroads from the legislative history could be reasonably interpreted in many different ways and hardly form the sort of “affirmative indication”¹¹³ required for ratification, especially when the statutory language plainly does not require anti-competitive conduct. “[O]nly the most extraordinary showing of contrary intentions” from

and also uses open-ended terms such as “public interest” and “practicable.” In other words, the belief of NS and CSXT would impermissibly render Congress’ particular choice of statutory language as surplusage. Duncan v. Walker, 533 U.S. 167, 174 (2001) (“We are thus reluctant to treat statutory terms as surplusage in any setting.”) (quotation omitted). See also Opening Comments of the Shipper Coalition for Railroad Competition at 17-19 (filed October 26, 2016).

¹¹¹ Cf. Ratzlaf v. United States, 510 U.S. 135, 147-148 (1994) (“we do not resort to legislative history to cloud a statutory text that is clear”) (citations omitted), superseded by statute on other grounds, 31 U.S.C. § 5324, as recognized in U.S. v. Khalife, 106 F.3d 1300, 1302 (n. 3) (6th Cir. 1997).

¹¹² See, e.g., Sweet Home Chapter v. Babbitt, 17 F.3d 1463, 1472 (D.C. Cir. 1994) (stating only that ratification “might be appropriate” if Congress reenacted the relevant statute *and* voiced approval of the agency interpretation).

¹¹³ See, e.g., AAR v. ICC, 564 F.2d 486, 493 (D.C. Cir. 1977).

legislative history “would justify a limitation on the ‘plain meaning’ of the statutory language.”
Garcia v. United States, 469 U.S. 70, 75 (1984).

Both CSX and NS contend that Congress’ failure to enact various bills proposed in the House and/or Senate during the last two decades “confirm[]” the ratification assertion and functions as an “unusually strong case of legislative acquiescence.”¹¹⁴ These contentions fail on two key levels. First, CSX and NS are too eager to draw inferences in an area where courts are reticent. Failed legislative proposals are “a particularly dangerous ground on which to rest an interpretation of a prior statute.” Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted). “[C]ourts are slow to attribute significance to the failure of Congress to act on particular legislation.”¹¹⁵ “Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction.”¹¹⁶ In fact, Congressional inaction “frequently” means “unawareness, preoccupation, or paralysis.”¹¹⁷

The facts surrounding the reciprocal switching issue are markedly different from those in prior cases where courts have divined meaning in Congressional inaction. For example, this is not a situation where, during the last two decades, “few issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress than those related to” reciprocal switching. Bob Jones, 461 U.S. at 599. At most, reciprocal switching was a minor part of minor legislative bills proposed in, but largely ignored by, Congress; indeed, most average citizens of the U.S. do not know what the phrase “reciprocal switching” means, let alone

¹¹⁴ See, e.g., CSX Comments, pp. 28-30; NS Comments, pp. 43-45.

¹¹⁵ Bob Jones University v. United States, 461 U.S. 574, 600 (1983) (citation omitted) (“Bob Jones”).

¹¹⁶ Pension Benefit, 496 U.S. at 650, quoting United States v. Wise, 370 U.S. 405, 411 (1962).

¹¹⁷ Zuber v. Allen, 396 U.S. 168, 185 (n. 21) (1969).

have awareness of any reciprocal switching disagreement over the past 20 years. Nor is this a situation where the Board repeatedly went to Congress, pleading for a change in the statutory language of 49 U.S.C. § 11102(c).¹¹⁸

CSX and NS ignore the fact that administrative agencies like the Board can revise both regulations and their interpretations of statutes that they implement. “Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.”¹¹⁹ In other words, agencies “must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’”¹²⁰

Second, the failure of Congress to act over the past twenty years has no impact on the true question before the Board – whether the Midtec requirement of anti-competitive conduct is the only permissible interpretation of § 11102(c). CSX and NS have pointed to no statement that Congress ever considered this issue. At most, Congressional ratification (or acquiescence), if it occurred, means only that Congress found the Midtec decision to be within the realm of permissible uses of the broad discretion given to the agency in § 11102(c).¹²¹ Of course, the plain language of the statutory text leaves no doubt that many possible permissible uses exist, because Congress gave the agency the authority to order reciprocal switching (1) based on broad concepts such as the “public interest” and what is

¹¹⁸ AAR v. ICC, 564 F.2d at 493.

¹¹⁹ American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway Co., 387 U.S. 397, 416 (1967).

¹²⁰ Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 42 (1983), quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). See also Rust v. Sullivan, 500 U.S. 173, 186-187 (1991).

¹²¹ See, e.g., Barnhart v. Walton, 535 U.S. 212, 220 (2002) (When Congress frequently amends or reenacts relevant statutory provisions without change, evidence exists that Congress “intended the Agency’s interpretation, **or at least understood the interpretation as statutorily permissible.**”) (emphasis added).

“practicable,” (2) in two different scenarios, which are given as alternatives separated by “or” in the statutory language. See 49 U.S.C. § 11102(c).

III. THE BOARD’S PROPOSAL IS THE PRODUCT OF REASONED DECISION-MAKING

A. The Board Has Articulated a Rational Connection Between the Board’s Reasons For Acting and the Rules That It Has Proposed

1. The effects of rail consolidations justify changes in the reciprocal switching rules.

The Board has concluded that the current reciprocal switching standard makes less sense in today’s regulatory and economic environment due, in part, to the consolidation of Class I rail carriers that has occurred over the past several decades. Decision at 9. The rail industry, however, claims that industry consolidation cannot justify the proposed rules because:

- the Board has imposed conditions to protect competition in past mergers;
- the Board approved past mergers due to the benefits of single-line service; and
- there is no evidence that consolidation has caused rate increases.¹²²

The rail industry’s reasons for rejecting industry consolidation as grounds for revising the reciprocal switching rules are specious. The Board is absolutely correct that rail consolidation has changed the industry in ways that warrant changes to the reciprocal switching standards.

a. Rail mergers have extended captivity over increasingly longer bottleneck segments that have restricted access to competing carriers on many routes.

While it is true that the agency imposed conditions to protect against the loss of direct competition at origin and destination locations served by both merging carriers (so-called “2-to-1” locations), rail consolidation has caused more subtle, but no less harmful, reductions in competition over downstream route segments that have accumulated with multiple mergers over

¹²² AAR Comments, pp. 25-27; CSX Comments, pp. 44-50; NS Comments, pp. 14-17; UP Comments, p. 22.

time. Prior merger decisions took no heed of extended bottlenecks at origins and destinations because the agency only protected competition lost at the end-points of a move. But a captive location in the 1980's was far more likely to be captive for a shorter distance than that same location is captive today because of consolidation.

This loss of competition is illustrated in the following example:

- Assume a location that tenders traffic for rail transportation over 800 miles from Point A to Point D.
- In the 1980's, assume a three rail carrier move from Points A to B (25 miles), B to C (750 miles), and C to D (25 miles).
- Assume that two or more rail carriers served the middle segment from Points B to C.
- Today, assume that rail consolidation has made this either a two carrier move covering segments A to C and C to D, or even a single carrier move from A to D.

Although the origin at Point A has remained captive to a single rail carrier over the entire time, the shipper has lost a competitive rail alternative for 750 miles of this 800 mile movement. In merger proceedings, however, the STB did not address this loss of competition because it did not occur at the origin or destination.

There are many permutations of this basic illustration. Some movements started with more than just three carriers; distances varied for each segment; carrier routes may have only partially overlapped; and the loss of competition likely was incremental and cumulative over the course of multiple mergers. Regardless of the specific details of individual movements, the ultimate result foreclosed competitive options in the middle of a route, often over substantial portions of the entire route.

Moreover, through multiple mergers, incentives to engage in reciprocal switching have decreased. At terminals served by multiple carriers prior to the wave of rail carrier consolidations, each carrier may have had different routing advantages that would incentivize

them to engage in reciprocal switching arrangements with the other carriers so that each could maximize its particular routing advantages to the benefit of all shippers within the terminal area. Consolidation has both reduced the number of carriers serving many terminals (often to just two railroads) and reduced or eliminated any routing advantages that the remaining carriers had over one another. Thus, their incentive to engage voluntarily in reciprocal switching is much less, as each carrier strives to protect its long-haul over captive traffic.

The AAR spins this fact by asserting that, “[a]s traffic levels fluctuate, locations that might have been commercially attractive to carriers for reciprocal switching may become less so, which is why changes in switching...would not suggest there is a problem with the current standards.”¹²³ But the AAR ignores the converse situation where traffic fluctuations might make reciprocal switching more attractive where it previously was not. There is no evidence of increased reciprocal switching opportunities, however, except for those imposed as conditions upon mergers to preserve competition lost at “2-to-1” locations. Ironically, although railroads argued that reciprocal switching sufficiently preserved pre-merger two carrier access when they wanted Board approval of their mergers, in this proceeding they stress the inefficiencies of reciprocal switching upon their operations. They cannot have it both ways.

The AAR also misses the point when it asserts that a decline in naturally occurring switching is not “a problem that needs to be addressed through a change in reciprocal switching rules.”¹²⁴ That comment is based upon the mistaken notion that reciprocal switching is only available as a remedy to redress a wrong. As discussed in Section II, reciprocal switching also is an affirmative right created by Congress to encourage greater rail competition.

¹²³ AAR Comments, p. 25.

¹²⁴ AAR Comments, p. 26.

Finally, CSX contends that, under the “one-lump” theory, no shipper was harmed by the loss of competition over any route where there was a bottleneck segment at the origin or destination pre-merger.¹²⁵ The premise of the one-lump theory is that there is only one monopoly profit to be gained from the sale of an end-product or service. The “one-lump” theory holds that, because a monopolist at the end stage of production is in a position to capture the entire monopoly profit, integration backwards upstream normally does not enable it to raise the profit-maximizing price. Thus, for movements from A to C, where only one carrier serves from A to B, but two carriers serve from B to C, the Board has held that a merger of the sole AB carrier with one of the BC carriers does not result in a loss of competition because the AB, or “bottleneck,” carrier already reaps the monopoly profit for the entire AC movement even prior to the merger. In several merger decisions, the agency invoked this theory to conclude that there would be no loss of competition when a bottleneck destination railroad merged with one of two neutral origin railroads.¹²⁶ The theory itself is highly controversial and has never been accepted by the shipping community.

Nevertheless, the “one-lump” merger decisions pre-dated the so-called “Bottleneck” decisions,¹²⁷ in which the Board recognized that the “one-lump” theory does not apply when the bottleneck rate is subject to regulation. The STB declared a “contract exception” to its longstanding policy that a shipper ordinarily is entitled to challenge the reasonableness of rates only on a through basis (i.e., from the origin to destination). Bottleneck I at *27-30. The

¹²⁵ CSX Comments, pp. 48-50.

¹²⁶ E.g., Burlington Northern Inc. et al. – Control and Merger – Santa Fe Pacific Corp. et al., 10 I.C.C.2d 661, 747-57 (1995), aff’d sub nom, Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997); Union Pacific– Control – Missouri Pacific, 366 I.C.C. 462, 538 (1982).

¹²⁷ Central Power & Light Co. v. Union Pacific RR Co., Nos. 41242 et al., 1996 STB LEXIS 358 (served Dec. 31, 1996) (“Bottleneck I”), clarified 1997 STB LEXIS 91 (served May 1, 1997) (“Bottleneck II”), aff’d in part, MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999)

exception declared that, **where a bottleneck carrier cannot serve both the origin and destination**, and where a shipper secures a separately negotiated contract rate for the non-bottleneck segment of the route, the shipper **may separately challenge** a common carriage bottleneck rate. *Id.* at *30-31. Regulation of the bottleneck rate prevents the bottleneck carrier from extracting the entire monopoly profit from both the captive and competitive route segments under the “one-lump” theory. The D.C. Circuit affirmed this “contract exception” in Union Pacific RR Co. v. STB, 202 F.3d 337, 342 (D.C. Cir. 2000).

Consolidation has reduced the ability of captive shippers to avoid the “one-lump” theory through the “contract exception.” Because the contract exception does not apply when the bottleneck carrier serves both the origin and destination, any merger, or combination of mergers, that have enabled bottleneck carriers to serve both locations necessarily had anti-competitive consequences. Specifically, such mergers destroyed the captive shipper’s eligibility to invoke the contract exception to bring a regulatory challenge to the bottleneck rate that would enable that shipper to realize the benefits of competition over the non-bottleneck segments. Because most major mergers occurred **before** the agency adopted the “contract exception,” this competitive harm was not identified and addressed in prior merger decisions.

Furthermore, even for movements where the contract exception has not been completely eliminated by prior mergers, the lengths of the bottleneck segments have grown longer through those mergers. This in turn requires greater reliance upon regulation over longer distances to defeat the one-lump theory. Conversely, it has reduced the distance over which shippers can take advantage of competition. Such consequences are contrary to the rail transportation policy to allow competition to establish reasonable rates to the maximum extent possible. 49 U.S.C. § 10101(1). Reciprocal switching rolls back the effect of extended bottleneck segments created by

mergers so that the captive shipper can avoid the consequences of the one-lump theory through regulation of just the bottleneck switch fee, thereby allowing the shipper to rely upon rail competition over the maximum possible distance. Otherwise, the captive shipper would have to rely upon regulation for a much greater portion of the route than was necessary prior to industry consolidation.

b. The benefits of single-line service do not override the pro-competitive objective of reciprocal switching.

The railroads next claim that industry consolidation does not support changes to reciprocal switching because prior merger decisions identified single-line service and reduced interchanges as a merger benefit.¹²⁸ But if the advantages of single-line service were the decisive factor in determining the public benefits of a merger, a single North American rail system would be the ultimate desirable objective. That is not the case. Rather, single-line service is but one benefit that must be balanced against other countervailing factors, including competitive reductions.

AAR claims that, because shippers have benefited significantly from single-line service, it would be “arbitrary” to promote reciprocal switching at the expense of single-line rail service.¹²⁹ But AAR presumes to make that judgment for shippers. Where the benefits of single-line rail service are compelling, there would be no reason for a shipper to select reciprocal switching over the incumbent’s single-line service. Changing the reciprocal switching rules simply gives the shipper the option to use a competing service; it does not mean the shipper will prefer that service.

¹²⁸ AAR Comments, p. 26; NS Comments, p. 17.

¹²⁹ AAR Comments, p. 26.

Finally, reciprocal switching does not always add an interchange to a movement. In some circumstances, it merely changes the location of the interchange between rail carriers. For example:

- Assume the same 800 mile three carrier move from Points A to D described in the proceeding section, with competition over the 750 mile segment from Points B to C.
- Assume the origin A to B carrier merges with one of the competing B to C carriers and the destination C to D carrier merges with the other competing B to C carrier.

Pre-merger, neither the origin or destination railroad had a long-haul beyond 25 miles. Post-merger, however, both railroads have equivalent 775 mile long hauls, but neither railroad can complete the movement without interchanging with the other railroad for 25 miles. Although the mergers have reduced the move from three carriers to two, the A to B origin carrier's long-haul right under the statute forces the shipper to use the origin carrier for the entire 775 mile A to C long-haul segment, thereby eliminating competition with the other carrier which also has a 775 mile move from B to D.

In the foregoing scenario, reciprocal switching does not make the movement less efficient by adding an interchange; it merely changes the location of the one interchange that already exists from the destination to the origin. The shipper, however, now has the competitive option to use either railroad for nearly the entire route of movement. The one-lump theory does not permit either carrier to use its 25-mile bottleneck to extract monopoly rents because the access fee is subject to regulation and the non-competitive carrier would lose its long-haul. This scenario is most likely to occur between NS and CSX in the East or UP and BNSF in the West because of the substantial overlap of their networks.

c. Reciprocal switching does not require a link between rail consolidation and rate increases.

Railroad claims that the Board must show a link between rail consolidation and rate increases miss the point.¹³⁰ This argument is an extension of railroad assertions that reciprocal switching is only intended to redress a wrong. As discussed in Section II, Congress intended reciprocal switching to be more than a response to negative conduct; reciprocal switching is an affirmative right and Congress gave the agency broad discretion to determine when and how to enforce this “right” within the context of various competing, and often conflicting, rail transportation policies.

2. The Board is correct that the dearth of cases indicates the bar for reciprocal switching is unattainably high, which justifies a change in the rules.

The Board is correct in its concern that “[t]he sheer dearth of cases brought under § 11102(c) in the three decades since Intramodal Rail Competition, despite continued shipper concerns about competitive options and quality of service, suggest that part 1144 and Midtec Paper Corp. have effectively operated as a bar to relief rather than as a standard under which relief could be granted.” Decision at 8-9. In Vista Chemical Co. v. Atchison, T. & S.F. Ry. Co., 5 I.C.C. 2d 331, 335 (1989), the agency stated that relief under the current standard “is available for the classical categories of competitive abuse: foreclosure; refusal to deal; price squeeze; or any other recognizable form of monopolization or predation.” But in an industry with few participants, even fewer competitors, and high barriers to entry, there is no need for railroads to engage in such behavior to exert market power. Indeed, the current rules set up a standard that effectively can **never** be satisfied.

¹³⁰ CSX Comments, p. 44; NS Comments, p. 15.

Foreclosure, for example, occurs when a carrier exploits its control over a bottleneck segment to protect its long-haul by refusing to interchange with carriers over non-bottleneck segments, thereby foreclosing competition from those carriers. Although this occurs routinely among railroads, the statute grants the origin railroad the right to its long-haul. 49 U.S.C. § 10705(a)(2). The same statutory section, however, creates an exception to this long-haul right for reciprocal switching. The current reciprocal switching standard thus creates a paradox in which the Board will grant reciprocal switching in cases of anti-competitive behavior such as foreclosure; but foreclosure may not be anti-competitive when permitted by the statute, except when the Board has granted reciprocal switching. There are two ways to break this paradox: (1) eliminate foreclosure as a form of competitive abuse that permits reciprocal switching; or (2) allow the Board to grant reciprocal switching when a market dominant origin carrier refuses to short-haul itself. The former is contrary to Board precedent that expressly identifies foreclosure as grounds for granting reciprocal switching, and the latter is very similar to the Board's proposals to grant reciprocal switching in this proceeding.

Refusals to deal can take many different forms and occur in horizontal and vertical markets. But it is difficult to conceive how a railroad could engage in a refusal to deal that could be remedied by reciprocal switching. Vertical refusals to deal refer to relations with downstream firms, such as dealers and distributors, but also could include refusals to deal with "disloyal" customers.¹³¹ But a customer can only be "disloyal" if it has a competitive alternative. Furthermore, although a railroad might refuse to deal with disloyal customers, the common carrier obligation already provides a remedy for such behavior. Horizontal refusals to deal typically take the form of a group boycott, but that requires collusion among competitors,

¹³¹ See generally, ABA Section of Antitrust Law, Antitrust Law Developments, Vol. 1, at 163-72, 246-48 (7th ed. 2012).

whereas the point of reciprocal switching is to introduce competition where none presently exists.¹³²

It also is not clear how a railroad would engage in a price squeeze, which typically occurs in two situations: (1) when a vertically integrated firm charges a low rate for a finished product that is so low compared to the price it charges for the raw materials its sells to competitors that those competitors cannot match the prices charged for the finished product; and (2) when a firm sells the same product in both the wholesale and retail markets, and charges retail rates that are the same as or lower than its wholesale rates.¹³³ In other words, a firm “squeezes” its competitors’ profit margins by setting a high wholesale price and charges a low retail price downstream, thereby effectively precluding the competitors’ ability to compete. A railroad in a monopoly position does not have competitors to “squeeze,” nor does it sell both raw materials and a finished product into a competitive market or at retail and wholesale rates.

While the description of anti-competitive conduct in Vista Chemical makes for a good sound-bite, it contains no analysis of how such activity actually might occur for transportation service that already is captive to a single rail carrier. After all, the point of reciprocal switching is to introduce competition into a captive market. Only a market with actual competitors is vulnerable to anti-competitive conduct. This would explain both why no shipper has been able to present a successful case for reciprocal switching under the current “competitive abuse” standard and why shippers have abandoned all such attempts for more than two decades. The current standard requires evidence of activity that simply is not necessary to the exercise of market power in a highly consolidated rail industry; nor is reciprocal switching likely to be a remedy for such activities if they did occur.

¹³² Id. at 110-19.

¹³³ Id. at 287.

3. The Board is correct that the railroads' improved financial health and productivity and technology enhancements support changes to the current reciprocal switching rules.

The AAR challenges the Board's decision to change the current reciprocal switching rules based on the enormous improvement in the railroads' financial health since the adoption of those rules. Decision at 9 ("to avoid obsolescence of the Board's regulatory policies, we must consider the better overall economic health of the rail industry....").¹³⁴ The AAR claims that this rationale is "directly contrary to the RTP mandate of promoting sustained revenue adequacy and minimizing the role of federal regulation in railroads' commercial activity" and that it is "flawed because the Board failed to consider more recent changes in the rail markets" that have reduced railroad revenue.¹³⁵ However, the AAR is "grasping at straws" to preserve the existing pro-railroad reciprocal switching policy. First, the RTP in no way establishes a "revenue adequacy mandate" that equates to protectionism of railroad revenue forever in time. Second, any recent market changes that may reduce railroad revenue presently or in the future pale in comparison to the railroad financial renaissance which has occurred since adoption of the Staggers Act in 1980.

AAR's claim that the RTP somehow entitles railroads to "sustained revenue adequacy" and prevents any change in Board policies is flatly contradicted by the long-standing principle that the Board's duty is to balance the often-conflicting elements of the RTP in order to reach a reasonable accommodation.¹³⁶ It is telling that AAR identifies no case precedent (because there

¹³⁴ As support for its finding that the railroads' financial health has improved substantially the Board cited to the recent Senate Commerce, Science & Transportation Committee Report issued in conjunction with the Surface Transportation Board Reauthorization Act of 2015 which stated that "the U.S. freight railroad industry has undergone a remarkable transformation since the enactment of the Staggers Rail Act of 1980".... and "the industry has evolved and the railroads' financial viability has drastically improved." S. Rep. No. 114-52, at 1-2 (2015).

¹³⁵ AAR Comments, p. 28. Individual railroads make similar claims. See CSX Comments, pp. 50-51; NS Comments, p. 15; and UP Comments, p. 22.

¹³⁶ BG&E, 817 F.2d at 115 (noting that there are "fifteen different and not entirely consistent goals" in the RTP).

is none) for its preposterous assertion that the policy of revenue adequacy in essence prevents any change in Board regulations that could impact railroad revenue. In fact, its sole justification for this bald position has nothing to do with the RTP. Rather, AAR wrongly claims that Congress expanded the Board's duty "to help carriers attain adequate revenues" based on the recent update to Section 10704(a)(2) of the statute in the STB Reauthorization Act. But this change only requires the Board to consider present and future infrastructure needs when maintaining and revising revenue adequacy standards and procedures, and can hardly be considered an "RTP mandate of promoting sustained revenue adequacy...."¹³⁷

The AAR cites generally to the recent freight volume declines over the past year as a counterbalance to the vast improvements in railroad financial health occurring over more than three decades, due primarily to fewer shipments of coal and petroleum.¹³⁸ But the recent and normal ebbs and flows in traffic patterns that railroads routinely face cannot be compared to the "remarkable transformation"¹³⁹ of the industry from one replete with inefficiencies and bankruptcies to the highly productive and profitable rail industry today. Rather than embracing the benefits of competition that would be spawned from new reciprocal switching arrangements, AAR takes a more pessimistic and protectionist view that is founded on speculation: "The recent changes in freight rail markets make it particularly important for the Board to avoid creating new regulatory uncertainties that **could** impede the railroads' ability to adapt to changing circumstances."¹⁴⁰ In reality, increased rail competition will allow the railroads to adapt to market changes in more innovative ways.

¹³⁷ AAR Comments, p. 27-28.

¹³⁸ AAR Comments, p. 28, n. 46.

¹³⁹ S. Rep. No. 114-52, at 1-2 (2015).

¹⁴⁰ AAR Comments, p. 28 (emphasis added).

In attacking the Board's rationale of improved financial health of the rail industry, NS distorts the clear legal standard which permits an agency, such as the Board, to change its existing regulatory policies so long as it provides "a reasoned analysis indicating that prior policies and standards are being deliberately changed"¹⁴¹ While NS admits that the railroads "have improved their financial position" as a result of Staggers, it denies that "railroads are abusing their market position warranting a change in policy." However, "abuse of market position" is not required for the Board to adopt its proposed new rules, and the railroads vastly improved financial health is a sound reason supporting the Board's deliberate change to its competitive access policy.

Finally, the AAR asserts that the Board cannot support its proposed change to the current reciprocal switching policy based on increased productivity and technological advancements in the rail industry, because reciprocal switching will create inefficiencies and lead to underutilization of facility investments that have enhanced productivity.¹⁴² However, AAR conveniently ignores the marketplace reality that shippers will not pursue new routings created via reciprocal switching that are significantly less efficient. As discussed above, in such a case, it is reasonable to assume that the incumbent railroad will retain the traffic. Moreover, enhanced productivity and technology permit carriers to adjust routings more quickly and efficiently. See Orrison R.V.S., pp. 8-9, 14-15, 18. Accordingly, it is entirely rational for the Board to consider the substantial improvements in productivity and technology that have transpired since adoption of the current reciprocal switching rules as a justification for expanding the use of switching arrangements.

¹⁴¹ Decision at 10, citing Grace Petroleum Corp. v. FERC, 815 F.2d 589, 591 (10th Cir. 1987).

¹⁴² AAR Comments, p. 29.

B. The Board's Standards Are Not Impermissibly Vague

AAR and CSX argue that the Board's proposed rule is impermissibly vague,¹⁴³ but base their vagueness assertions on a tortured reading of both the proposed regulation and the vagueness doctrine. The main thrust of their argument is that the public interest test under Prong 1 provides no standard because it involves a multifactor benefit-detriment analysis applied on a case-by-case basis. But this argument both ignores the fact that the multifactor analysis is one of four criteria that must be satisfied under the Prong 1 test and it misconstrues the vagueness doctrine. AAR fails to provide any legal justification for its vagueness claims.¹⁴⁴

The vagueness doctrine only requires that the Board provide fair notice as to when it will require reciprocal switching.¹⁴⁵ Because “‘we can never expect mathematical certainty from our language,’” the fair-notice standard demands no more than a reasonable degree of certainty.¹⁴⁶ Moreover, the vagueness doctrine applies lesser scrutiny to economic regulation “because businesses . . . can be expected to consult relevant legislation in advance of action.”¹⁴⁷ Thus, “regulations are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.”¹⁴⁸

¹⁴³ See, AAR Comments, pp. 41-44; CSX Comments, pp. 81-83.

¹⁴⁴ AAR cites to Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016), in its vagueness argument, but for the proposition that an agency must provide reasons for its decisions. AAR Comments, p. 42. This has no bearing on whether a regulation's language is impermissibly vague.

¹⁴⁵ See FCC v. Fox Television Stations, Inc. (Fox II), 132 S. Ct. 2307, 2317 (2012). The vagueness doctrine is an outgrowth of Constitutional due process. See id. (noting that the requirement of fair notice is essential to the protections that the Due Process Clause of the Fifth Amendment provides).

¹⁴⁶ U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 737 (D.C. Cir. 2016) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)) (U.S. Telecom).

¹⁴⁷ Timpinaro v. SEC, 2 F.3d 453, 460 (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982)) (quotations omitted).

¹⁴⁸ Piscottano v. Murphy, 511 F.3d 247, 280-81 (2d Cir. 2007) (quoting United States v. National Dairy Products Corp., 372 U.S. 29, 32, (1963)) (internal quotations omitted).

The Board’s public interest test satisfies the fair notice requirement because it generally outlines the standards that are relevant to satisfying the public interest.¹⁴⁹ The test includes three independent criteria that must be satisfied in addition to a multifactor benefit-detriment criterion. Not only do these criteria substantially limit the circumstances when reciprocal switching will be determined to serve the public interest, but they also ensure that certain considerations will be given controlling weight. For example, if a proposed switching arrangement will result in an unsafe condition or hamper the ability of a carrier to serve its shippers, the switching arrangement will not pass the public interest test, regardless of whether the Board finds the potential benefits outweigh the detriments.

Moreover, the vagueness doctrine permits the Board to adopt a flexible public interest test by incorporating a multifactor benefit-detriment analysis. “[A] regulation [that involves a multifactor standard] is not impermissibly vague because it is ‘marked by flexibility and reasonable breadth, rather than meticulous specificity.’”¹⁵⁰ To promote flexibility, the Board has not limited the factors it will consider when balancing the benefits of a reciprocal switch.¹⁵¹ But it has explained that the balancing analysis will focus on factors as they specifically relate to the reciprocal switching request that is before the Board, rather than reciprocal switching as a whole.¹⁵² Additionally, it has indicated that case-specific presentations on the benefits and detriments of a reciprocal switching request should be guided by the Board’s current petition for exemption process.¹⁵³

¹⁴⁹ See U.S. Telecom, 825 F.3d at 736 (finding that a rule satisfied vagueness doctrine because it “mark[ed] out the rough area of prohibited conduct.”)

¹⁵⁰ Id. at 737.

¹⁵¹ Decision at 18.

¹⁵² Id.

¹⁵³ Id.

Given the variety of conditions affecting the public interest, the vagueness doctrine accommodates the Board's flexible public interest standard. In applying the vagueness doctrine, courts have recognized that, "by requiring regulations to be too specific[,] courts would be opening up large loopholes allowing conduct which should be regulated to escape regulation."¹⁵⁴ This concern is especially acute in "a field in which specific regulations cannot begin to cover all of the infinite variety of conditions."¹⁵⁵ As the Board has noted in its Decision, there are many factual scenarios under which a reciprocal switching request may arise, and creating rigid standards could withhold reciprocal switching from large categories of shippers or result in reciprocal switching where it may not be warranted.¹⁵⁶ Also, the public interest involves the potentially competing interests of shippers, carriers, and the general public, and the Board's standard would allow for an appropriate vetting and balancing of those interests that may not be uniform within each such group or across the geographic locations where reciprocal switching may be requested.

Moreover, the Board's benefit-detriment criterion is not so vague as to be standardless. The terms "benefit" and "detriment" are words of common understanding.¹⁵⁷ For example, it is not difficult to ascertain that providing access to new markets via a switching arrangement is a benefit or that delays arising from a switching arrangement would be a detriment. Also, it is clear that the criterion requires a cost-benefit analysis in each case, which is a common analysis that businesses undertake daily. Certainly, there may be cases where it is unclear that benefits

¹⁵⁴ U.S. Telecom, 825 F.3d at 737.

¹⁵⁵ Id.

¹⁵⁶ Decision at 14-15.

¹⁵⁷ See Throckmorton v. Nat'l Transp. Safety Bd., 963 F.2d 441, 444 (D.C. Cir. 1992) ("In reviewing regulations for vagueness, we must decide only whether the regulation delineated its reach in words of common understanding."). In Throckmorton, the court upheld regulations that prohibited conduct to the extent it would create a hazard, but provided no guidelines for determining when conduct is hazardous.

outweigh detriments, but “under [the vagueness doctrine] a company is not entitled to such precision as would eliminate all close calls.”¹⁵⁸

The Third Circuit’s decision in FTC v. Wyndham Worldwide Corp. is instructive on the hollowness of CSX’s claim that the benefit-detriment criterion is standardless. Windham Worldwide dealt with whether a statutory standard resembling the Board’s benefit-detriment test was impermissibly vague. The standard prohibited conduct that “causes or is likely to cause substantial injury to consumers which . . . is not outweighed by countervailing benefits to consumers or to competition” and was “not so vague as to be no rule or standard at all.”¹⁵⁹ Although the court recognized that the standard was imprecise, it noted that the standard was not impermissibly vague because it “informs parties that the relevant inquiry [] is a cost-benefit analysis that considers a number of relevant factors” and need not eliminate all borderline cases where it is unclear that conduct meets the standard.¹⁶⁰

Also, while CSX peppers its argument with pithy quotes on the vagueness doctrine from various cases, the actual outcomes of those cases demonstrate that the Board’s proposed rule is not impermissibly vague. First, the Board’s public-interest test is a far cry from the regulations that the courts found impermissibly vague in the cases that CSX cites:

- In AT&T Corp. v. Iowa Utilities Board, the Supreme Court found that an agency’s standards for statutory relief were impermissibly vague because they failed “to apply some limiting standard,” since any person seeking relief could establish the facts necessary to obtain it.¹⁶¹ In contrast, under the Board’s proposed public interest test, no

¹⁵⁸ FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 256 (3d. Cir. 2015) (Wyndham Worldwide).

¹⁵⁹ Wyndham Worldwide, 799 F.3d at 255.

¹⁶⁰ Id. at 255-56.

¹⁶¹ AT&T v. Iowa Utils. Bd., 525 U.S. 366, 388-390 (1999) (emphasis in original). The rule reviewed implemented a statutory requirement that telecommunication carriers grant access to elements of their network if: access was necessary to the requesting carrier; and failure to provide access would impair the requesting carrier’s ability to provide services it seeks to offer. Id. at 388. However, the rule rendered the “necessary” and “impairment” criteria meaningless by stating that any increase in cost or decrease in the requestor’s service quality resulting from denial of a network element rendered the element necessary and

one fact can establish that switching is in the public interest and not every person seeking reciprocal switching will be able to obtain it.

- In Timpinaro v. SEC, the court found a rule applying a multifactor definition of a professional trading account may¹⁶² have been impermissibly vague because “a trader would be hard pressed to know when he is in danger of triggering an adverse reaction [from the regulator].”¹⁶³ The bases for this determination were that “five of the seven factors . . . are subject to seemingly open-ended interpretation”; the uncertainty created by these factors is “all the greater when these mysteries are considered in combination, according to some undisclosed system of relative weights”; and the order adopting the rule did not address this vagueness.¹⁶⁴ Here, however, the Decision addresses how the Board will evaluate the benefit-detriment factors.¹⁶⁵ The Board has assigned a system of relative weights by using the other public-interest criteria to identify overriding factors. And, while the list of benefit-detriment factors is open-ended, the factors are not. The Timpinaro factors were open-ended because they were expressed in terms of an undisclosed qualitative threshold. In contrast, the benefit-detriment factors do not involve a qualitative threshold.
- In Fox II, the Supreme Court found that an agency’s new regulatory policy was impermissibly vague because the agency applied it retroactively and, thus, it “fails to provide a person of ordinary intelligence fair notice of what is prohibited.”¹⁶⁶ Fox II is inapposite because the Board’s proposed rule does not apply retroactively.

Second, CSX quotes Grayned v. City of Rockford¹⁶⁷ for the rule that the vagueness doctrine prohibits delegation of basic policy matters to enforcement and adjudicative bodies for resolution on an ad hoc and subjective basis. But, like the anti-noise ordinance upheld in

constituted an impairment regardless whether the element could be self-provided or obtained elsewhere. Id. at 389-90. Thus, a requesting carrier could gain access to any network element it did not already have, regardless whether it could provide it itself or obtain it from someone else with better service quality or price, and the agency would have no role in determining if access was warranted.

¹⁶² The court remanded the rule for reconsideration of vagueness without determining that it was in fact too vague. Timpinaro v. SEC, 2 F.3d 453, 460 (D.C. Cir. 1993) (Timpinaro).

¹⁶³ Timpinaro, 2 F.3d at 460.

¹⁶⁴ Id. The factors were: “(1) a pattern or practice of day trading; (2) a high volume of day trades in relation to all trades in the account; (3) a high volume of day trades in relation to the number and value of securities held in the account; (4) excessive frequency of short-term trading; and (5) excessive frequency of short sale transactions.” Id.

¹⁶⁵ Decision at 18.

¹⁶⁶ Fox II, 132 S. Ct. 2307, 2318 (2012). While CSX also quotes from Fox II for the proposition that a regulation cannot be so standardless that it authorizes or encourages seriously discriminatory enforcement, the Court did not cite to discriminatory enforcement concerns in its opinion.

¹⁶⁷ Grayned v. City of Rockford, 408 U.S. 104 (1972) (Grayned).

Grayned, the public-interest test codifies basic policy decisions. In Grayned, the Court found that an anti-noise ordinance reflected basic policy choices because it prohibited disturbances only if they disrupted normal school activities.¹⁶⁸ Thus, while “enforcement requires the exercise of some degree of [] judgment, ” the ordinance “contains no broad invitation to subjective or discriminatory enforcement” and does not permit conduct “only at the whim of any police officer.”¹⁶⁹ Likewise, the proposed rule is not a broad invitation to subjective or discriminatory enforcement. The four criteria in the public-interest test represent the basic policy determinations that form the narrow contours of what is practical and in the public interest. Also, while the benefit-detriment criterion may afford some discretion as to the relative weight of detriments and benefits, the Board has narrowed this discretion by requiring that certain facts, such as unsafe conditions, be given overriding weight. Thus, a railroad will not have to enter a reciprocal switching arrangement at the whim of the Board.¹⁷⁰

Third, CSX’s characterization of the Board’s proposed rule as the type of “mush” abhorred in Paralyzed Veterans of America v. D.C. Arena L.P.,¹⁷¹ is inconsistent with both the Paralyzed Veterans holding and the content of the Board’s proposed rule. In Paralyzed Veterans, the Court announced that an agency may not “promulgate mush and then give it concrete form

¹⁶⁸ Id. at 114. The ordinance prohibited persons on public or private grounds adjacent to a school or class in session from making “any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.” Id. at 107-08.

¹⁶⁹ Id. at 113-114. Because the Grayned ordinance involved First Amendment freedoms, the Court applied a stricter vagueness scrutiny than the scrutiny that would apply to a rule governing economic conduct. See Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (“If . . . the law interferes with the right of free speech . . . , a more stringent vagueness test should apply.”); Grayned, 408 U.S. at 109 (noting that vague laws may inhibit “sensitive areas of basic First Amendment freedoms”).

¹⁷⁰ Cf. Grayned, at 114 (noting that an anti-noise ordinance did not invite subjective judgment, because a police officer could not enforce it on a whim).

¹⁷¹ Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), overruled on other grounds, Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199 (2015) (Paralyzed Veterans).

only through subsequent less formal interpretations.”¹⁷² But it declined to characterize a rule that required an arena to contain wheelchair seating with “lines of sight comparable” to those for the general public as mush, even though the rule did not indicate whether it required lines of sight over standing spectators.¹⁷³ It emphasized that the phrase “could be interpreted” as requiring, and “anyone . . . should have thought it might imply[,] an unobstructed view over standing spectators.”¹⁷⁴ The Board’s proposed rule provides at least as much notice as the Paralyzed Veterans regulation. Through the use of various independent criteria, it identifies the extent to which switching arrangements are in the public interest or needed for competitive access such that railroads are on notice of when the Board may order reciprocal switching.

Another flawed aspect of CSX’s argument is its claim that the Decision is impermissibly vague concerning the principles the Board would use to decide requests to set access prices. As an initial matter, it is premature to claim the rule is impermissibly vague on access pricing just because the proposed rule does not contain precise access-pricing provisions.¹⁷⁵ Moreover, CSX bases this claim on the vagueness doctrine, but the vagueness doctrine does not set a standard for the clarity required of a notice of proposed rulemaking. Instead, the appropriate standard is that the notice of proposed rulemaking “expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.”¹⁷⁶ Here, the Decision expressly asks for comments on the proposed access pricing methodologies.¹⁷⁷ Thus,

¹⁷² Id. at 584.

¹⁷³ Id. at 584-85.

¹⁷⁴ Id. at 585 (emphasis in original).

¹⁷⁵ The Board has discretion to announce policy via adjudication. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974).

¹⁷⁶ U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 700 (D.C. Cir. 2016) (quoting CSX Transp., Inc. v. STB, 584 F.3d 1076, 1081 (D.C. Cir. 2009)).

¹⁷⁷ Decision at 25.

the Decision does not need to provide additional detail on access pricing for the Board to adopt one of its access pricing proposals in the final rule. Furthermore, the Board does not have any rules for access pricing even under the current reciprocal switching standards, and thus it could elect to continue the current case-by-case adjudicatory approach.

Finally, turning to AAR's nitpicking of various aspects of the rules it deems vague, AAR misses the mark.¹⁷⁸ The vagueness doctrine only requires that the rules "mark out the rough area" of when reciprocal switching is practical and in the public interest or necessary to provide competitive rail service.¹⁷⁹ As explained above, the Board's public-interest test satisfies this requirement.¹⁸⁰

C. Congress Did Not Restrict Reciprocal Switching To Terminal Areas

Several railroads assert that the proposed rule is improper or even unlawful because reciprocal switching is necessarily limited to terminal areas by 49 U.S.C. § 11102. The railroads' further claim that the proposed rule is inherently flawed because it allows the Board to order reciprocal switching **outside** terminal areas. For example, NS asserts that the proposed rule is "unlawful, because Congress did not authorize the Board to order reciprocal switching in interchanges beyond a terminal area."¹⁸¹ Other railroads made similar assertions.¹⁸² The

¹⁷⁸ AAR Comments, pp. 43-44.

¹⁷⁹ U.S. Telecom, 825 F.3d at 736.

¹⁸⁰ Neither AAR nor CSX address an aspect unique to the Board's proposed competitive-need test in their vagueness arguments.

¹⁸¹ NS Comments, p. 36.

¹⁸² See, e.g., AAR Comments, pp. 45-46 (asserting that "reciprocal switching" was a "term of art" in 1980, when it was added to the governing statute, that meant switching in a terminal area); CSX Comments, p. 77 ("The proposed rule is unlawful because it purports to authorize the Board to order reciprocal switching outside of a terminal area.") [emphasis original]; UP Comments, p. 55 ("This terminal-area approach is required by statute.").

railroads advance several reasons in support of the supposed “unlawfulness” of the proposed rule, but none withstands scrutiny.

1. The plain language of § 11102(c) tellingly omits any reference to terminal areas.

The railroads’ position results primarily from conflating §§ 11102(a) and (b), which address use of terminal facilities, with § 11102(c), which deals with reciprocal switching. They insert a “terminal facility” limitation into § 11102(c) simply because one exists in §§ 11102(a) and (b).¹⁸³ However, the railroads’ position that reciprocal switching is limited to a terminal area is flatly inconsistent with the text of § 11102(c), since the word “terminal” is not found anywhere in subsection (c). In fact, unlike §§ 11102(a) and (b), there is no geographic limitation to the reciprocal switching authority in § 11102(c), and the railroads’ “preference for symmetry cannot trump an asymmetrical statute.” CSX Transportation, Inc. v. Alabama Department of Revenue, 562 U.S. 277, 296 (2011). The Board’s reciprocal switching authority is subject only to the standards that the switching arrangements are determined to be “practicable and in the public interest” or “necessary to provide competitive rail service.”

Congress took pains to insert a terminal area limitation in both subsections (a) and (b), yet notably omitted such a limitation from subsection (c). “[W]here Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quotation and citation omitted).

¹⁸³ See, e.g., CSX Comments, p. 78 (“The inclusion of the ‘reasonable distance’ language in one subsection of § 11102 but not another is powerful evidence that Congress did not intend reciprocal switching arrangements to extend to a ‘reasonable distance outside the terminal.’”); NS Comments, p. 37 (“Section 11102(c) does not authorize the Board to order reciprocal switching for a ‘reasonable distance outside the terminal.’”).

Several railroads fixate on the “reasonable distance” language of § 11102(a) to support their assertion that the Board can only order reciprocal switching in terminal areas.¹⁸⁴ The argument appears to be that, because the words “reasonable distance outside of a terminal” are used in § 11102(a) but not in § 11102(c), the Board can only order reciprocal switching inside terminal areas. Such a position ignores that there is no terminal limitation or other geographical limitation in § 11102(c), and it is improper and contrary to the plain language of the statute for the railroads to foist a “terminal” limitation on § 11102(c). To interpret the statute in a way that ignores the plain meaning would be unreasonable.¹⁸⁵

The statutory limitations to reciprocal switching, as mentioned above, are that the reciprocal switching must be “practicable and in the public interest” or “necessary to provide competitive rail service.” There is no terminal, reasonable distance or other geographic limitation in the reciprocal switching statute. In contrast, the Board’s proposal for reciprocal switching to be within a “reasonable distance” of an interchange for § 11102(c) is not based on the “reasonable distance” from a terminal as stated in § 11102(a), but simply on the discretion afforded to it by Congress in implementing § 11102(c).¹⁸⁶

Further, to the extent that the railroads believe a terminal area limitation is implicit in § 11102(c) due to the title of § 11102 (“Use of terminal facilities”), such belief is contrary to settled law.¹⁸⁷ Attempted reliance on the title of § 11102 would also fail because it would

¹⁸⁴ See, e.g., CSX Comments, p. 78; AAR Comments, p. 45.

¹⁸⁵ See, e.g., Shays v. FEC, 337 F.Supp.2d 28, 51 (D.D.C. 2004).

¹⁸⁶ See, e.g., Midtec Court Review, 857 F.2d at 1500 (describing the discretion afforded to the Board in adopting regulations regarding reciprocal switching).

¹⁸⁷ See, e.g., Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004), quoting Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company, 331 U. S. 519, 529 (1947) (“The caption of a statute, this Court has cautioned, cannot undo or limit that which the [statute’s] text makes plain.”).

render, as surplusage, the explicit references to “terminal facilities” in §§ 11102(a) and (b).

TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (“[w]e are reluctant to treat statutory terms as surplusage in any setting”) (internal citations and quotation omitted).

2. Numerous authorities, including the railroads’ own public statements, fail to limit reciprocal switching to terminal areas.

Several railroads assert that a terminal area limitation is implicit in the Board’s authority under § 11102(c) because, allegedly, the term “reciprocal switching” is commonly known within the industry to be limited to terminal areas.¹⁸⁸ This assertion is belied by the railroads’ own public documents. The official definitions of “reciprocal switching” utilized by many of the railroads submitting comments in this proceeding say nothing about a terminal area limitation.¹⁸⁹ Furthermore, some railroads’ tariffs contain voluminous details describing the exact circumstances and conditions under which a particular railroad will, and will not, perform reciprocal switching.¹⁹⁰ The sheer magnitude and specificity of these guidelines contradict the contention that “reciprocal switching” is a term with a single, unitary definition that is limited to terminal areas.

¹⁸⁸ See, e.g., CSX Comments, p. 78 (“‘reciprocal switching’ is a term that has long been understood by the agency and the railroad industry – both before and after the enactment of the Staggers Act – to describe the movement and interchange of rail cars within a terminal area”) (emphasis in original). See also NS Comments, p. 37; UP Comments, p. 55; AAR Comments, pp. 45-46.

¹⁸⁹ For example, CSX defines reciprocal switching as “[a] mutual interchange of inbound and outbound carload freight which is switched to or from a siding or another carrier under a regular switching charge. The charge is usually absorbed by the carrier receiving the line haul.” See <https://www.csx.com/index.cfm/about-us/company-overview/railroad-dictionary/?i=R>. The BNSF definition is “[s]witching done by competing railroads to place equipment to industries located on the railroad.” See <https://www.bnsf.com/customers/pdf/glossary.pdf>. UP defines reciprocal switching as “[a] switching service performed for another railroad on loaded cars on which the other railroad receives a road haul. The switching railroad is paid by the road haul carrier for performing the service.” See <http://www.up.com/customers/glossary/p-s/>.

¹⁹⁰ See, e.g., NS-8001-A at Items 1150, 1230, 1320, 1330, 1340, 4000, 4020, and 4630, and all of Section 5. Available at: <http://www.nscorp.com/content/dam/nscorp/ship/shipping-tools/Shipping%20News%20and%20Alerts/NS8001-A-71st-Revision-eff-01-1-2017.pdf>.

In support of their view that reciprocal switching always means terminal areas, the railroads rely upon various court and agency decisions, but primarily the following five decisions: Railroad and Warehouse Commission of Minnesota v. Chicago Great Western Railway, 262 ICC 437 (1945); Switching Charges and Absorption Thereof at Shreveport, La., 339 ICC 65, 70 (1971); Central States Enterprises, Inc. v. Seaboard Coast Line Railroad Company, 1984 ICC Lexis 499 (May 11, 1984); Central States Court Review, 780 F.2d at 668 (n. 1); and Midtec Paper Corporation v. Chicago & North Western Transportation Company, 3 I.C.C.2d 171, 179-180 (1986) (“Midtec II”).¹⁹¹ The problem with the railroads’ reliance on these authorities is that they ignore numerous **other** authorities that define or use the term “reciprocal switching” without any reference to a terminal area limitation. When Congress adopted reciprocal switching in the Staggers Act, neither the statute nor the legislative history mentioned any restriction to terminal areas. Instead, the Conference Committee merely stated that “in areas where reciprocal switching is feasible,” it can provide relief for shippers with inadequate rail service.¹⁹² In the Midtec II decision, the ICC defined reciprocal switching with the following simple statement:

Reciprocal switching is the movement, for a fee, by one carrier of the car or cars of another between a point of interchange and a point on the first carrier’s lines.

Midtec II, 3 I.C.C.2d at 176. Similarly, the D.C. Circuit broadly defined reciprocal switching to include a switching agreement that “requires a carrier that owns a line to move a competing

¹⁹¹ See, e.g., AAR Comments, pp. 45-46; CSX Comments, pp. 78-80; NS Comments, pp. 37-38; UP Comments, p. 55.

¹⁹² H.R. Rep. No. 96-1430, at 116 (Sept. 29, 1980), accompanying S. 1946.

carrier's cars to loading or unloading points on that line.”¹⁹³ Again, there was no mention of terminal areas in the court's definition.¹⁹⁴

In the time period surrounding the creation of the Staggers Act, various agency decisions also reveal use of the term reciprocal switching in a manner that is not limited by terminal areas. See, e.g., Boston & Maine Corp., Debtor – Trackage Rights over Consolidated Rail Corporation between Rotterdam Junction, NY and Buffalo, NY, 360 I.C.C. 239, 240-241 (1979) (B&M seeks reciprocal switching rights on extensive rail lines of second railroad); St. Louis Southwestern Railway Company – Purchase (Portion) – Wm. H. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad Company, Debtor, 363 I.C.C. 323, 398-399 (1980) (Western Pacific Railroad Company seeks reciprocal switching conditions which would “either create or enlarge a zone in which industries on SPT's line can also be served by WP”). Even after adopting the new competitive access rules in 1985, the ICC stated only that “[i]t is not clear whether reciprocal switching can be required outside a terminal facility.” Midtec II, 3 I.C.C.2d at 178 (n. 17). Therefore, it is entirely permissible for the Board to definitively state that reciprocal switching can be ordered outside terminal areas because Congress included no such limitation in the statute and even the ICC recognized such an interpretation as a possibility.

¹⁹³ Consolidated Rail Corp. v. ICC, 43 F.3d 1528, 1530 (D.C. Cir. 1995).

¹⁹⁴ See also Illinois Central Railroad Company – Construction and Operation Exemption – In East Baton Rouge Parish, LA, STB Docket No. 33877, slip op. at 8 (n. 17) (served Feb. 20, 2002) (describing a reciprocal switching arrangement where “KCS, for a fee, transports the cars of other carriers over its lines to destination, thereby permitting those other carriers to establish single-line rates for this customer”); Policy Alternatives to Increase Competition in the Railroad Industry, STB Ex Parte No. 688, slip op. at 3 (served Apr. 14, 2009) (“Reciprocal switching involves the incumbent railroad transporting traffic, usually for a short distance, over its own track on behalf of a competing railroad for a fee.”); Central Illinois Railroad Company – Discontinuance of Service Exemption – In Cook County, Ill., STB Docket No. AB-1066 (Sub-No. 2X), slip op. at 2 (n. 3) (served Nov. 16, 2010) (“reciprocal switching is an arrangement whereby a railroad serving a shipper's facility transports traffic over its track to that facility for a competing railroad that cannot physically serve the facility and usually involves similar service by the competing railroad to shipper facilities in an area not physically served by that other railroad”).

Even if it could be proven that a common understanding of the phrase “reciprocal switching” existed thirty-six years ago, Congress intended to change that understanding with the Staggers Act. Legislative history reveals that Congress sought to deviate from the prior use of reciprocal switching when the ICC was given authority to order reciprocal switching. The House Committee on Interstate and Foreign Commerce plainly stated that “reciprocal switching has been limited to situations where competition between rail carriers is not threatened” and, crucially, “[t]he Committee intends for the Commission to permit and encourage reciprocal switching as a way to encourage greater competition.”¹⁹⁶

3. Reciprocal switching is not barred by railroads’ long-haul rights.

Several railroad parties contend that the reciprocal switching proposal is unlawful because it could upset the railroads’ right to long-hauls under 49 U.S.C. §§ 10702, 10703, and/or 10705.¹⁹⁷ According to these railroads, the Board must utilize its prescription of through route authority under § 10705 if it wants to limit the length of a railroad’s haul.

This argument is fatally undermined by the plain language of the statute they purport to cite. Congress explicitly included an exception in § 10705 for those situations where the Board uses its authority to prescribe terminal use **or reciprocal switching under § 11102**. See 49 U.S.C. § 10705(a)(2)(A). The railroads appear well-versed in the provisions of § 10705(a)(2)(B) and (C), but seem to have forgotten about subsection (A).¹⁹⁸

Even if the explicit exception of § 10705(a)(2)(A) did not exist, there still would be no reason for the Board to abandon its proposal. The Board is faced with many competing statutory directives. To the extent that §§ 11102 and 10705 are in conflict, it is no different than the

¹⁹⁶ House Report, at 67.

¹⁹⁷ See, e.g., AAR Comments, p. 46; CSX Comments, pp. 80-81; NS Comments, pp. 38-39; UP Comments, p. 55.

¹⁹⁸ See, e.g., CSX Comments, p. 80; UP Comments, p. 55.

conflict between rate reasonableness, § 10701(d)(1), and revenue adequacy, § 10704(a)(2), or the conflict between minimizing the need for regulatory control, § 10101(2), and ensuring effective competition and coordination, § 10101(5). Courts recognize that the Board must implement a statutory framework with oft-conflicting policy goals, and significant leeway is given to the Board in arriving at an accommodation of these conflicting goals. See, e.g., AAR v. STB, 306 F.3d, 1108, 1111 (D.C. Cir. 2002) (“We have previously held that it is up to the Board to arrive at a reasonable accommodation of the conflicting policies set out in the Staggers Act.”) [citation omitted]; BG&E, 817 F.2d at 115 (“Our task thus is only to determine whether the ICC has arrived at a reasonable accommodation of the conflicting policies set out in its governing statute.”). See also BNSF Railway Company v. STB, 453 F.3d 473, 483 (D.C. Cir. 2006).

The railroads’ long-haul argument would impermissibly elevate the protections of § 10705 to the exclusion of all other statutes. Indeed, it would mean that the Board could never approve construction of a competing rail line (§ 10901), approve a feeder line application (§ 10907), or implement various other statutory provisions because such implementation could shorten the distance of the railroad’s haul. The Board should reject the absolutist interpretation offered by these railroad parties.

4. Perverse incentives would be created by adding a terminal area limitation to the Board’s reciprocal switching authority.

Finally, from a policy point of view, it creates problematic incentives if the Board’s authority under § 11102(c) is limited simply to terminal areas or individual railroad stations. If such a limitation existed, railroads would have strong incentives to carve up existing terminal areas and create more railroad stations simply as a means to avoid the possibility of reciprocal switching. Indeed, reliance on railroad-created terminal boundaries would artificially exclude some facilities that may exist just beyond the new boundary line but otherwise should naturally

be considered part of the same terminal. A better approach to reciprocal switching, and the one proposed by the Board, is to engage in a case-by-case analysis of the relevant circumstances surrounding a proposed switching movement to determine if it is practicable and in the public interest, or necessary to provide competitive rail service, just as Congress intended.

D. The Board Is Not Required To Perform A Cost-Benefit Analysis

The railroad parties contend that the Board erred by failing to include a cost-benefit analysis (“CBA”) in its proposal.¹⁹⁹ The primary authority relied upon for this contention is the recent Supreme Court decision in Michigan v. EPA, 135 S.Ct. 2699 (2015). This decision, however, does not require the Board to conduct a CBA as part of its proposal. In the decision, the Court was faced with a situation where (1) the **governing statute** required the EPA to conduct three separate studies regarding air quality and emissions, one of which dealt with cost; (2) the statute also directed the EPA to regulate power plant emissions if it found regulation “appropriate and necessary”; (3) the EPA specifically stated that it was not considering cost in its decision to regulate power plant emissions; and (4) the EPA admitted that its avoidance of cost meant that it was ignoring all forms of harm, even health and environmental harms.²⁰⁰

The Michigan v. EPA decision thus turned on the interpretation of the specific statute that the EPA was implementing. A similar focus on statutory interpretation can be found in D.C. Circuit opinions regarding the use of CBAs.²⁰¹

¹⁹⁹ See, e.g., AAR Comments, pp. 4, 30-31, and Fagan V.S.; CSX Comments, pp. 52 and 70-72; NS Comments, pp. 58-62 and Lutter V.S.

²⁰⁰ Michigan v. EPA, 135 S.Ct. at 2710 (three studies required), 2705 (regulation ordered if the EPA found it “appropriate and necessary”), 2705 (EPA decides that cost should not be considered), and 2707 (breadth of EPA refusal to consider cost).

²⁰¹ National Association of Home Builders v. EPA, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (court rejects challenge to regulation because, even though statute requires EPA to consider economic consequences, there is no “statutory duty to demonstrate that the benefits of the amended rule outweigh its costs”); National Wildlife Federation v. EPA, 286 F.3d 554, 570-571 (D.C. Cir. 2002) (statute “requires that...the

NS witness Lutter also has asserted that the Board “failed to give effect” to the Congressional Review Act (“CRA”) in its NPRM.²⁰² The CRA describes a legislative process that Congress can undertake if it believes that a federal agency regulation should be disapproved.²⁰³ As part of that process, agencies should submit a CBA, if one exists, to the U.S. Congress before a new rule takes effect.²⁰⁴ This does not impose any CBA requirement upon the Board in this proceeding.

The railroads’ arguments about the necessity of a CBA misconstrue the law and are largely reduced to a series of unenforceable statements about the value and limitations of CBAs. Here, the switching provision in the statute does not require the Board to conduct such an analysis.

E. No Environmental Impact Statement Is Needed

CSX and NS both criticize the Board for not considering the environmental impacts of its proposals to change the reciprocal switching rules under the National Environmental Policy Act (“NEPA”).²⁰⁵ But their arguments assume that the Board’s proposals “have the potential to affect significantly the quality of the human environment.” 49 C.F.R. § 1105.5(a). See also, 49 C.F.R. §§ 1105.6(b)(5) and (c)(7). No such determination has been made in this proceeding.

Indeed, the Board’s environmental rules state that “[n]o environmental documentation will normally be prepared...for...[c]ommon use of rail terminals and trackage rights.” 49 C.F.R. § 1105.6(c)(4). Reciprocal switching encompasses the common use of rail facilities, including

Administrator must take costs into consideration, but does not require that she conduct a cost-benefit analysis”).

²⁰² NS Comments, Lutter V.S., p. 7.

²⁰³ See e.g., 5 U.S.C. § 802.

²⁰⁴ See e.g., 5 U.S.C. § 801(a)(1)(B)(i).

²⁰⁵ CSX Comments, pp. 73-76; NS Comments, pp. 62-63.

terminals, by requiring one rail carrier to switch traffic to another rail carrier within or in the vicinity of a terminal area. Moreover, reciprocal switching falls under the same statutory section, and serves a similar purpose, as terminal trackage rights. This is consistent with the fact that the agency apparently did not perform any environmental analysis when it adopted the current competitive access regulations in Ex Parte No. 445.

But even assuming that the foregoing exclusion does not apply to the new reciprocal switching proposals, it is not a foregone conclusion that the proposed rules will have a “significant” impact upon the environment. Railroad claims that they will be less efficient and unable to compete with trucks are speculative and self-serving. In addition, when reciprocal switching occurs where there is an existing interchange, the same rail car is moving through the same terminal on existing trains that already interchange traffic between two carriers. Thus, while there may be some additional handling of cars in reciprocal switching, that additional handling is unlikely to require new or substantially different operations than already exist. Also, some forms of reciprocal switching do not even require additional handling of rail cars, but merely change the location of an existing interchange. Finally, as observed in Sections II.C and V.C. as to Canadian interswitching, a very small percentage of traffic eligible for interswitching actually uses it, and a far greater proportion of Canadian traffic is eligible for interswitching than U.S. traffic would qualify for reciprocal switching under the proposed rules. The rail industry commenters have not offered any legitimate reason to conclude that the U.S. experience would be any different.

The Board surely is justified in relying upon the comments received in this proceeding to determine what, if any, environmental review is appropriate. Any suggestion that the Board has committed procedural error by not addressing environmental impacts in the Decision is

misplaced. Indeed, that determination may depend upon the Board’s resolution of many disputed matters raised by the comments it receives. The Shipper Coalition is confident that the Board’s Section of Environmental Analysis is familiar with the NEPA requirements and will address them at the appropriate time, only if and when it determines that the proposed rules will have a significant impact upon the environment.

IV. THE RAILROAD ATTACKS ON THE BOARD’S PROPOSED CASE-BY-CASE ADJUDICATION ARE WRONG

A. The Board’s Proposed Case-By-Case Approach Is Consistent With the Statute and the Board is Fully Equipped to Assess the Impact of Its Decisions

The railroads complain that the Board’s case-by-case approach does not give the Board a clear regulatory “framework” that is required under the Administrative Procedure Act,²⁰⁶ and individual railroads complain that the Board will be unable to assess the impact of its individual decisions.²⁰⁷ The railroads are wrong: the Board’s case-by-case approach is consistent with the statute and fully supportable, and the Board is fully equipped to assess the impact of its decisions as it adjudicates individual cases.

²⁰⁶ The AAR, for example, suggests a legal flaw in the Board’s proposed case-by-case approach when it complains that the Board “fails to explain why it has chosen to eschew any regulatory framework for reciprocal switching orders and instead plans to rely on case-by-case litigation under broad and non-specific statutory language. The APA requires a reasoned and well-explained justification for a change in regulatory policy.” AAR Comments, p. 42.

²⁰⁷ See, CSX Comments, pp. 59-60; NS Comments, pp. 55-58; UP Comments, pp. 34-36. However, BNSF complains, slightly differently from the other railroads, that the Board is failing to consider the impact that this proposal, combined with other recent Board proposals, will have on railroad investment, citing individual comments filed by shipper parties in these various cases. See, BNSF Comments, pp. 11-14. The Shipper Coalition disagrees. The BNSF cites shipper proposals or comments in Ex Parte 722, Ex Parte 665 (Sub-No. 2), and Ex Parte 704. See, id., p. 12, fn. 8. The latter two proposals would simply expand shipper access to existing Board protections. Regarding the shipper proposals in those cases cited by BNSF, the Board is potentially years away from deciding, or perhaps even proposing, rules that would impact the railroads financially. The Board has taken no action in response to these shipper suggestions, much less indicated that it will be advancing a NPRM in response to these individual comments. The Board is fully equipped to deal with BNSF’s concerns if and when the agency proposes actions that in fact would be likely to adversely affect BNSF’s current strong financial status.

First, it is clear that the statute is consistent with the Board’s case-by-case approach. The statute does not explicitly require any administrative rules at all – indeed, the Board could simply revoke its rules and adjudicate cases directly under the statutory standards. The wording of the statute appears to envision case-by-case adjudication, as the Board evaluates whether in a particular case a reciprocal switching arrangement is “practicable and in the public interest” or “necessary to provide competitive rail service.” Indeed, the **current** rules require a “case by case” approach, where individual shippers in individual cases attempt to prove that a prescription is “necessary to remedy or prevent an act contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive.” 49 C.F.R. § 1144.2(a). Contrary to the railroads’ arguments, the Board has fully explained the reasons for its case-by-case approach in its Decision and in doing so, has fully complied with the requirements of the Administrative Procedure Act. Decision at 14-15.

Most of the individual railroad complaints amount to overblown concerns that the Board will be unable to assess the cumulative impact of its case-by-case decisions. In response to these concerns, it is important to note that the case-by-case approach, combined with the information required by the Board’s own proposal, by its very nature requires a very measured development of cases. The Shipper Coalition’s opening Comments in this proceeding, for example, set forth a procedural schedule in an individual case that would require seven months for an initial decision from the Board.²⁰⁸ Even if a number of cases were filed simultaneously, the requirements of the Board’s proposal and the procedural schedule advanced by the Shipper Coalition would necessitate a measured adjudication of individual cases, giving the Board ample time to assess the cumulative impact of its decisions.

²⁰⁸ Shipper Coalition Comments, pp. 27-30.

Second, as discussed in detail in the very next subsection, the railroads vastly overstate the potential scope of the impact of the proposed rules. While individual railroads cite to AAR “evidence” that over eleven million carloads will be eligible for access under the Board’s proposal,²⁰⁹ as discussed immediately below the actual amount of traffic that will be eligible for reciprocal switching will be far less. The real crux of the railroad arguments in this area is that the Board “cannot control the regulatory beast once unleashed . . .” and that the “troubled history of past rail regulation does not bode well . . .”²¹⁰ The Shipper Coalition believes that Board members appointed by the President and confirmed by the Senate are equipped to examine cumulative impacts, and the Board’s professional staff, with years of experience in rail regulation, is also competent to assist the Board in this responsibility.

Third, the Canadian experience, which is discussed extensively in Section V.C. below, strongly indicates that the operational impact of the Board’s rules will be small, and the adverse operational impact will be nonexistent. As discussed in that subsection, it is very likely that there will be far fewer carloads both qualifying for and actually obtaining reciprocal switching under the Board’s proposal, compared to inter-switching regime in Canada. And as discussed in the subsection below, even the Canadian carriers have identified **no** adverse impacts as a result of the automatic switching regime that exists in Canada.²¹¹

Some rail carriers state that the Board’s rules give it no information as to the impact of its decisions far from the source;²¹² in addition, the NS states that, if the Board adopts its proposed

²⁰⁹ AAR Comments, p. 33 and Baranowski V.S., p. 5 ; NS Comments, p. 56.

²¹⁰ NS Comments, pp. 55, 56.

²¹¹ In Section VII.C., the Shipper Coalition suggests that if the Board determines that a time limit on reciprocal switching orders is desirable, then the Shipper Coalition would suggest a 10-year time limit. Such a time limit would also confine any impact of a particular reciprocal switching order, and that order’s contribution to a cumulative impact, to that 10-year period.

²¹² CSX Comments, p. 59-60.

rules, railroads will begin granting reciprocal switching voluntarily, outside of individual cases brought to the Board, of which the Board will be unaware..²¹³ However, if the Board has any concerns in this area, there is a simple way to cure any perceived problem, without denying shippers the competitive rail system envisioned by the Staggers Act. The Board could, for example, require carriers to report the following information on a periodic (e.g. semi-annual) basis: (a) how many reciprocal switching cases have been formally brought against that railroad, the result of that case, and any data showing the effect on rail operations of the impacted carrier and on the system; and (b) how many new reciprocal switching arrangements have been granted voluntarily by a railroad in view of the Board's rules, the facts and circumstances of those individual grants of reciprocal switching, and any data showing the effect on rail operations of these voluntary grants of reciprocal switching. Such a reporting system will enable the Board to have all information necessary to assess the overall impact of its rule on the industry, and give the Board an opportunity to propose a revision to its rules if it believes that such a revision is desirable.

B. The Railroads Vastly Overstate the Potential Scope Of Impact of the Proposed Rules

In its Comments, the AAR argued that the Board failed to consider the impact of the proposed rules, and claimed, by relying on the analysis of its witness Michael Baranowski, that the potential scope of the Board's proposed rule is "considerably broader" than the potential scope of the rule proposed by NITL that was the subject of evidence in Ex Parte No. 711.²¹⁴ In his verified statement, Mr. Baranowski estimated that between 11 and 12.5 million carloads – about 76 percent of all non-exempt carloads – are potentially affected by the Board's Prong 1

²¹³ NS Comments, pp. 55-56;

²¹⁴ See, AAR Comments, pp. 29-34, quotation at 33; see also, Baranowski V.S. attached to AAR's Comments.

proposal, depending on the mileage threshold for a “reasonable distance” that is considered.

With respect to Prong 2, Mr. Baranowski estimated that between about 990,000 carloads and about 2.5 million carloads would be potentially affected.²¹⁵

The AAR’s estimates are, in a word, absurd. As discussed below and in the attached Reply Verified Statement of Henry J. Roman, President, Escalation Consultants,²¹⁶ Mr. Baranowski’s analysis (1) incorporated basic errors that cause his estimate of potentially impacted carloads to be vastly overstated; and (2) failed to take into account fundamental factors that would substantially reduce Mr. Baranowski’s vastly inflated estimates of potentially impacted carloads. The result is that Mr. Baranowski’s carload impact estimates for both Prong 1 and Prong 2 are meaningless. Even beyond the absurdity of Mr. Baranowski’s calculations, the AAR and Mr. Baranowski fail to account for numerous factors that are an integral part of the Board’s proposal that will substantially reduce the number of shippers that likely will request and qualify for reciprocal switching, particularly when compared to the NITL’s original proposal in Ex Parte No. 711.

First, as to the basic numbers calculated by Mr. Baranowski, he estimated that the Board’s Prong 1 proposal would potentially impact 11,344,308 carloads at a 10-mile distance to the destination, increasing to 12,548,942 carloads at a distance of 30 rail miles. But as discussed by Mr. Roman, Mr. Baranowski’s Prong 1 analysis includes – implausibly – both single and dual-served stations. Dual-served stations **already** have access to an alternate railroad and it is therefore unrealistic to include such traffic in the analysis, since a shipper is unlikely to pursue a

²¹⁵ See, AAR Comments, Baranowski V.S., pp. 4-5.

²¹⁶ Mr. Roman submitted a Verified Statement on March 1, 2013 as well as a Reply Verified Statement on May 22, 2013 in Ex Parte No. 711, which the Shipper Coalition commends to the Board and which are incorporated as evidence in this proceeding.

reciprocal switching remedy for traffic that is already served by another railroad.²¹⁷ As Mr. Roman points out, the inclusion of traffic at dual-served stations is why a very high percentage of Mr. Baranowski's alleged "potentially impacted" carloads for Prong 1 are in the 10-mile or less category: dual-served stations have a zero mileage distance between railroads serving such stations.

The inclusion by Mr. Baranowski of dual-served stations has another effect that results in his inflated carload estimates: namely, Mr. Baranowski has improperly included in his analysis a large number of Rule 11 movements, i.e. through movements from origin to destination where the shipper negotiates a separate contract with the origin and destination carriers. This error essentially creates and counts, as "origins" and "destinations" in the Waybill, stations that are not true "origins" and "destinations" at all. On such movements, the shipper is not going to pursue competitive switching at the gateway serving as the destination on the first rule 11 movement and at the origin on the second rule 11 movement because the gateway is already dual-served. But because Mr. Baranowski's calculations include dual-served stations, large numbers of carloads handed off at east-west gateways such as Chicago, Memphis and New Orleans are counted as "potentially affected."²¹⁸ In reality, these "origin" and "destination" handoffs shown in the Waybill should not be counted as potentially affected by reciprocal switching, since no shipper could request reciprocal switching to obtain access to a third or even a fourth railroad.

In addition to these basic errors that cause Mr. Baranowski's analysis to be meaningless, there are other calculation errors that result in additional substantially overstated estimates of the number of carloads potentially affected. For Prong 1, Mr. Baranowski included substantial numbers of low-margin competitive movements, i.e. those with revenue to variable cost (R/VC)

²¹⁷ Roman R.V.S., pp. 4-5.

²¹⁸ See, Roman R.V.S., pp. 5-6..

ratios below 180 percent.²¹⁹ But as Mr. Roman points out, such movements are highly unlikely to become subject to reciprocal switching, because they appear to be already competitive and the gains from and costs of reciprocal switching would be highly unlikely to result in any additional competitive benefits to the shipper.²²⁰ Finally, Mr. Roman points out that Mr. Baranowski's percentage of carloads are overstated, because each carload appears to be counted twice, when both origin and destination are considered to be affected.²²¹

Other problems affect Mr. Baranowski's Prong 2 analysis, which shows just a fraction of the number of potentially affected carloads as his Prong 1 estimates.²²² Mr. Baranowski's Prong 2 estimates (as well as his Prong 1 estimates), do not take into account any effect from the switch fee that will necessarily apply to reciprocal switch movements. Obviously, if the cost of the switch fee causes the rate for the movement over the alternative railroad to be greater than the movement over the incumbent, the shipper may not use reciprocal switching. And just as significantly, Mr. Roman notes that Mr. Baranowski failed to account for other "revenue factors" that will reduce the number of shippers that will be potentially affected by the Board's proposal, including the rate likely to be charged by the competing carrier. Depending on the assumptions used, many shippers of carloads at lower R/VC ratios will find it uneconomical to pursue competitive switching because the rate that is likely to be charged by the competing carrier is not

²¹⁹ See, Roman R.V.S., p. 7.

²²⁰ Id.

²²¹ Id.

²²² Mr. Baranowski's Prong 2 analysis, unlike his Prong 1 analysis, eliminates dual-served stations and movements with R/VCs below 180%. See, Roman V.S., pp. 7-8. While Mr. Baranowski's Prong 1 analysis shows that 11.3 million carloads are "potentially affected" at 10 rail-miles, his Prong 2 analysis shows that only about 992,000, or less than one-tenth of his Prong 1 figure, are potentially affected under Prong 2.

likely to make a reciprocal switching adjudication at the Board “worth it.”²²³ Mr. Roman notes that potentially impacted carloads drop dramatically when revenue factors are considered..²²⁴

Even beyond Mr. Baranowski’s mathematical and conceptual errors that undermine the credibility of his estimates, the AAR fails to even mention the numerous factors that would substantially reduce the number of shippers that are likely to qualify for and benefit from reciprocal switching under the Board’s proposal, especially compared to the NITL’s prior proposal. As Commissioner Begeman noted, the Board’s reciprocal switching proposal rejects the use of conclusive presumptions, which were an integral part of the NITL proposal. While the Shipper Coalition supports the Board’s proposed reciprocal switching rules, the direct implication of Commissioner Begeman’s statement is clear: under the Board’s proposal, there will be complexity and costs to obtain reciprocal switching. The complexity and the costs of STB adjudications of reciprocal switching prescriptions will significantly reduce the number of shippers who will pursue such prescriptions, certainly compared to the NITL proposal. Specifically, there are likely to be a variety of disincentives, including but not limited to the following:

- 1) Shippers who qualified for reciprocal switching under the NITL proposal through the use of the conclusive presumptions were likely to face lower litigation costs. In contrast, under the Board’s proposal, there will be higher costs associated with the need for discovery, experts, and legal counsel. Every shipper will need to determine whether the benefit is worth the cost of litigation. The litigation costs alone are likely to discourage smaller shippers from seeking reciprocal switching under the Board’s proposal.
- 2) Litigation will not only generate costs, but it will mandate the expenditure of equally important commodities for a business – time and resources. Even under the Shipper Coalition’s proposed procedural schedule in its opening comments, at least seven months would be required to litigate a switching case, without counting possible delays and appeals. As business changes over the months (or

²²³ Roman R.V.S., pp. 8-13.

²²⁴ Roman R.V.S., pp. 11-13.

longer) that would be required to litigate a case, a potential switching order may become less attractive.

- 3) Litigation by its nature involves risk, which is likely to take a variety of forms. The multiple factor analysis proposed by the Board for both prongs means that any one of several considerations could “sink” a reciprocal switching proposal, such as a determination that the benefits do not outweigh the detriments under Prong 1; a decision that the distance to a proposed interchange is not “reasonable”; uncertainty over whether intra- or intermodal competition is effective under Prong 2; and many others. The fact that these determinations are made on a case-by-case basis means that it is likely to take years to accumulate enough precedent to provide guidance to the industry. If the experience with maximum reasonable rate cases is any guide, there may never be a clear path. Moreover, because of the case-by-case procedure, there will always be differences between cases that result in risk. Thus, just because Shipper A was able to obtain a reciprocal switching order when the distance to the interchange was 10 miles, may not automatically mean that a 10-mile distance for Shipper B at another location would be “reasonable,” if the circumstances related to the mileage (e.g., configuration of the terminal area) were not similar.

All of these considerations mean that the scope of the impact described by the AAR and witness Baranowski is wildly overstated, and that the scope of the impact of the Board’s proposal is substantially less than that of the NITL proposal, which relied on conclusive presumptions that were excluded from the Board’s approach.

The Board’s case-by-case approach, however, does permit the Board to place its toes in the water cautiously and to monitor and adjust over time its approach to reciprocal switching. The case-by-case approach also allows the Board to consider carefully subtle differences between applicants and the specific facts of cases, and would permit necessary adjustments to be made. By making these adjustments based on individual factors, the Board can broaden or restrict the availability of reciprocal switching to the shipping public, taking into account the current state of the rail industry.

The Shipper Coalition recognizes, however, that under the Board’s case-by-case approach, it may be impossible to know “for sure” the exact number of shippers that would qualify for reciprocal switching, though it will certainly be less than under the NITL’s conclusive

presumptions approach and the automatic approach afforded to Canadian shippers. But the fact that it may be impossible to know “for sure” should **not** mean that the Board should abandon its approach. The perfect should not be the enemy of the good. If the Board were to determine that it must calculate “for sure” the exact overall scope of impact of even a modest case-by-case approach before it can make any change to its current rules, then the current rules will never change. Such a result would be contrary to the statute, general administrative law and precedent, and sound policy-making.

C. The Board Is Correct That There Should Be No Litigation of Broad Policies In Individual Reciprocal Switching Cases

In its Decision, the Board stated that an individual case would not be an appropriate forum to litigate a railroad’s revenue inadequacy and has indicated that the overall revenue inadequacy of the defendant would not be a basis for denying the establishment of a switching arrangement under the “necessary to provide competitive rail service” Prong 2 of the Board’s proposed rules.²²⁵ CSX complains about this restriction, arguing that the rule as stated fails to consider the effects of reciprocal switching on railroad revenue inadequacy.²²⁶ But the Board’s Decision goes nowhere near as far as CSX argues. The Decision simply – and properly – states that an individual reciprocal switching case would not be an appropriate forum to litigate broad questions, such as the “general” merits of reciprocal switching, the “general” health of the industry, or revenue adequacy. The Board could easily clarify its apparent intent by stating that an individual reciprocal switching case would not be an appropriate forum to litigate whether a

²²⁵ See, Decision at 18 (“Individual reciprocal switching proceedings would not be an appropriate forum to litigate, for example, the general merits of reciprocal switching as a statutory remedy, the general health of the industry, or railroad revenue inadequacy.”), and proposed rule 1145.2(b)(2) (“[i]n considering requests for reciprocal switching under (a)(2) of this section, the overall revenue inadequacy of the defendant railroad will not be a basis for denying the establishment of a switching arrangement.”)

²²⁶ See, CSX Comments, pp. 66-68.

particular railroad was revenue adequate; that would be a question for the Board's separate rules on revenue adequacy and its annual overall determination of the revenue adequate status of each railroad.

Concerning the text of proposed rule 1145.2(b)(2), the Shipper Coalition read this rule to mean that the revenue inadequacy of a particular railroad, by itself, would not be a basis for denying a reciprocal switching request. Thus, the Shipper Coalition would not object to the Board's clarifying the text of its discussion at page 18 of the Decision as follows:

“Individual reciprocal switching proceedings would not be an appropriate forum to litigate, for example, the general merits of reciprocal switching as a statutory remedy, the general health of the rail industry, ~~or revenue adequacy~~ the standards for railroad revenue adequacy, or the Board's determination of a carrier's revenue adequate/inadequate status. The fact that a carrier has been determined to be revenue inadequate will not by itself defeat a request for reciprocal switching.”

The text of the Board's proposed rule 1145.2(b)(2) similarly can be revised to say that “the overall revenue inadequacy of the defendant railroad will not by itself defeat a request for reciprocal switching.”

V. THE PROPOSED RULES WILL NOT HARM RAILROAD OPERATIONS

The railroad commenters engage in apocalyptic predictions for rail operations if the Board changes its reciprocal switching rules. For example, citing to the congestion in Chicago during the Winter of 2013-14 and to the service crisis following the UP/SP merger in the late 1990's, CSX boldly asserts that “[m]ultiple involuntary switching orders will have a similar effect and slow velocity across the entire network, harming rail carriers as well as their customers.”²²⁷ Yet CSX offers no facts to link reciprocal switching to the causes and/or scope of

²²⁷ CSX Comments, p. 60. See also, AAR Comments, pp. 34-37; NS Comments, pp. 50-58; UP Comments, pp. 40-45.

those problems.²²⁸ The railroad predictions are principally speculative hypotheses predicated upon inflated estimates of the amount of traffic likely to be switched; ignore the vast number of tools available to railroads to adjust their operations to maximize efficiency under most traffic scenarios; and are presented as if most, if not all, instances of reciprocal switching will result in a worst case scenario. Such blatant scare-mongering is designed to frighten the Board into indecision and, ultimately, inaction.

The Shipper Coalition has submitted the Reply Verified Statement of John Orrison in response to the various testimony of the railroad operation witnesses. Mr. Orrison can address these issues with the same authority as the railroad witnesses because he once was one of them. He has held comparable operating positions at CSX and BNSF and at one time supervised two of the railroad witnesses: CSX's Cindy Sanborn and UP's Tom Haley. Orrison R.V.S., pp. 2-3. While at CSX, Mr. Orrison submitted a verified statement to the Board presenting the CSX operating plan in the Conrail acquisition proceeding. Id. at 4. In total, Mr. Orrison has over 40 years of experience in the switching of rail customers and establishing rail service plans, including switching movements. Id. at 3-4. From this experience, Mr. Orrison knows first-hand the ability of the Class I railroads to adapt their operating plans to maintain optimal efficiency in response to changing traffic patterns and volume fluctuations, and the extensive coordination that occurs between railroads to minimize the effects of interchanging traffic upon both carriers' networks.

Based upon his decades of operating experience, Mr. Orrison exposes the inaccuracies and exaggerations in the railroad testimony as "Chicken Little" predictions that disregard the

²²⁸ Witness Orrison testifies that the UP/SP service crises was self-inflicted by UP when it opted to aggressively shutter yards and terminals to reduce operating costs and capital expenditures. Service problems following the Conrail split also were self-inflicted. Orrison R.V.S., p. 17.

realities of everyday railroading. For example, he points out that the additional activities the railroad witnesses associate with reciprocal switching will not even occur on the incumbent carrier in most scenarios, and thus cannot cause the incumbent to be less efficient. Id. at 10-11. He also explains how railroads routinely coordinate interchange activities to minimize, or avoid altogether, the extra steps associated with interchanges and the alleged inefficiencies and complexities the railroad witnesses parade before the Board. Id. at 5-6, 13. In addition, Mr. Orrison presents aspects of reciprocal switching that the railroad witnesses ignore, such as the potential for reciprocal switching to increase efficiency, reduce congestion, and improve service. Id. at 12-13. Ultimately, he notes that anyone can create hypothetical examples of potential switching arrangements to make the concept appear too complex for level-headed consideration. Id. at 20. The Class I railroads, however, have highly qualified and experienced railroad operators, yardmasters, trainmasters, and superintendents whose job is identify ways to reduce operational complexity. Id. at 19. Furthermore, if and when such complex scenarios do arise, they will be sufficiently few and far between for the Board to evaluate them on a case-by-case basis. In short, if reciprocal switching doesn't work, it will be because the railroads choose not to make it work.

A. Railroad Predictions Of Reduced Efficiencies And Operational Mayhem Are Wrong.

In an effort to persuade the Board not to change the standards for granting reciprocal switching, the railroads portend all sorts of operational impacts that will throw the rail industry back into the “dark ages” pre-Staggers. The railroads’ focus on such hypothetical scenarios, however, does not make them the rule. Nor does it mean that railroads cannot overcome them using the same sophisticated tools and procedures they routinely employ to address volume fluctuations and changes in traffic patterns attributable to other causes. This becomes clear from

a closer examination of what reciprocal switching entails and how it relates to other operational variable that railroads routinely face.

There are three principal reciprocal switching scenarios illustrated in Figures 1 through 3 below.²²⁹ Figure 1 is the basic scenario to which most of the railroad comments have been addressed. It converts single-line service to two-carrier service as a result of the switch. If the destination is a gateway rather than the final destination, this scenario converts 2-carrier service to 3-carrier service because the origin carrier's long-haul extends only as far as the gateway.

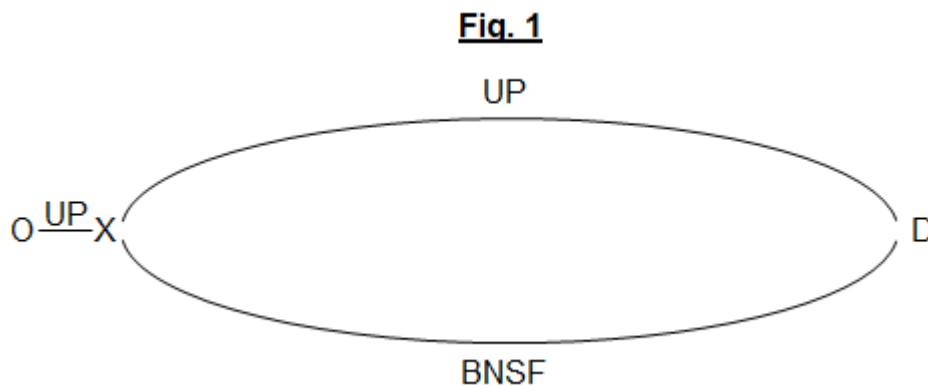
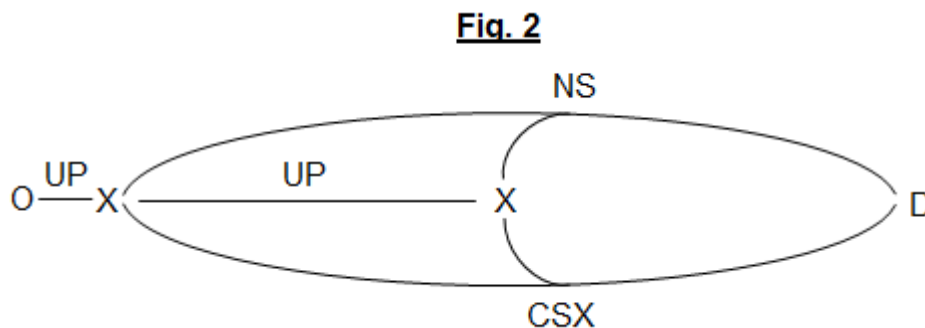
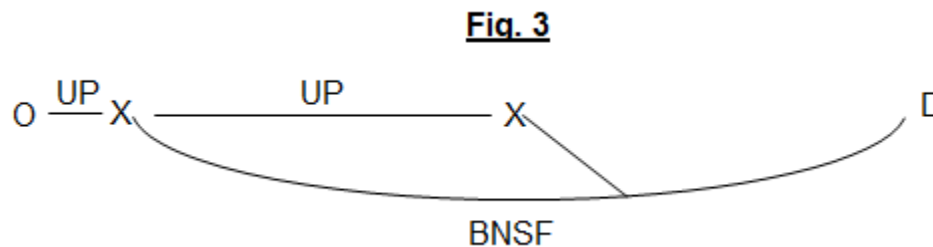


Figure 2 is a form of gateway movement where reciprocal switching does not increase the number of interchanges or carriers in the route, but instead merely changes the interchange location.



²²⁹ Although these illustrations presume that reciprocal switching occurs at the origin, each can be reversed to apply reciprocal switching at the destination, without changing the analysis presented in this section.

Figure 3 also does not increase the number of interchanges or carriers in the route, but only changes the interchange location.



The most notable feature in these illustrations is that **only in Figure 1** does reciprocal switching require an additional interchange. **The reciprocal switching illustrations depicted in Figures 2 and 3 don't increase the number of interchanges or rail carriers and thus cannot implicate most of the alleged inefficiencies that are the primary focus of the railroad industry's criticisms.** In Figures 2 and 3, reciprocal switching allows the other railroads who already participate in the route to claim a longer haul when they can be more competitive or, in other words, more efficient.²³⁰ If the shift in interchange location has the potential to cause congestion or other inefficiencies for the incumbent at the new location, the Board can consider such evidence when it evaluates whether the proposed switching would be feasible or will unduly hamper the ability of the incumbent to serve its other customers.

Not a single railroad commenter has discussed or otherwise acknowledged the reciprocal switching scenarios in Figures 2 and 3. That is understandable because a majority of their objections apply only to Figure 1 switching scenarios. Yet Figures 2 and 3 are not uncommon scenarios. Figure 2 is likely to be replicated on east-west (and vice-versa) gateway movements

²³⁰ The Dow Chemical Company described a real-world example of Figure 2 at pages 6-7 of its Opening Comments. In that example, Dow's Taft, Louisiana facility is captive to UP. Although Taft is 30 miles from New Orleans where UP currently interchanges other traffic with CSX and NS, UP insists upon its long-haul by taking Dow's traffic to East St. Louis before interchanging with CSX and NS, thereby foreclosing competition from those carriers much closer to the origin.

where the origin carrier attempts to preserve a long-haul by handling the traffic in the north-south direction (and vice versa) for the longest distance that is practical before interchanging. Figure 3 will be common in the western U.S. between BNSF and UP, in the eastern U.S. between NS and CSX; and along the Mississippi River Valley between BNSF, UP, CN and to a lesser extent KCS.

Even as to the Figure 1 illustration, which does add an interchange, the railroads greatly exaggerate both the scope and probability of negative effects. They conjure all sorts of “worst” case scenarios and present them as if they are likely to occur in most reciprocal switching situations. Moreover, they ignore the fact that operating plans are not static, but are designed to efficiently serve existing traffic patterns. As traffic patterns change, railroads adjust their operating plans as appropriate to serve the new traffic patterns in the most efficient manner. The need for a new or modified operating plan does not render it less efficient than the previous plan; it is simply a different plan designed to provide the most efficient service for a different traffic pattern. The effects of reciprocal switching constitute just one of many variables that determine the most efficient operating plan.

Thomas Haley, UP’s Vice President – Network Planning and Operations, acknowledges that, “[i]f forced switching were to cause yard congestion or operational gridlock, [UP] would adjust its operations in an effort to restore fluidity, as we have adjusted to changing traffic patterns and congestion on many occasions in the past.”²³¹ But he nevertheless claims that reciprocal switching is “different” because it “creates a new level of challenges to achieving recovery.”²³² Mr. Haley, whose testimony echoes many of the same arguments posed by the

²³¹ UP Comments, Verified Statement of Thomas C. Haley (“Haley V.S.”), p. 8.

²³² Id.

other railroad witnesses, provides four reasons to support this statement, all of which are baseless.

First, Mr. Haley asserts that there never would be a **complete** recovery because UP would be using more resources than necessary to handle a given amount of traffic.²³³ Those resources are the extra handling associated with an additional interchange and the potential loss of traffic density to build trains and blocks of cars that bypass intermediate yards.²³⁴ But as noted in Figures 2 and 3 above, many forms of reciprocal switching do not require any additional handling, but only alter the interchange location between existing carriers. Furthermore, when reciprocal switching does add an interchange, as in Figure 1, the alternate carrier incurs the additional handling, not the incumbent. *Orrison R.V.S.*, pp. 10-11. The incumbent carrier ordinarily will continue to handle the switched traffic between its classification yard and the customer location in the same manner as it did before. At the yard, instead of switching the rail car onto its own road train, the incumbent will switch the car onto an interchange train along with other interchange traffic, not just the reciprocal switch traffic, for transport to the alternate carrier's classification yard. *Id.* at 10. Whatever additional handling occurs from that point is the responsibility of the alternate carrier and will occur on that carrier's network. The alternate carrier has no incentive to compete for that traffic unless it has, or is willing to invest in, the capacity to perform those functions. The salient point, however, is that this form of reciprocal switching does not require the incumbent carrier to engage in the additional switching activities identified by the railroad commenters.

²³³ *Id.*

²³⁴ *Haley V.S.*, pp. 4-8. See also, CSX Comments, Verified Statement of Cindy M. Sanborn ("Sanborn V.S."), pp. 4-6, 13-14; NS Comments, Verified Statement of Jeffrey H. Sliger ("Sliger V.S."), pp. 9-17, 22.

As for potential impacts upon bypass trains, reciprocal switching is just one of many factors that determine the efficiency of existing operating plans. Mr. Haley can only speculate that, **in some cases**, the loss of a long-haul movement to reciprocal switching **might** alter the efficiency of UP's existing operating plan that would require adjustments. But if adjustments are needed, that is what railroads routinely do in response to fluctuating volumes and changing traffic patterns. However, not all volume reductions from reciprocal switching will be sufficient to warrant blocking changes. In other cases, the incumbent may create new blocks based upon the modified traffic flow that are different but not necessarily less efficient. Orrison R.V.S., p. 14. Although Mr. Haley attempts to illustrate his concerns with examples of UP non-stop trains, from Houston, Texas to both West Colton, California and St. Louis, Missouri, that would have to make intermediate stops without sufficient traffic density, Mr. Orrison explains how an efficient railroad would adjust its operations so that the total additional transit time would be immaterial. Id. at 15-16.

Mr. Haley also focuses on just one side of the ledger. While the incumbent may lose some density over its long-haul route due to its loss of reciprocal switch traffic, the alternate carrier may increase density over its long-haul route due the gain of that traffic. Id. at 16. Such traffic gains may allow the alternate carrier to create new bypass trains to improve the efficiency of its network. Furthermore, the incumbent carrier may be on the prevailing end of reciprocal switching at other locations that would allow it to do the same. The carrier that has the most to gain from reciprocal switch traffic will be the strongest competitor for those movements, thus maximizing the overall efficiency benefits of reciprocal switching.

Second, Mr. Haley alleges that reciprocal switching “would leave our network continually vulnerable to a new source of disruption as shippers in different locations seek forced

switching whenever they believe it would provide them with an advantage.”²³⁵ But rail volumes fluctuate for many different reasons and railroads routinely adjust to those changes. One such reason may be the loss of traffic to competitive alternatives where such alternatives exist. Reciprocal switching merely creates the potential for competition over a larger share of rail traffic. Mr. Haley’s objection reflects a mentality of entitlement to an exclusive franchise over all currently captive traffic, which is inconsistent with the Congressional intent that reciprocal switching enhance competition.²³⁶

Moreover, contrary to the implication in Mr. Haley’s statement, reciprocal switching will not occur on a whimsical basis within the sole discretion of shippers.²³⁷ The process of obtaining a grant of reciprocal switching will take many months under the Board’s proposal and most such grants will be limited to traffic between a single origin and destination, particularly under Prong 2. Once the Board has granted reciprocal switching for specified traffic, shippers and carriers will have the same incentives to enter into contracts as they do for all other traffic, whether it be captive or competitive. Those contracts provide valuable predictability to both railroads and shippers. *Orrison R.V.S.*, pp. 6-7.

Third, Mr. Haley makes the puzzling claim that UP “could not mitigate the impacts of forced switching through the processes we normally use to try to anticipate and adjust for changes in traffic patterns.”²³⁸ Mr. Orrison disagrees with this claim, noting that railroads have

²³⁵ *Haley V.S.*, p. 9.

²³⁶ See also, *Sanborn V.S.*, pp. 7-8 (essentially asserting that the predictability of captive traffic is the key to success of modern railroading).

²³⁷ See also, *Sanborn V.S.*, p. 11 (lamenting a lack of “predictability” because “the proposed regulations permit shippers to shift their traffic back and forth between ...[carriers]... at any time”); *Sliger V.S.*, pp. 26-27 (describing “the inevitable inability to predict switching volumes” and equating reciprocal switching to “unanticipated traffic demands”), 29 (“consequences of unanticipated shifts in traffic subject to forced switching”).

²³⁸ *Haley V.S.*, p. 9.

an extensive array of tools precisely to address these types of traffic shifts. For example, the AAR and its Class I rail members have dedicated immense resources to establish Interline Service Agreements (“ISAs”) to coordinate the efficient movement of traffic through interchanges. ISAs contain agreement upon subjects such as interchange locations, days of the week for interchange, time for interchange delivery and pick-up, and other operational matters. Orrison R.V.S., pp. 5-6. Railroads meet regularly to develop new ISAs and evaluate existing ISAs. Railroads also share data to better predict switching volumes and to provide visibility of loaded and empty cars moving toward terminals. Id. at 6. Furthermore, the Class I railroads have teams of service-design planners who use sophisticated software to monitor traffic flows constantly and to identify cost savings and operations adjustments in response to traffic changes. Id. at 8-9. According to Mr. Orrison, such tools enabled BNSF to implement operating plan adjustments weekly. Id. In addition, incumbent carriers frequently coordinate with customers to pre-block cars, which reduces the level of sorting the incumbent must perform. Id. at 13. Lastly, Mr. Haley completely ignores the role that contracts play in providing predictability to railroads as they adjust their operating plans for changing traffic patterns. Contract volume commitments provide the constraint upon a shipper’s ability to shift traffic between carriers that Mr. Haley claims would be lacking under reciprocal switching. Id. at 6-7, 19. Mr. Orrison provides examples of how railroads actually have employed the multitude of foregoing tools to quickly adapt their operations to changing circumstances. Id. at 6-8, 21.

Fourth, Mr. Haley claims that UP no longer would have sufficient incentives to adjust to changing traffic patterns through capital investments.²³⁹ Mr. Orrison responds that BNSF and UP both have made substantial investments in the Texas/Louisiana Gulf Coast where BNSF

²³⁹ Haley V.S., p. 9. See also, Sanborn V.S., pp. 16-17

competes extensively through reciprocal switching rights that it received in the UP/SP merger proceeding. Orrison R.V.S., p. 21. In addition, he notes that both railroads have invested heavily even for competitive traffic by using contracts to reduce their investment risk. Id. Finally, Mr. Orrison observes that railroads invest for many other reasons too, such as to lower their operating costs to achieve a higher return. Id. at 21-22. The Shipper Coalition addresses the rail industry's investment incentive claims in further detail in Part VI and the Reply Verified Statement of Dr. Kevin Caves, which validate that Mr. Orrison's observations also reflect economic theory.

A common theme across each of the railroad operating witnesses is that reciprocal switching will substantially reduce, if not eliminate, the predictability that Class I railroads require to operate efficiently.²⁴⁰ According to Mr. Orrison, this is nonsense. "Adaptability" is far more important than "predictability." Orrison R.V.S., pp. 1, 8. Although Class I railroads prefer predictability, they operate in an environment where traffic volumes fluctuate continuously, often with little notice, and as a result, they have developed highly sophisticated procedures and tools to permit them to quickly adapt their operating plans to fluctuating volumes and changing traffic patterns. Id. at 7-8, 14-15, 18-19. Such adjustments are on display even in the verified statements of the railroad operating witnesses.²⁴¹ While reciprocal switching may render a few **existing** operating practices less efficient, the solution is to **modify** those practices to fit new traffic patterns, not to deny reciprocal switching.

Moreover, railroad claims that reciprocal switching will greatly reduce predictability are predicated upon the fallacious assumption that shippers will whimsically shift traffic between

²⁴⁰ CSX Comments, pp. 57-58; NS Comments, pp. 48, 50-51.

²⁴¹ Sanborn V.S., pp. 13-14.

carriers on a daily, weekly or monthly basis.²⁴² Reciprocal switching will be no less predictable than all the current rail traffic that already is subject to either inter- or intra-modal competition. Railroads and shippers alike achieve predictability through contracts with volume commitments. Orrison R.V.S., pp. 6-7, 19. Whether the incumbent or the alternate carrier obtains the switch-eligible traffic, the same contracting tools will continue to provide sufficient predictability to develop efficient operating plans.

The Board, therefore, should view the railroad industry claims that reciprocal switching will be detrimental to operations with a healthy dose of skepticism. The railroad industry has focused upon just one form of reciprocal switching that will add an interchange to the affected movements and presented worst case scenarios for that type of switching as if they will occur routinely across their networks and to a degree that will wreak havoc on total network operations and investment. As Mr. Orrison has testified, these claims are greatly exaggerated. Moreover, the rail industry will adjust to reciprocal switching impacts, without reductions to overall efficiency or investment, by employing the same arsenal of resources that railroads use to handle any other changes to volumes and traffic patterns.

B. The Board's Case-By-Case Approach Allows It To Assess And Mitigate Effects Upon Operational Efficiency

The railroads complain that the Board cannot adequately redress the operational impacts of reciprocal switching through a case-by-case review of individual switching requests because such a review will not capture the cumulative effects of multiple reciprocal switching orders over time.²⁴³ Using case-by-case evaluations is a sound approach for assessing and mitigating operational impacts of reciprocal-switching requests. Railroad concerns about this approach are

²⁴² Sanborn V.S. , pp. 7-8; Sliger V.S., p. 7; Haley V.S., p. 9.

²⁴³ AAR Comments, p. 37; CSX Comments, pp. 59-60; NS Comments, pp. 55-58; UP Comments, pp. 43-45.

not credible because this approach allows for the fullest evaluation of a reciprocal switching request. In fact, railroads use this approach themselves to analyze the operational impacts of losing or gaining a customer. Railroad concerns also are unrealistic for reasons already presented in other portions of these Reply Comments.

The Shipper Coalition has addressed most of the railroad objections to the Board's case-by-case approach in Section IV of these Reply Comments. Those arguments apply equally to this section. In particular, as discussed in Section IV.B., the railroads grossly overstate both the universe of movements eligible for reciprocal switching and the subset of that universe that is likely to use reciprocal switching. Reciprocal switching must actually occur for there to be operational impacts. But there are many reasons why a shipper with eligible traffic may not even request reciprocal switching, ranging from the time and cost of a Board proceeding to infrequent or insufficient movements to a less efficient alternative carrier. Furthermore, even where the Board has granted a reciprocal switching request, the incumbent carrier is likely to retain the traffic, thereby avoiding any operational changes. Thus, the potential for a great number of reciprocal switching requests to be **made, granted, and used** such that there would be significant harmful cumulative effects is quite low.

As discussed in the preceding section, the railroads assume that **all** reciprocal switching will be inherently less efficient by imposing an additional interchange upon such movements. But two other forms of reciprocal switching merely change the location of an existing interchange between the same carriers who already participate in the movement and thus do not exhibit the key characteristic of an added interchange that the railroads claim make reciprocal switching inherently inefficient. Furthermore, even when reciprocal switching does involve an additional interchange, most if not all of the extra activity associated with that interchange occurs

on the alternate carrier, which leaves the incumbent carrier no less efficient in its terminal operations. Nor will there necessarily be adverse impacts upon the incumbent's lost long-haul segment due to lower traffic density, and when such impacts do occur, the rail industry has ample tools and procedures to address them. As a result, the railroads will nearly always be able to adjust for cumulative impacts of multiple reciprocal switching grants as and when such switching occurs, just as they adjust for other changes in traffic volumes and flows.

As Mr. Orrison explains, the railroads themselves routinely conduct case-by-case assessments to model the operational impacts of gaining or losing business. Orrison R.V.S., p. 18. He further notes that railroads can use the same modelling processes to evaluate changes to traffic patterns and volumes that result from reciprocal switching. Id. The proposed case-by-case approach also ensures that reciprocal-switching requests are not rejected on the basis of complexity when railroads can make operational adjustments to accommodate the request with minimal impact on operational efficiency.

Finally, railroad concerns over cumulative impacts are a red-herring. At bottom, the rail industry's arguments against a case-by-case approach would require the Board to have a crystal ball to determine what the future might hold for an infinite series of potential scenarios that might occur in the future before granting a reciprocal switching request. Of course this is impossible to. Certainly, Congress did not grant the Board the power to require reciprocal switching on the condition that the Board evaluate each reciprocal-switching request with a crystal ball.

The Board appropriately has concluded that it can address operational impacts on a case-by-case basis. The Board can and should examine the operational impacts of specific reciprocal switching requests and in the context of the **existing** traffic, rail operations, and infrastructure at

that time. To the extent the Board considers cumulative impacts, its evaluation can and should focus upon the cumulative impacts of the current reciprocal switching request and requests that previously have been granted in the context of current circumstances.²⁴⁴ The Board should assume that railroads have made appropriate adjustments to their operating plans in response to each prior grant of reciprocal switching, just as they would adjust to any other change in traffic volumes or flows, and that those adjustments are reflected in the operational circumstances at the time the Board considers subsequent switch requests. The Board cannot and should not engage in hypothetical “what if” scenarios in hindsight or suppositions as to speculative future scenarios.²⁴⁵

C. The Canadian Experience Shows That Reciprocal Switching Does Not Harm Railroad Operations

The Canadian experience with inter-switching is highly instructive on the impacts of the Board’s proposals for reciprocal switching. As a threshold matter, Canadian inter-switching is far more broadly available than reciprocal switching will be under the Board’s proposals. In Canada, any traffic within 30 kilometers (~18 miles) of an interchange automatically is eligible to use inter-switching. In contrast, the Board will require shippers to prove eligibility under either Prong 1 or Prong 2 of its proposal to obtain reciprocal switching. Furthermore, operational safety and feasibility issues will trump all other factors under both prongs, whereas no similar restrictions upon inter-switching exist in Canada. Thus, because a far smaller

²⁴⁴ When conducting environmental reviews, a cumulative impact is “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions....” 40 C.F.R. § 1508.7. The types of future cumulative impacts the railroads raise are not “reasonably foreseeable.” Cf., *Ariz. Eastern Ry.—Construction and Operation—In Graham County, AZ*, STB Fin. Dkt. No. 34836, 2009 STB LEXIS 120, at *144-45 (“Cumulative effects include the effects of future...actions that are reasonably certain to occur...”) (served April 6, 2009).

²⁴⁵ If, despite the foregoing demonstration, the Board has concerns that there will be extensive cumulative effects that could go unaddressed, it can mitigate those concerns by adopting a 10 year duration for reciprocal switching requests, which would render the impact of any single grant to a finite duration before it must be renewed based upon then-existing operations. See Section VII.C.

proportion of total rail traffic in the U.S. would qualify for reciprocal switching than in Canada, it stands to reason that the proportion of total traffic subject to reciprocal switching in the U.S., and consequently the potential operational impacts of reciprocal switching, would be even less than in Canada.

Furthermore, starting from a substantially smaller percentage base of eligible traffic, the amount of that traffic that actually will use reciprocal switching also will be less in the United States. There are many reasons why the amount of traffic actually switched will be far less than the universe of eligible traffic, among them:

- The incumbent carrier retains the traffic by being more competitive, especially in cases where incumbent carrier's ability to offer single-line service gives it an inherent advantage even when all other factors are equivalent between the competing carriers.
- The alternative carrier cannot compete because it is less efficient.
- The access fee results in a cost to the competing carrier that is not present for the incumbent carrier.
- A shipper's traffic volume is too small and/or infrequent to justify the time and expense of pursuing reciprocal switching at the Board.

The first three factors apply equally in the U.S. and Canada, whereas the fourth factor will be unique to the U.S., since inter-switching is automatic in Canada without the time and expense of a regulatory proceeding. This additional hurdle, therefore, should mean that an even smaller volume of eligible traffic will actually be switched, further reducing the operational impacts in the U.S. relative to the Canadian experience with inter-switching.

In Ex Parte No. 711, NITL submitted the Opening Verified Statement of Thomas Maville on the Canadian experience with inter-switching. Mr. Maville's testimony showed that, although approximately forty (40) percent of all Canadian traffic is exposed to inter-switching at both the

origin and destination,²⁴⁷ the amount of cars actually inter-switched is only a small fraction of the total.²⁴⁸ In other words, although a substantial proportion of Canadian traffic qualifies for inter-switching, and the carriers compete for the business, **the incumbent carrier keeps the business in the large majority of cases.** This result is hardly exceptional or unexpected, since the incumbent carrier has a **huge** incentive to keep the business, even at a lower profit level, rather than to lose the business entirely.

There is no reason to believe that the same dynamic would not take place in the United States under the Board's proposal. For all the reasons addressed above, there will be a much smaller universe of traffic eligible for reciprocal switching and a smaller proportion of that eligible traffic likely will use reciprocal switching under the Board's proposal compared to the experience in Canada. Furthermore, the Board's proposal will apply reciprocal switching to **less** traffic than the original NITL proposal, which NITL estimated would apply to only 4 percent of the carloads handled by the Big Four carriers in 2010.²⁴⁹ That is far less than the 40% of eligible traffic in Canada. As noted above, only a small proportion of the traffic eligible for switching in Canada is actually switched. Because the Board's proposal eliminates the NITL conclusive presumptions it is reasonable to assume that the proportion of traffic eligible for switching will be even less.

²⁴⁷ Maville V.S., pp. 24-28.

²⁴⁸ Maville V.S., p. 21. In 2007, only 279,900 carloads were actually inter-switched by CN and CP, out of a total of 7,442,000 freight carloads.

²⁴⁹ In the Opening Verified Statement of Jay Roman, submitted with the Opening Submission of The National Industrial Transportation League, Docket No. Ex Parte 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, March 1, 2013 ("Roman O.V.S."), Mr. Roman estimated that the total amount of traffic of the Big Four railroads that would qualify for inter-switching was about 1.24 million cars out of the approximately 31 million cars transported annually by those carriers, or about 4 percent. Roman O.V.S., p. 29. In Section IV.B. of these Reply Comments, the Shipper Coalition demonstrates that the AAR has vastly over-estimated the scope of the Board's proposal.

Moreover, this “traffic growth” will not take place immediately, or even over a single year. The nation’s rail carriers will have plenty of time to absorb this minute change in their system. To put this figure in perspective, the following table sets out the number of carloads originated by Class I rail carriers each year for the past ten years, according to figures published by the AAR.²⁵⁰ The table also sets forth the increase or decrease in the number of carloads compared to the previous year, as well as the percentage increase or decrease compared to the previous year:

U.S. Railroads – Carloads Originated			
Year	Total Carloads Originated	+ / - From Previous Year	% + / - From Previous Year
2011	30,000,000	790,000	2.7%
2010	29,210,000	3,204,652	12.3%
2009	26,005,348	(4,619,425)	(15.1%)
2008	30,624,773	(834,158)	(2.7%)
2007	31,458,931	(655,468)	(2.0%)
2006	32,114,399	972,182	3.1%
2005	31,142,217	1,047,421	3.5%
2004	30,094,796	1,224,747	4.2%
2003	28,870,049	968,682	3.5%
2002	27,901,367	695,952	2.5%
2001	27,205,415	-	-

²⁵⁰ For numbers from 2001 to 2009, see Railroad Facts, 2010 edition, p. 24. For the 2010 and 2011 figures, see <https://aar.org/statistics&publications/documents/aarstats-2013-02-07.pdf>.

The table shows that the annual increase or decrease in the number of cars originated by Class I carriers is many multiples of the number of cars that are likely to change carriers under even the broader scope of the NITL proposal, much less the Board's narrower proposal. Thus, there is simply no reason to believe that the advent of reciprocal switching under the Board's proposal will have any adverse effect on the nation's rail system.

There are other lessons that the Canadian experience can teach. As Mr. Maville noted, regulated inter-switching in Canada has been reviewed and monitored on a regular basis since 1988 when the inter-switch limit was substantially expanded to 30 kilometers. The reviews consistently found that the inter-switching regulations have increased rail-to-rail competition, but have had no negative impact on railway operations or network efficiencies.²⁵¹ Neither CN nor CP, which have participated in these reviews, have identified any adverse operational effects of the Canadian inter-switching system, which is far more extensive than the Board's proposal. In 2002, or fifteen years after Canada increased the inter-switching limits to 30 kilometers (and thus the amount of automatically eligible traffic) CP noted in its submission to the agency that "[t]he current structure of the inter-switching rates has worked to the general benefit of all parties concerned...."²⁵²

Despite the broadly available inter-switching in Canada, Mr. Maville noted that, by a variety of measures of a railroad's operating efficiency/workload performance and financial performance over time, Canadian carriers are among the most efficient and productive on the continent and in the world.²⁵³ These include ton miles per employee, revenue per ton mile

²⁵¹ Maville V.S., pp. 30-37.

²⁵² Maville V.S., p.32.

²⁵³ Maville V.S., pp. 37-44.

earnings, operating ratio, total carloads moved and total revenues earned.²⁵⁴ Mr. Maville shows that, since 1988, Canadian carriers have become more efficient and more productive. In short, there is simply nothing in the figures to suggest that the substantial extension of inter-switching has had any adverse effect on the productivity, efficiency or financial performance of Canadian railroads.²⁵⁵

The Canadian experience is a powerful indication that there would be no adverse network effects as a result of the introduction of reciprocal switching under the Board's proposal, but it is not the only one. Current reciprocal switching arrangements, the implementation of the Shared Asset areas in the Conrail merger case, the activities of terminal and short-line carriers, all suggest that there will be no adverse operational effects. There has been substantial growth in the number of short-line carriers since the Staggers Act; yet, the operations of these carriers has not harmed system efficiency. Significantly, the Christensen Report identified **no** operational or network concerns if competitive switching were introduced in the United States. See, Laurits R. Christensen Associates, Inc., A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals That Might Enhance Competition, revised 2009, at 22-12 to 22-14. Similarly, the Board's own Railroad-Shipper Transportation Advisory Council ("R-STAC") identified no operational concerns when it recommended the adoption of competitive switching within 30 miles of an interchange.

Indeed, the Canadian example suggests that competitive switching can **increase** network efficiency. In all likelihood, traffic will be switched primarily when the competing carrier is able to offer a more efficient or direct route (i.e., lower costs) than the incumbent, efficiencies sufficient to overcome the need for the switch at origin and/or destination. Moreover, under a

²⁵⁴ Id.

²⁵⁵ Maville V.S., pp. 35, 36-39.

regime of reciprocal switching, shippers will be able to access underutilized rail facilities and/or free up capacity on congested lines. The fundamental point is that, under reciprocal switching, the marketplace will decide based on the relative efficiencies and costs of the two competing carriers. Dr. Caves, in his Reply Verified Statement, also points out that the competition created through reciprocal switching can spur investment by the alternate carrier to improve network efficiency, which is a fact that the railroad economic witnesses ignore altogether by focusing solely upon alleged disincentives to investment by incumbent carriers. Thus, the Board should not be blind to the possibility that Canadian carriers are so efficient and profitable precisely because so much of their traffic base is subject to direct rail-to-rail competition.

VI. THE PROPOSED RULES WILL NOT INHIBIT INVESTMENT

The Class I railroads claim that reciprocal switching will reduce incentives to invest in their networks.²⁵⁶ As a threshold matter, however, those claims hinge significantly upon other railroad claims as to the volume of traffic that will be subject to reciprocal switching and that reciprocal switching will consume more of the incumbent carrier's terminal capacity. For all the reasons addressed in Section IV.B., the railroads grossly overstate the volume of traffic that will actually be switched. As a result, they similarly overstate the investment risks associated with reciprocal switching, even assuming those are legitimate risks.

Furthermore, the railroads erroneously assume that reciprocal switching necessarily will consume more of the incumbent carrier's terminal capacity. As discussed in Section V and in the Reply Verified Statement of John Orrison, that is improbable in most reciprocal switching scenarios. Orrison R.V.S., pp. 10-13. In some scenarios, because reciprocal switching will merely change the location of an interchange but will not increase the number of interchanges or

²⁵⁶ AAR Comments, pp. 37-40; CSX Comments, pp. 61-64; NS Comments, pp. 48-50; UP Comments, pp. 45-51.

carriers, there will be no additional activity to consume more of the incumbent's capacity. In other scenarios where reciprocal switching does add an interchange, the additional activity will occur on the alternative carrier, not the incumbent. The incumbent carrier will perform the same number of switches, but the final switch will be to an interchange train rather than the incumbent's road train. The circumstances in which reciprocal switching **might** consume more capacity on the incumbent thus will be exceptions that can be sufficiently evaluated in individual cases.

Also, the claimed risks to investment from reciprocal switching are not legitimate economic risks. The Shipper Coalition has submitted the Reply Verified Statement of Dr. Kevin Caves in response to railroad claims that reciprocal switching will inevitably lead to reduced investment, diminished efficiency, and degraded service quality. Dr. Caves makes the key point that competition spurs investment and that insufficient competition diminishes investment incentives. Caves R.V.S. at ¶¶ 38-42. Firms may compete not just through rates, but also by making investments that make their service offerings more attractive and valuable to their customers. Conversely, the lack of competition can incentivize firms to restrict investment.

For example, Dr. Caves describes the "Arrow Effect" or "Replacement Effect," which tends to be strongest when significant entry barriers exist, which aptly describes the rail industry. Id. at ¶¶ 41-42. Although a monopolist may find that a particular investment does not yield much additional business because its market share already is quite high, a competitor making the same investment would expect to profit more because it could gain a substantial share of the market previously served by the monopolist. Dr. Caves notes the proliferation of empirical support for the "Replacement Effect," including the rail industry in which increased

competitiveness and falling prices coincided with increased investment after passage of the Staggers Act. Id. at ¶ 42.

Reciprocal switching will eliminate many short distance bottleneck barriers to entry, thereby allowing the potential competition that already exists for most of the transportation route to influence railroad investment decisions. The alternative carrier will now have the opportunity and incentive to make investments needed to attract formerly captive traffic away from the incumbent. Conversely, the incumbent will have new-found incentives to make investments needed to retain that traffic on its network. Id. at ¶ 28. Railroad suggestions that the incumbent carrier won't make investments needed to attract competitive traffic are tantamount to asserting that it will not compete.

The railroad economists attempt to demonstrate that reciprocal switching will disincentive investment based upon an unproven assumption that the extant investment decisions of the rail industry already are procompetitive. Id. at ¶¶ 25-26. This same assumption also underlies their arguments for access pricing based upon the Efficient Component Pricing Rule, which the Shipper Coalition addresses in Section VIII.A. See also, id. at ¶ 27. But, as Dr. Caves testifies, that starting point assumes away the need for any regulatory remedy when the very purpose of reciprocal switching is to allow competition to play a greater role in these decisions. Furthermore, a grant of reciprocal switching under Prong 2 is predicated upon a finding that there is a lack of effective competition for the traffic that would benefit from switching. Similarly, the balancing of benefits and detriments under Prong 1 will allow an incumbent railroad to argue the effects of the requested switching on investment in individual cases.

Professor Willig presents a numerical example to illustrate his theory that reciprocal switching will reduce investment. But that example, as Dr. Caves points out, assumes the

shipper already is paying a competitive price or that Stand-Alone Cost regulation is constraining the railroad's rate to the competitive level. Id. at ¶ 29. But by changing that assumption to reflect a shipper who pays a rate above the competitive level, there is ample room for the competing railroad to offer a lower price that the incumbent could match while still covering all of its costs and without reducing investment incentives. Id. at ¶ 30.

Professor Willig also suggests that competition from reciprocal switching would drive rates below the assumed competitive level in his example, thereby precluding even the recovery of fixed costs, which will discourage investment. But as Dr. Caves explains, Professor Willig reaches that conclusion by assuming that the competition resulting from reciprocal switching will drive prices down to incremental costs, and that this assumption is unfounded in an oligopoly model. Id. at ¶ 31. Furthermore, Dr. Caves notes that actual rail industry experience with intermodal investment undermines Professor Willig's assumption, since the rail industry has invested billions in intermodal infrastructure despite intermodal traffic being the most competitive traffic on rail networks. Id. at ¶ 32. Dr. Caves also cites to testimony in Ex Parte No. 722 that UP's ability to increase rates on competitive traffic has been a major factor in its ability to achieve revenue adequacy. Id. Neither intermodal investment nor UP's experience would be possible under Professor Willig's assumption because such shippers would pay prices equal to incremental cost and contribute nothing to rail revenue adequacy. Id. There is no reason, therefore, to believe that the limited duopoly competition permitted by reciprocal switching will cause railroads to price below the total cost of providing that transportation service. Thus, railroads should have sufficient incentive to continue to invest under the proposed reciprocal switching rules.

Indeed, a key fact overlooked in the railroad objections to reciprocal switching is that reciprocal switching, and all the alleged risks cited by the railroads, exists across the national rail network today. While the railroads acknowledge the existence of those arrangements, they distinguish them as “voluntary,” rather than “forced,” switching and describe voluntary switching as mutually beneficial. The pretexts for the vast majority of such “voluntary” switching arrangements, however, actually were regulatory mandates imposed as conditions upon past mergers to preserve head-to-head rail competition. Yet during these merger proceedings, we never heard from the railroads about investment disincentives or stranded investment risks associated with reciprocal switching. Moreover, since those mergers occurred, 15-20 years ago, the rail industry has thrived and new investments have been made by both the incumbent and alternate carriers even in regions with a high concentration of mandated reciprocal switching, such as the Texas/Louisiana Gulf Coast. *Orrison R.V.S.*, p. 21.

Railroad claims that reciprocal switching will reduce their ability to invest by destroying their ability to engage in differential pricing also are overblown.²⁵⁷ While reciprocal switching will reduce the amount of traffic subject to current degrees of differential pricing, it will not destroy differential pricing by any means. First, far less than all captive traffic will be subject to reciprocal switching: only traffic that is within a reasonable distance of a working interchange that otherwise satisfies the proposed standards in Prongs 1 or 2 and that constitutes sufficient volume to justify the time and expense of an STB proceeding. Second, captivity is not essential for differential pricing to exist. For example, the highly competitive passenger airline industry engages in differential pricing even among passengers on the very same flight based solely on demand elasticity. Railroads similarly will be able to continue to differentially price their

²⁵⁷ AAR Comments, pp. 38-39; CSX Comments, *Ward V.S.*, pp. 11-12; NS Comments, pp. 46-47.

competitive reciprocal switch traffic based upon demand elasticity, albeit to a lesser degree than when they possessed a complete monopoly over that traffic. As discussed in Sections II.A.3. and III.A.1. and 3, the substantial improvement in the revenue adequacy of the rail industry, among other factors, warrants the proposed relaxation of the current reciprocal switching standards in favor of greater reliance upon competition to determine the appropriate degree of differential pricing.

Professor Wright offers the telecommunications industry as an example of a failed forced access regime that he contends should be a lesson to the Board. But Dr. Caves, who has written and testified extensively on this subject according to his *curriculum vita*, points out significant differences between the access granted over telecommunications networks and the access associated with reciprocal switching. Caves R.V.S. at ¶¶ 34-37. First, in the telecommunications industry, intermodal entrants such as cable and wireless operators have been eroding the incumbent telephone company market share for decades, whereas there has been no comparable competitive market discipline to benefit captive rail shippers. *Id.* at ¶ 36. Second, the access pricing regime imposed by the Federal Communications Commission transferred revenue from a facilities-based incumbent to a competitor that might invest little (or even nothing) in its own network. In contrast, under reciprocal switching, both the incumbent and competing carriers own and operate extensive proprietary networks. Therefore, because the competing carrier must earn sufficient revenue to pay down its own fixed costs in addition to variable costs, a competitive rate will allow the incumbent to do the same. *Id.* at ¶ 37. Third, the unbundled network elements in the telecommunications industry typically comprised a large portion (in some cases 100%) of the total infrastructure needed to serve the customer at regulated

rates, whereas reciprocal switching implicates only a short bottleneck segment to the nearest working interchange with the competing railroad's own network. Id.

Finally, the Canadian experience with inter-switching indicates that mandated reciprocal switching does not diminish investment or network efficiency. The Canadian system of automatic switching has existed for a century and there is no evidence that it has disincentivized investment, diminished efficiency, or degraded service. Moreover, under a regime of reciprocal switching, shippers will be able to access underutilized rail facilities on the alternate carrier and/or free up capacity on congested lines of the incumbent, which will make more efficient use of existing infrastructure and thereby **reduce** the need for some investment. The fundamental point is that, under reciprocal switching, the **marketplace** will decide based on the relative efficiencies and costs of the two competing carriers.

The railroad objections to reciprocal switching based upon reduced investment incentives, if taken to their logical extremes, would favor the elimination of all competition so that railroads could maximize differential pricing to maximize revenue for investment. But economic theory belies any notion that non-competitive markets will create such investment incentives. Therefore, the railroads must contend either that adequate competition already exists or rate regulation already caps rates at competitive levels. Neither contention is credible. The principal objective of reciprocal switching is to enhance competition by eliminating short distance origin/destination bottlenecks so that existing competition along the remainder of a route can function. Moreover, regulatory rate remedies are so complex, costly, and time-consuming for most traffic that shippers seldom can pursue them economically, which neutralizes even the threat of regulatory action as an effective rate constraint. Nor do the current rate regulatory standards produce the equivalent of a competitive rate. Because it is competition

that spurs investment, reciprocal switching is far more likely to generate more investment and permit more efficient use of existing investments.

VII. THE BOARD SHOULD REJECT OTHER RAILROAD CRITICISMS

A. The Board's Proposal for the Duration of a Reciprocal Switching Order Is Valid

In its Decision, the Board notes that Section 11102(c) does not set out a time period for how long a reciprocal switching prescription would last and, therefore, proposes that a prescription would last for as long as the criteria for each prong are met, unless otherwise ordered by the Board in a particular circumstance. Further, in the event of substantially changed circumstances, a party may petition the Board to reopen a reciprocal switching order. The railroads wrongly criticize this approach as inconsistent with the Board's power under the statute to address unreasonable rail rates and because this approach could leave switching orders in place indefinitely.²⁵⁸

The Board's approach is grounded in the statute, which has no time limit on reciprocal switching orders. Moreover, there is no reason why the Board's ordinary processes for "reopening" decisions based on changed circumstances are insufficient under Section 11102(c). Indeed, terminal trackage rights orders under Section 11102(a) are similarly indefinite and subject to a petition for reopening, and there is no reason why a similar procedure is not appropriate for reciprocal switching under the same statutory section.

As previously noted several times herein, a reciprocal switching order is not a determination that a rail rate is unreasonable because an order under Section 11102(c) simply permits a competitive market to set the rate. Where the Board directly intervenes in the market

²⁵⁸ See, AAR Comments, pp. 44-45 and BNSF Comments, pp. 9-10.

to set a rate using extremely complex analyses based on historical data under the Stand-Alone Costs methodology, it may make more sense for the Board to time-limit its order.

Moreover, it is simply untrue that the Board's approach is likely to make it impossible for a railroad to prove changed circumstances. Under Prong 1, for example, the incumbent railroad will have direct information as to any changed circumstances that affect operational or other "detriments" under the benefits/detriments test, and the incumbent certainly is aware if the switching becomes infeasible or unsafe or hampers its service to shippers. It also is untrue, as the AAR states, that a railroad seeking removal of a switching order "would effectively have to mount an entire 'public interest' case."²⁵⁹ Under the Board's standards for petitions to reopen, a petitioner simply has to state "the nature of and reasons for the relief requested"; any evidence "must be stated briefly"; the petition is limited to 20 pages; and the petition must state "the respects in which the proceeding involves... substantially changed circumstances" See, 49 C.F.R. §§ 1115.3(c) and (d), and § 1115.4. And under Prong 2, the incumbent railroad, an entity that presumably is constantly monitoring the trucking and other transportation markets, will be able to determine whether there have been changes to inter- or intramodal competition in the geographic area of the reciprocal switch. In either case, if the Board decides to consider a request to reopen, the railroad will have access to the Board's discovery procedures.

Finally, the statute gives the Board full powers to intervene in an emergency. Under Section 11123 of the statute, the Board is given full power to direct the handling, routing, and movement of traffic and the distribution of traffic; to prescribe temporary through routes; to give directions for preference or priority in transportation; and other powers. 49 U.S.C. § 11123(a). The Board's authority is for an initial period of 30 days, but can be extended up to 240 days. 49

²⁵⁹ AAR Comments, p. 44.

U.S.C. § 11123(a) and (c)(1). In the event that changed circumstances result in operational problems, the Board can issue emergency orders while it considers a rail carrier's petition to reopen.

Notwithstanding the Shipper Coalition's strong view that a time limit on reciprocal switching orders is unnecessary, if the Board determines otherwise, the Shipper Coalition would propose a 10-year limit as is the case for SAC rate prescriptions. A minimum 10-year period is necessary for shippers to justify their investment of time and money in a reciprocal switch case and to realize the benefits of switching through contracts of sufficient duration for the prevailing carrier to recoup any infrastructure investment made to handle the shipper's traffic.

B. The Railroad's Generalized Complaints About Disparate Impacts Are Incorrect, and the Board Can Address These and Other Railroad Concerns In the Context of An Individual Case

In its opening comments, the Kansas City Southern Railway Company ("KCS") argues that, as a smaller Class I carrier, it will be subject to "different impacts" that the Board's proposal may have, and asks that the Board exclude it from the proposal.²⁶⁰ In addition, the AAR and other railroads criticize the Board for not discussing how the Board will deal with such disparate subjects as the handling of TIH traffic, the provision of cars, handling priority, alleged passenger delays, and other subjects,²⁶¹ and argue that the Board "has an obligation to fully explain how it plans to implement its proposal...."²⁶²

Aside from simply making the statement that there will be disparate impacts on the smaller Class Is and that the KCS has relatively little market power, KCS provides little evidence of these assertions. Presumably, if KCS faces full intramodal and intermodal competition, there

²⁶⁰ Opening Comments and Evidence of the Kansas City Southern Railway Company in Ex Parte No. 711 (Sub-No. 1), submitted October 26, 2016, pp. 21-30.

²⁶¹ See, AAR Comments, p. 43; CSX Comments, pp. 72-73.

²⁶² CSX Comments, p. 73.

will be little reason for shippers to seek reciprocal switching and little ability for shippers to prove that a switching order will result in benefits. Further, if such effective competition exists, then switching would not be necessary to provide competitive rail service, since the shipper will not be able to prove a lack of inter- and intramodal competition.²⁶³ The Board can best evaluate any alleged “different” or “disparate” impacts in the context of an individual case, and that is the proper forum in which it should do so, rather than adopting a wholesale exclusion of one or more Class I carriers on the grounds that they are “smaller” than other “larger” carriers.

The same is true of the other “issues” raised by the railroads. If a request for reciprocal switching involves a proposed TIH movement, the incumbent railroad can certainly argue that the proposed switching is “unsafe” or “infeasible.” See, Decision at 18 and 19. Subjects such as priority of handling, provision of cars, and alleged passenger delays are clearly within both the “benefits/detriments” test of Prong 1, and/or part of the “not feasible” or “will unduly hamper the ability” of a carrier to serve its shippers analysis under both Prongs 1 and 2. These subjects, and other matters dealing with individualized circumstances in particular reciprocal switching requests, can best be dealt with in the context of an individual case.

C. The Board Is Correct That the Existence of a Reciprocal Switching Remedy Should Not Automatically Mean That a Market Is Competitive

Some railroads argue that it is improper for the Board to permit a shipper to pursue both reciprocal switching and rate remedies, and that the Board should forbid a shipper that has received an order for reciprocal switching to later pursue a rate reasonableness complaint.²⁶⁴ But as discussed in Section II.B.2.b. above, in its Decision the Board simply indicated that there is no

²⁶³ KCS argues the fact that a high RSAM indicates that it does not have the same market power as carriers with lower RSAMs, and that its RSAM is high compared to the four largest Class Is. But KCS’ own figures do not prove its point: in the four year RSAM data (2011-2014) discussed by KCS, in 2011 and 2012, the KCS’ RSAM was virtually the same or close to the RSAMs of the NS and CSX.

²⁶⁴ BNSF Comments, pp. 10-11; See also NS Comments, p. 31; CSX Comments, p. 14.

need to issue a “blanket rule” as requested by the railroads that a reciprocal switching order would automatically preclude a finding of market dominance in a rate case. Decision at 23. BNSF argues that the Board should preclude a shipper from pursuing rate relief for some undetermined “reasonable period of time” after entry of a switching order so that the parties can assess the impact of the switching prescription.²⁶⁵ But instead of promulgating some arbitrary rule as to what would be a “reasonable” period of time, the Board is better off doing what it proposed: continuing to analyze whether or not a transportation alternative provides effective competition. Decision at 23.

D. The Board Is Not Required To Deal With Labor Protective Conditions or Labor Impacts At This Time

The railroads complain that the proposed rules are silent regarding the responsibility for labor protection costs.²⁶⁶ However, the effect of a reciprocal switching order on labor protective conditions or the labor impacts related to reciprocal switching are not issues appropriate to address at this time. Indeed, applicable statutory²⁶⁷ and regulatory²⁶⁸ provisions, as well as the provisions relating to the requirements for reciprocal switching in the Decision,²⁶⁹ do not require the Board to address these issues now. Rather, they provide that the Board, at its discretion, may address these issues on a case-by-case basis.

The statutory language under section 11102(c)(2) provides the Board with discretionary authority to require reciprocal switching agreements to contain provisions for the protection of

²⁶⁵ BNSF Comments, p. 11.

²⁶⁶ AAR Comments, p. 44; CSX Comments, p. 76.

²⁶⁷ 49 U.S.C. § 11102(c); see also § 10101(11).

²⁶⁸ 49 C.F.R. § 1144.2.

²⁶⁹ Decision at 15-19.

the interests of employees that it may impact.²⁷⁰ Current STB regulations regarding reciprocal switching arrangements do not include labor concerns as one of the relevant factors the Board must take into account in determining whether the establishment of a switching arrangement satisfies the criteria of 49 U.S.C. § 11102(c).²⁷¹ Moreover, a prior ICC decision suggests that such issues only become relevant for the Board to consider once a rail carrier involved in a proposed reciprocal switching arrangement submits evidence indicating that railway employees may suffer harm if such arrangement is granted by the Board.²⁷² Accordingly, labor conditions and/or labor impacts should be factors that the Board should wait to address on a case-by-case review when “evaluat[ing] a switching arrangement based on the specific circumstances at hand” in accordance with its proposed rules.²⁷³

E. The Board Is Correct To Eliminate the Current Standing Rule

CSX argues that the Board’s proposed elimination of its current “standing” rule is arbitrary and capricious.²⁷⁴ In its Decision, the Board indicated that its standing requirement, which requires the petitioner to show that it has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future transportation needs, was adopted because the statute at the time included a “substantial injury” requirement for the agency to suspend a proposed cancellation of a through route or joint rate. Decision at 26. In its Decision, the Board indicated that it would eliminate this requirement for reciprocal

²⁷⁰ 49 USC § 11102(c)(2); Decision at 18.

²⁷¹ 49 C.F.R. § 1144.2(a)(1).

²⁷² Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement, STB FD No. 29802, 266 I.C.C. 845, 855 (Dec. 10, 1982).

²⁷³ Decision at 17.

²⁷⁴ CSX Comments, pp. 83-84.

switching, since the statutory provisions are no longer in force and because the purpose of reciprocal switching is to encourage competition. Id. at 26-27.

The Board is completely correct in ruling that to “require[e] the shipper to use the competing carrier pursuant to a reciprocal switching order for a significant amount of traffic would limit the shipper’s flexibility, which would be contrary to the goal of such an order.” Decision at 27. CSX also argues that the lack of a standing rule impairs the carrier’s ability to oppose a reciprocal switching request, because it would not know how much traffic the shipper is intending to route via the competing carrier.²⁷⁵ But reciprocal switching proceedings will require discovery by all parties, in which a carrier can ask exactly the information desired by CSX. In addition, the Shipper Coalition has previously suggested that the Board should establish procedures for reciprocal switching cases that require each party to set forth, at the beginning of a case, information necessary for the efficient conduct of a proceeding, including requiring a shipper to state the projected traffic volumes.²⁷⁶

F. The Board’s Proposed Rules Clearly Apply Only to Shipper-Owned Facilities

The AAR complains that it is “unclear” whether the rules apply only to facilities owned by shippers or could be interpreted to apply to facilities owned or financed by the incumbent railroad.²⁷⁷ The language in the rules seems perfectly clear to the Shipper Coalition, but the Coalition would have no objection to additional wording to clarify the point.

²⁷⁵ CSX Comments, p. 84.

²⁷⁶ Shipper Coalition Opening Comments, pp. 23-31 and see especially p. 26.

²⁷⁷ AAR Comments, pp. 43-44.

G. The Board Should Not Completely Exempt Short Lines From the Proposed Rule

In its Comments, the ASLRRA argues that the Board should “completely” exempt short lines from the rule, by “expressly limit[ing] the application [of the rule] to situations in which no Class II or Class III railroad participates **at any point** in the movement of the traffic regardless of whether the Small Railroad appears on the waybill.”²⁷⁸ In its opening Comments, the Shipper Coalition argued that, while the Board is correct in not making Class II and III carriers subject to a request for access by another carrier, the Board should allow a Class II or Class III carrier to seek access to a shipper served by an incumbent Class I carrier.²⁷⁹ The Shipper Coalition explained that this revision to the Board’s proposal would protect small carriers from the desire of a Class I to directly access the small carrier’s customers, while giving small carriers the opportunity to expand their business by becoming an accessing carrier. *Id.* Indeed, most if not all of the harms identified by the ASLRRA in its Comments²⁸⁰ would be eliminated by adopting the Shipper Coalition position, *i.e.*, by exempting Class II and III carriers from being subject to a reciprocal switching request.

ASLRRA’s request to exempt from the proposed rule any movement in which a small carrier participates at any point in the movement, even if the small carrier is not shown on the waybill, is a large overreach. Under ASLRRA’s proposal, if a shipper is served in Los Angeles by a Class I carrier, which moves the traffic 1800 miles to Memphis where the traffic is handed off to a short line for a five-mile transport to delivery, that traffic would be exempt from a request for reciprocal switching to a competing carrier **in Los Angeles** because of the

²⁷⁸ ASLRRA Comments in Ex Parte No. 711 (Sub-No. 1), October 26, 2016, p. 11 (“ASLRRA Comments”) (emphasis added).

²⁷⁹ Shipper Coalition Opening Comments, pp. 31-34.

²⁸⁰ ASLRRA Comments, pp. 9-10.

participation in the movement by the Class III carrier **in Memphis**, whether or not that competing carrier in Los Angeles would still use the Class III carrier in Memphis.

The Board should reject the ASLRRA's request. The request would determine whether a reciprocal switching proposal could be granted based on circumstances far from the point of requested competition. It would create huge incentives for mischief, as Class I's could "spin off" captive "short lines" solely for the purpose of frustrating requests for reciprocal switching at terminals. Indeed, in doing so, the ASLRRA's proposal would create incentives for a Class I carrier to create additional switches, without any corresponding increase in competition or the efficiencies that competition brings. Moreover, the ASLRRA's proposal would actually harm some shortlines, because it would create incentives for a shipper to cut a Class II or Class III carrier out of a movement in order to permit the shipper to seek a competitive switch, even if the switch would not affect the shortline at all. The Board should reject ASLRRA's overreach and adopt the proposal of the Shipper Coalition.

VIII. THE BOARD'S ACCESS FEE PROPOSALS ARE LAWFUL AND THE BOARD SHOULD NOT INCLUDE LOST CONTRIBUTION IN ITS DETERMINATION OF AN ACCESS PRICE

A. Lost Contribution Should Not Be Included In the Access Price

Nearly all of the railroad commenters assert that any methodology the Board adopts for establishing the access price for reciprocal switching must include a component for lost contribution, which also is referred to as the "Efficient Component Pricing Rule," or "ECPR."²⁸¹ As expressed in the Shipper Coalition Comments, at pages 53-54, ECPR has no place in reciprocal switch access pricing because ECPR functions properly only under a stringent set of

²⁸¹ AAR Comments, pp. 46-49; CSX Comments, pp. 86-95; NS Comments, pp. 64-68; UP Comments, pp. 51-55.

assumptions that do not apply to the railroad industry. In the absence of those assumptions, ECPR locks in an incumbent carrier's monopoly rent.

In response to economic testimony from railroad witnesses, the Shipper Coalition has submitted the Reply Verified Statement of Dr. Kevin W. Caves, Ph.D. ("Caves V.S.") on the lost contribution question. Dr. Caves observes that "to the extent that the incumbent firm's prices for its final product...exceed competitive levels owing to the exercise of market power, adoption of the ECPR will protect that market power and prevent its customers...from benefiting from the price competition that a competitor...could bring." Caves V.S. at ¶ 15. Therefore, proponents of ECPR must operate under the assumption that prices to end-users are already constrained to competitive levels, either by competition or by regulation that effectively mimics competition. Indeed, that assumption is evident in the testimony of the railroad economists. For example, the numerical examples presented by Professors Willig and Wright assume that the rates charged by the incumbent railroad already are at competitive levels, or are at least constrained to competitive levels by the SAC test, and thus contain no excess profit. Id. at ¶¶ 18-21. By changing that one unjustified assumption, Dr. Caves demonstrates how ECPR embeds the excess profit into the access price. Id. at ¶¶ 10-14.

That assumption is unfounded in the rail industry. Indeed, under Prong 2 of the proposed rules, the absence of effective competition is a prerequisite to obtaining reciprocal switching. The railroad economists, however, assume that SAC constrains the incumbents' rates to competitive levels. Id. at ¶¶ 18-21. That assumption allows the railroad economists to avoid the negative implication of ECPR. But Dr. Caves refutes the railroad economists' claims that SAC simulates a competitive outcome. Id. at ¶¶ 22-24. Furthermore, even if SAC did replicate a competitive outcome, it is highly improbable that the threat of regulation actually constrains rail

pricing to the SAC level given the enormous time and expense to shippers of pursuing a SAC case.

B. The Board’s Proposed Access Price Methodology Is Not Impermissibly Vague

Both CSX and NS make the specious assertion that the access price proposals in the Decision are impermissibly vague.²⁸² For the same reasons described in Section III.B. with respect to other vagueness arguments asserted by the railroads, the vagueness attacks on the access fee also should fail. Also, it is premature to claim that the proposed access pricing methodologies are impermissibly vague just because the Decision does not contain complete details.²⁸³ Indeed, the Board’s final rules for determining maximum reasonable rates adopted in Coal Rate Guidelines were no more detailed than the preliminary access fee proposals in the Decision. The agency only provided more detailed guidance through subsequent adjudications.

In addition, the vagueness doctrine does not set a standard for the clarity required of a notice of proposed rulemaking. Instead, the appropriate standard is that the notice of proposed rulemaking “expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change.”²⁸⁴ Here, the Notice expressly asks for comments on two proposed access pricing methodologies.²⁸⁵ Additional details can be fleshed out through the comments. The Notice does not need to provide additional detail on access pricing for the Board to adopt one of its access pricing proposals in the final rule.

²⁸² CSX Comments, pp. 90-91; NS Comments, pp. 69-72.

²⁸³ The Board has discretion to announce policy via adjudication. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). Notably, the Board has not adopted any access pricing rules for reciprocal switching granted under the current rules, but has left the subject for determination on a case-by-case basis in individual adjudications.

²⁸⁴ U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 700 (D.C. Cir. 2016) (quoting CSX Transp., Inc. v. STB, 584 F.3d 1076, 1081 (D.C. Cir. 2009)).

²⁸⁵ Decision at 25.

Regardless of the foregoing, the SSW Compensation methodology proposed by the Board is hardly vague. The Board has applied that methodology in previous trackage rights cases to determine compensation and it has sought comment on how that methodology could be adapted to reciprocal switching, which serves the same regulatory goals. Moreover, the Shipper Coalition has offered a detailed proposal based upon the SSW Compensation methodology in response to the Decision upon which the railroads will have ample opportunity to comment in their reply comments.

C. The Constitution Does Not Require An Access Price That Includes Lost Contribution

Both CSX and NS contend that implementation of the reciprocal switching rule proposed in the Decision would create a “taking” of private property such that “just compensation” is required under the Fifth Amendment to the U.S. Constitution.²⁸⁶ These contentions fail on several levels.

1. A shipper’s captive status is not a property interest.

The takings claim of CSX and NS must fail because neither railroad has described a sufficient private property interest that would be “taken” if reciprocal switching were ordered by the Board. It is axiomatic that, absent a property interest, there can be no “taking” under the Fifth Amendment.²⁸⁷ NS appears to claim that the property interest at stake is the “long haul” of the incumbent railroad (NS Comments, p. 68), but NS has pointed to no authority finding that the long-haul rights of a railroad qualify as private property for purposes of the Fifth Amendment.²⁸⁸

²⁸⁶ See, e.g., CSX Comments, pp. 87 and 94-96; NS Comments, pp. 64 and 67-69.

²⁸⁷ See, e.g., Minneapolis Taxi Owners Coalition v. City of Minneapolis, 572 F.3d 502, 509 (8th Cir. 2009).

²⁸⁸ The Shipper Coalition uses these paragraphs to respond to NS’s specific argument that railroads have a protected private property interest in their “long-hauls” for purposes of the Fifth Amendment. The

NS refers to the “lost contribution to its network” and is obviously concerned about profits lost by creation of competition to a previously captive shipper.²⁸⁹ NS complains that reciprocal switching would “deprive[] the incumbent railroad of what it would have earned” had competition not been created by reciprocal switching.²⁹⁰ CSX’s position is similar. CSX argues that “access to a particular shipper” is the property right at issue, and that the “taking” includes the lost contribution from “long haul” service to that shipper.²⁹¹ Both NS and CSX buttress their position with extended discussions of differential pricing²⁹² – thereby confirming that their true concern is exclusive access to “their” captive shippers (and the resulting financial gain from service to such captive shippers).

Exclusive access to a shipper is not a property right under the Fifth Amendment. A party that participates in a field regulated by the government does not have a property right in any expectation that the government regulations would never change.²⁹³ Any future application of the proposed reciprocal switching rule would *not* be a situation where “the government has seen fit to take a limited resource and secure it for the benefit of an individual or a predetermined

Shipper Coalition has already addressed the other “long-haul” arguments of the railroads in Section III.C.3. of these Reply Comments.

²⁸⁹ See, e.g., NS Comments, p. 65 (quoting decision about exploiting bottlenecks); 68 (referring to a new railroad competitor as an “interloper”), and 69 (referring to “hand[ing] traffic to a competitor”).

²⁹⁰ NS Comments, p. 68.

²⁹¹ CSX Comments, p. 95.

²⁹² NS Comments, pp. 64-67; CSX Comments, pp. 88 and 92. The fact that differential pricing has long been recognized by the ICC, the Board, and the courts does not detract from the fact that Congress specifically created a reciprocal switching rule, that the Board has been directed to support competition, and that shippers and third-party railroads separately always have property rights to create new rail lines that would produce competition. In other words, railroad desire for maximum and unaffected differential pricing cannot eviscerate all other statutory provisions that the Board implements.

²⁹³ See, e.g., Minneapolis Taxi Owners, 572 F.3d at 508-509 (taxicab license owners had no property right in expectation that government would never remove cap on licenses); Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993) (investment-backed business expectation based on validity of existing firearms import permit is not a property interest).

group of individuals.”²⁹⁴ Instead, Congress has specifically authorized the Board to order reciprocal switching and to facilitate competition. See 49 U.S.C. §§ 10101(1), (4), and (5); 49 U.S.C. § 11102(c). A railroad serving a captive shipper can have no reasonable expectation that the shipper will always be captive. Even beyond Board regulation, shippers and third party railroads always have the ability to create competition, and thereby eliminate the “captive” status of a shipper, by constructing “build-outs” or “build-ins” of new rail lines to the relevant shipper.

Absurd results would ensue if a railroad’s “exclusive access” or “long-haul right” to a captive shipper were found to be a property right. This would mean that Fifth Amendment compensation would be due to the serving railroad whenever the Board authorized the construction of a “build-out” by a shipper (or a “build-in” by a railroad) to create competition. In fact, for **private** rail line build-outs, where no Board authorization occurs, the view of CSX and NS would mean that the incumbent railroad would have a takings claim against any local government entity that provided any sort of building permit or construction permit to the shipper for construction of the private rail line.

2. Even if a property right exists, the issuance of any reciprocal switching order is not a “taking.”

Even if the railroads could show that “exclusive access” to a captive shipper is a property right, the issuance of a reciprocal switching order is not a “taking” for purposes of the Fifth Amendment. Any party alleging the existence of a Constitutional taking “bears a substantial burden.”²⁹⁵ When determining whether that burden has been met, it is important to remember that “government regulation...[o]ften...curtails some potential for the use or economic

²⁹⁴ Members of the Peanut Quota Holders Association, Inc. v. United States, 421 F.3d 1323, 1334 (Fed. Cir. 2005).

²⁹⁵ Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998) (citation omitted).

exploitation of private property”²⁹⁶ and “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.”²⁹⁷

A reciprocal switching order would not be a Constitutional taking because such an order would merely be fulfilling the Board’s duties under federal law in §§ 10101 and 11102(c), meaning that no railroad can have a reasonable expectation that the number of railroads serving a particular shipper would never change, or that a long-haul would never be shortened.

Ruckelshaus v. Monsanto, 467 U.S. 986, 1005-1007 (1984) (regulated industry had no reasonable expectation that EPA would maintain confidentiality of data because federal law authorized EPA’s disclosure). Moreover, if reciprocal switching is ordered, it would not materially interfere with the incumbent railroad’s use of its property, because non-interference is one of the foundations of such an order. See, Decision at 18-19 (reciprocal switching will not be ordered if “the proposed switching is not feasible or is unsafe” or if “the presence of such switching will unduly hamper the ability of that carrier to serve its shippers”).

NS complains that reciprocal switching is inevitably a constitutional taking because the incumbent “has engaged in no wrongdoing” and is an “innocent carrier.”²⁹⁸ This is a bizarre position that, if taken to its logical conclusion, would cause the collapse of most government regulation.²⁹⁹ Most regulated entities in a wide variety of industries remain subject to regulation regardless of whether they are engaging in any “wrongdoing” or are “innocent.” The simple fact

²⁹⁶ Andrus v. Allard, 444 U.S. 51, 65 (1979).

²⁹⁷ Armstrong v. United States, 364 U.S. 40, 48 (1960).

²⁹⁸ NS Comments, pp. 64-65.

²⁹⁹ Equally bizarre is the contention that the proposed rule would “depriv[e]” railroads of the ability to negotiate the access fee.” NS Comments, p. 67. The proposed rule specifically states that the Board would set a fee only in those situations where the railroads could not agree. Decision at 24. This is what Congress required in § 11102(c), and it is no different than various other statutory provisions. See, e.g., 49 U.S.C. §§ 10901(d), 11102(a), and 11123(b)(2).

that financial impact ensues does not mean that a Constitutional taking has occurred. Indeed, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Pennsylvania Coal Company v. Mahon, 260 U.S. 393, 413 (1922).

At heart, CSX and NS are unhappy about the possible replacement of captive shippers with competitively-served shippers, and the possible reduction in transportation revenue that may ensue. This unhappiness may be understandable, but it does not mean that a reciprocal switching order would be a Constitutional taking. As the Supreme Court has said, “loss of future profits...provides a slender reed upon which to rest a takings claim.” Andrus, 444 U.S. at 66.

IX. CONCLUSION

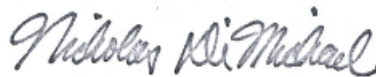
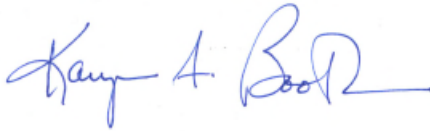
For the foregoing reasons, the Board should adopt as final its proposed reciprocal switching rules, subject to the revisions and clarifications proposed by the Shipper Coalition in its opening Comments and this Reply.

Respectfully Submitted,

The Shipper Coalition for Rail Competition

The Agricultural Retailers Association
Alliance of Automobile Manufacturers
American Chemistry Council
American Fuel & Petrochemical Manufacturers
American Petroleum Institute
Chlorine Institute
The Fertilizer Institute
Glass Packaging Institute
National Association of Chemical Distributors
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Dated: January 13, 2017

EXHIBIT 1

Verified Statement of Henry J. Roman

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No. 1)

REPLY VERIFIED STATEMENT

of

HENRY JULIAN ROMAN

January 11, 2017

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Propose of My Verified Statement	2
III. Summary Results.....	3
IV. Prong 1 – Analysis of Public Interest Prong	4
V. Prong 2 – Analysis of Competitive Access Pricing	7

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No. 1)

REPLY VERIFIED STATEMENT

of

HENRY JULIAN ROMAN

I. INTRODUCTION

My name is Henry Julian Roman ("Jay Roman"). I am President of Escalation Consultants, Inc., which is located at 4 Professional Drive Suite 129, Gaithersburg, MD 20879. I am the same Henry Julian Roman who submitted a Verified Statement on March 1, 2013 as well as a Reply Verified Statement on May 22, 2013 in the initial Ex Parte 711 proceeding. In my March 1, 2013, Verified Statement, I estimated the effect of the Competitive Switching Proposal ("CSP") proposed by the National Industrial Transportation League ("NITL" or "League") on both shippers and railroads using the 2010 Confidential Waybill Sample ("2010 Waybill"). My witness qualifications were included in my 2013 Verified Statement and my updated qualifications are attached to this Verified Statement.

II. PURPOSE OF MY VERIFIED STATEMENT

I have been asked by The Shipper Coalition for Railroad Competition to examine the October 26, 2016 Verified Statement of Mr. Michael Baranowski in this Ex Parte No. 711 (Sub No. 1) rulemaking proceeding. The purpose of this Reply Verified Statement is to respond to the assertions and conclusions set forth in Mr. Baranowski's statement regarding the potential carload impacts of the Surface Transportation Board's ("STB" or "Board") proposed rules that would authorize reciprocal switching prescriptions that are practicable and in the public interest (Prong 1) or necessary to provide competitive rail service (Prong 2), as set forth in the Board's July 27, 2016 decision in Ex Parte 711 (Sub-No. 1)—*Petition for Rulemaking to Adopt Revised Competitive Switching Rules* ("Decision").

The stated purpose of Mr. Baranowski's testimony was "to estimate the number of 2014 carloads potentially subject to the reach of the new proposals outlined [in the Decision]." ¹ My Reply Verified Statement addresses problems with the calculations of carloads potentially impacted by both Prong 1 and Prong 2 of the Board's proposed reciprocal switching rules ("RS Rules") ², as set forth in Table 1 and Table 2 on page 5 of Mr. Baranowski's Verified Statement.

¹ Baranowski VS at 1.

² Baranowski VS at 5.

III. SUMMARY RESULTS

Prong 1 Analysis:

My analysis of Mr. Baranowski's Prong 1 results shows that his calculations of potentially affected non-exempt carloads are neither relevant nor realistic. Mr. Baranowski's Prong 1 results are substantially overstated for several reasons. Most significantly, the analysis inappropriately counts cars at dual-served rail stations as being potentially impacted by the Board's proposed rules.

Prong 2 Analysis:

Issue 1 – Mr. Baranowski's Prong 2 Analysis is more reasonable than his Prong 1 Analysis. However, it still substantially overstates potentially affected carloads as it does not include "Revenue Factors" which will always reduce the carloads potentially affected by the RS Rules. Revenue Factors, such as the switch fee and the rate from the non-incumbent railroad, are an integral part of an analysis to determine the potential carloads affected by the RS Rules, as they are critical to determining whether it is economical for shippers to use these rules to try to obtain competitive switching for a movement. Mr. Baranowski's results are substantially overstated as his analysis ignores the fact that shippers will not use the RS Rules on movements where they provide no cost advantage.

Issue 2 – Impacted carload results would be much less under the Board's proposed RS Rules than under the NITL CSP. This is because the Board would have much greater control over the number of switching arrangements to be

granted under its case-by-case approach than under the NITL proposal, which was based on conclusive presumptions that would have created a more automatic right to switching relief. Also, under Prong 2 of the Board's RS rules, a shipper must prove a railroad has market dominance over a movement by meeting both the standard quantitative and qualitative tests, rather than simply showing the movement has an R/VC of at least 240%, which would further reduce the estimated carloads.

IV. ANALYSIS OF PRONG 1 - PUBLIC INTEREST PRONG – Table 1

To calculate the number of carloads affected by the Board's Prong 1 (Public Interest Prong), Mr. Baranowski "identified all of the non-exempt Class I railroad carloads originating or terminating traffic at stations served by more than one Class I railroad and at single served stations within three distinct rail mileage bands from the junctions."³ Table 1, on page 5, contains the results of his Prong 1 Analysis. Table 1 shows that for junctions within ten (10) rail miles the Board's RS Rules would potentially impact 11,344,308 carloads and this represents 75.7% of all non-exempt Class I carloads.

My analysis of Mr. Baranowski's results demonstrate that they are not accurate or realistic for the following reasons:

- Mr. Baranowski's Prong 1 results include both single and dual served stations. Dual served stations have access to an alternate railroad and it is not realistic to include all potentially competitive traffic in the impacted carloads results, since reciprocal switching would not likely be pursued for traffic that is already

³ Baranowski VS, page 4, Section 1.

subject to competition. All carloads that originate or terminate at dual served stations are included in Mr. Baranowski's "junctions within ten (10) mile" results as this is the smallest mileage range from junctions he considers. The large number of these stations on the Waybill substantially inflates Mr. Baranowski's results.

- The large number of Rule 11 movements⁴ in the 2014 Carload Waybill Sample ("2014 Waybill"), used for the analysis essentially makes the results of the Baranowski Prong 1 Analysis meaningless. This is because many shippers negotiate separate contracts with each Class I railroad that moves traffic for a portion of the distance between the origins and destinations when shipments are handled as Rule 11 movements. For example, if a movement originated in Houston TX and terminated in Atlanta GA under a Rule 11 movement via New Orleans LA, there would be a contract between UP and the customer from Houston TX to the New Orleans LA gateway and then a separate contract between the customer and CSXT from the New Orleans LA gateway to the final Atlanta GA destination. The UP and CSXT moves are referred to as Rule 11 movements. On the Waybill, the UP movement would be shown as originating in Houston TX and terminating in New Orleans LA and the CSXT movement would be shown as originating in New Orleans LA and terminating in Atlanta GA. Dual served stations on the Waybill would include all gateways on Rule 11 movements as these gateways must be dual served or they would not be a

⁴ A Rule 11 movement is a through movement involving at least two railroads in which the shipper contracts separately with each carrier involved in the movement.

gateway. Gateways are shown as either an origin or a destination on the Waybill and all of the Waybill Rule 11 gateway moves would fall within the ten (10) mile distance to a junction in the Prong 1 results. The significance of the Rule 11 issue on Mr. Baranowski's results is quite large. By including dual served stations, Mr. Baranowski's analysis includes the carloads at large gateways like Chicago IL, Salem IL, East St Louis IL, Memphis TN, New Orleans LA, Birmingham AL and numerous other major gateways that interchange traffic between railroads, as potentially impacted stations by the Board's RS Rules.

Including competitive stations in the analysis will obviously generate a large number of potentially impacted carloads, but these carload results have little to do with the actual carloads that would be impacted by the Board's RS Rules. It is interesting to note that the potentially affected carloads within thirty (30) rail miles of a junction versus within ten (10) rail miles only increase from 11,344,308 to 12,548,942 carloads, an increase of 10.6%. This demonstrates that the real impact in Mr. Baranowski's Prong 1 Analysis occurs in his ten (10) miles or less results, which would include the carloads on the Waybill going through Rule 11 gateways. It does not appear that the results generated from Mr. Baranowski's Prong 1 Analysis were completely thought through as Rule 11 gateways will not be impacted by the Board's RS Rules because of the practical reality that a shipper would not pursue switching if there already is a second carrier at the gateway.

- The Prong 1 Analysis shows the percentages of non-exempt carloads potentially affected by the Board's Public Interest Prong across the 3 distance categories, but the percentages are overstated. Each carload appears to be counted twice in Mr. Baranowski's Prong 1 results when both the origin and destination are considered to be affected by the Public Interest Prong.
- The results of Mr. Baranowski's Prong 1 Analysis are also substantially overstated because the analysis does not even consider the R/VC ratios for the counted movements. This means that low margin competitive moves are included in the results. In particular, a large number of moves with R/VC's below 100% are included even though these types of moves would not be candidates for competitive switching under the Board's RS Rules.⁵

V. ANALYSIS OF PRONG 2 – COMPETITIVE ACCESS PRONG – Table 2

Mr. Baranowski's Prong 2 Analysis looks at the potential number of carloads affected by the Board's Competitive Access Prong 2. All non-exempt Class I railroad carloads originating or terminating at single served stations with R/VC's at or above 180%, within the same rail mileage bands as the Prong 1 Analysis, are included in his Prong 2 Analysis. The results of this Analysis show that sixteen-point four percent (16.4%) of non-exempt carloads within thirty (30) miles of a junction are potentially affected by the Board's Prong 2 Rules.

This analysis is more reasonable than Mr. Baranowski's Prong 1 Analysis as it considers Non-Revenue Factors that will reduce the number of carloads impacted by the Board's

⁵ The STB's 2014 RSAM results, developed from the Waybill, show that 15.9% of all railroad costs occur on moves with R/VC's below 100%.

proposed Prong 2 Rules. Carload reductions based on Non-Revenue Factors in the Prong

2 Analysis include:

- Dual served stations are eliminated and only carloads at single served stations are analyzed; and
- Moves with R/VC's below 180% are eliminated.

These changes substantially and appropriately reduce the potentially affected carloads in Mr. Baranowski's Prong 2 Analysis.

However, the estimated carloads in this Analysis are still substantially overstated because the Analysis does not account for any Revenue Factors that will further reduce the number of potentially affected carloads. Also, the 180% R/VC threshold is too low of a standard to determine impacted carloads. This is especially true for moves that have both the origin and destination impacted as the shipper would be required to incur a switch fee at both the origin and destination which would almost certainly make the movements uneconomical. In the NITL proposal, a 240% minimum R/VC threshold was used because it was recognized that competitive switching would primarily only affect moves with high R/VC ratios as these are the moves that are more likely to reflect captive shipper pricing.

As noted above with regard to concerns with Mr. Baranowski's Prong 1 Analysis, it is important to account for the Revenue Factors that would reduce the affected carloads, including in particular the rate proffered by the non-incumbent railroad that gains access to origins or destinations due to the Prong 2 Rules and the access fee for that non-incumbent railroad.

When Revenue Factors are considered, the number of affected carloads would be

reduced substantially on moves with R/VC's less than 300%. This was illustrated in my May 1, 2013 Reply Verified Statement in the initial Ex Parte 711 proceeding. My analysis⁶ showed the impact of the Revenue Factors on potentially impacted carloads. These amounts were presented on two bases:

1. By applying a "Full Competition" revenue screen⁷. A Full Competition revenue screen assumes that the non-incumbent railroad would compete aggressively and provide competitive rates for the affected business that are comparable to the rates railroads provide to shippers when they compete head-to-head with another railroad at a shipper's dual served facility.
2. By applying a "Reduced Competition" revenue screen⁸. The RS Rules would only create competition between two railroads for potentially impacted moves and this represents less competition than for moves that have head-to-head rail competition. The Reduced Competition revenue screen is more realistic as it assumes the non-incumbent railroad would price the potentially affected movement above the rates for moves that have normal service from more than one railroad.

⁶ STB EP 711, Roman Reply VS, Table at 12 (May 22, 2013).

⁷ Screen was described in STB EP 711, Roman VS at 30-32 (March 1, 2013).

⁸ Screen and the method of calculating the screen was described in STB EP 711, Roman VS at 35-39 (March 1, 2013).

The following table contains the results for R/VC ranges above 180% for both Full Competition and Reduced Competition revenue screens. Numbers are taken from Table 1 of my May 22, 2013 Reply Verified Statement.

Table 1
Impact of Revenue Factors on Potentially Impacted Carloads

(1)	(2)	(3)	(4)	(5)
	R/VC Range	Potentially Impacted Cars After Applying Non-Revenue Screens	Potentially Impacted Cars After Applying both Revenue and Non-Revenue Screens	Percent of Cars After Applying Revenue Screen (col. 4 ÷ col. 3)
Full Competition Competitive Benchmark R/VC's	180-209	529,809	210,176	39.7%
	210-239	327,813	191,956	58.6%
	240-299	752,524	461,815	61.4%
	300-399	543,078	444,986	81.9%
	400-499	179,394	167,902	93.6%
	500<	138,035	124,239	90.0%
	Totals	2,470,653	1,601,074	64.8%
Reduced Competition <u>Lerner Index</u> and Competitive Benchmark R/VC's	180-209	529,809	110,804	20.9%
	210-239	327,813	130,630	39.8%
	240-299	752,524	383,473	51.0%
	300-399	543,078	417,812	76.9%
	400-499	179,394	117,431	65.5%
	500<	138,035	122,671	88.9%
	Totals	2,470,653	1,282,821	51.9%

The above Table 1 demonstrates that a large number of moves with R/VCs below 300% will simply not make it through the revenue screen.

Table 1 Reduced Competition results show that on moves with R/VCs between 180% and 209% only 20.9% of the carloads that make it through the non-revenue screen also make it through the revenue screen and only 39.8% of the moves with R/VCs between 210% and 239% make it through the revenue screen. This analysis shows that Revenue Factors are very important in determining the potentially affected carloads from the

Board's RS Rules as they naturally reduce the number of affected carloads on movements with lower R/VCs. Of course, the higher the access fee and the rate from the non-incumbent railroad, the less economical the RS Rules would be for shippers and the lower the number of potentially affected carloads. Mr. Baranowski did not consider any Revenue Factors in his Prong 2 Analysis which makes his results substantially overstated. Table 1 above shows that at a minimum, a more realistic analysis would need to use a much higher R/VC threshold than that used in Mr. Baranowski's Prong 2 Analysis if revenue filters are not considered in determining the potential impact of the RS Rules.

I need to emphasize that before considering revenue filters Mr. Baranowski's potentially affected carloads are very similar to the carloads in my 2013 Reply Verified Statement for movements with R/VCs at or above 180% (reference Table 1 on page 11 of this Verified Statement). My 2013 analysis had 2,470,653 potentially impacted carloads, while Mr. Baranowski's Prong 2 calculations have 2,454,418 potentially affected carloads. I was using the 2010 Waybill while Mr. Baranowski is using the 2014 Waybill, but our results are within 16,235 carloads of each other. Table 2 contains a summary of these results.

Table 2
**Baranowski Prong 2 Impacted Carload Results
 Within 30 Rail Miles v. Roman Results Only
 Considering Non-Revenue Filters**

	Potentially Impacted Carloads
Baranowski Prong 2 Results	2,454,418
Roman Rebuttal Testimony R/VC's Above 180% & Only Non-Revenue Filters	2,470,653
Difference	16,235

The similarity of the numbers in Table 2 indicate that there appears to be agreement between Mr. Baranowski and myself on the number of potentially impacted carloads before considering whether it makes economic sense for a shipper to use the RS Rules to try to obtain competitive access at a facility. The question that is left unanswered in Mr. Baranowski's Prong 2 calculations is how many of his carloads will no longer be potentially impacted once the impact of fundamental business considerations and market economics of using the RS Rules are considered for a movement: the higher the access fee and the higher the rate from the non- incumbent railroad, the smaller the number of movements that will be impacted by the RS Rules. Mr. Baranowski has chosen to ignore the fact that shippers will not use the RS Rules on movements where these revised rules provide no cost advantage.

The Revenue Factors that impact competitive access pricing are an integral part of the analysis to determine carloads affected by the Board's RS Rules. My analysis of the NITL proposal, contained in my March 1, 2013 Verified Statement, took into consideration both the Non-Revenue Factors as well as the Revenue Factors that impact the potential number of carloads that will be affected by a change in competitive switching regulations and my results were one-half of Mr. Baranowski's potentially affected carloads. The results of potentially impacted carloads in Table 14, page 38 of my March 31, 2013 Verified Statement, are included in Table 3 immediately below along with Mr. Baranowski's thirty (30) rail mile range Prong 2 results.

Table 3

Roman v Baranowski Potentially Impacted Carload Results

	Potentially Impacted Carloads	Roman % Difference from Prong 2 Results
Baranowski Prong 2 results within 30-mile range	2,454,418	
Roman results considering revenue and non-revenue factors and within a 30-mile range under the NITL CSP		
Full Competition	1,239,297	-49.5%
Reduced Competition	1,078,662	-56.1%
<u>Note: Roman results are based on the NITL Competitive Switching Proposal and the 2010 Waybill.</u>		

Table 3 shows that when revenue filters are used the number of impacted carloads drops dramatically. My potentially impacted carloads are approximately 50% less than Mr. Baranowski's carloads depending upon whether one uses the full competition or reduced competition method of approximating the new rate from the non-incumbent railroad. My analysis showed that when the rate from the non-incumbent railroad and the switch fee cost are considered, the RS Rules are no longer economically viable for a large number of carloads. Mr. Baranowski's analysis did not measure this impact which means his Prong 2 results are significantly overstated as they do not measure the true impact of the Board's revised competitive switching rules.

There are some big differences between the NITL proposed change to the competitive switching rules and the Rules proposed by the Board that will naturally reduce the number of impacted carloads below the 1.1 million carload amount in my March 2013 Verified Statement. The impact of the Board's case-by-case proposal on carloads and railroad revenue can reasonably be expected to be less than the NITL proposal, which would have required the Board to grant switching relief when the

conclusive presumptions were satisfied. Under the case-by-case approach, the Board would have greater discretion and control over the number of switching arrangements to be granted and it would allow the Board to take account of the switching arrangements previously granted when evaluating the impacts in a particular case.

Another major difference in the Board's proposed RS Rules from the NITL competitive switching proposal that will reduce impacted carloads is that under the Board's proposal a shipper must prove market dominance and cannot just rely on the 240% R/VC conclusive presumption. Having to prove market dominance would naturally lead to a further reduction from the 1.1 million potentially impacted carloads in my March 2013 Verified Statement.

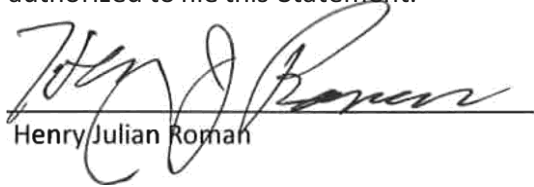
It is difficult to determine the actual reduction in impacted carloads resulting from:

1. The shipper having the burden of proving market dominance; and,
2. The greater discretion and control the Board would have in granting or denying a request for reciprocal switching.

The number of carloads will, however, naturally be substantially less than under the NITL proposal which included burdens of proof based on conclusive presumptions.

VERIFICATION

I, Henry Julian Roman, verify under penalty of perjury that I have read this Reply
Verified Statement, that I know the contents thereof, and that the same are true and correct
based on my knowledge, information and belief. Further, I certify that I am qualified and
authorized to file this Statement.



Henry Julian Roman

Executed on: January 11, 2017

Curriculum Vitae
**Henry Julian Roman (Jay
Roman)**

Jay Roman is the President of Escalation Consultants, Inc. A consulting firm engaged in economic analysis and consultation related to prices and price movement in rail transportation contracts. His business address is 4 Professional Drive, Suite 129, Gaithersburg, MD 20879.

Since founding Escalation Consultants in 1979, Mr. Roman has assisted a large number of companies in controlling prices in rail transportation agreements and on an annual basis he is involved with billions of dollars in rail spend. Some of the industries he works with are: Coal, Chemicals, Petroleum, Automobile, Grain, Steel, Fertilizer, Farm and Food Products, Paper Products and Forest Products. Some specifics on Mr. Roman's engagements are as follows.

Rail Rate Analysis - Mr. Roman regularly performs studies of rail rates and railroad costs for major companies with movements in the U.S. and Canada. The studies provide information for key products, which enables companies to better structure their rail negotiations, as well as, the best markets for their products along with where capital should be invested to lower cost and maximize revenue.

Rail Databases - Mr. Roman is the owner and developer of Rail Rate Checker which is a very large database that contains data on rail rates, rate changes, rail costs, volumes and rail profit by commodity group. A large number of companies subscribe to this database to assist in determining what reasonable rates are for their rail movements and to determine opportunities for reducing rail expenses.

Rail Bid Evaluations - Mr. Roman is the owner and developer of the Optimized Rail Bid Evaluation (ORBE) program. The ORBE program is the only computer program that automatically determines shippers least spend from rail bids, while uncovering win/win opportunities between shippers and railroads.

Seminars on Rail Contracting - Mr. Roman conducts the most attended and recommended rail negotiation seminar, which is held twice a year. His seminars have been attended by thousands of people in the U.S. and Canada and virtually all industries that ship by rail have participated in his rail contracting seminars.

Expert Witness Testimony - Mr. Roman has testified as an expert on pricing issues involving coal and rail transportation before the Federal Energy Regulatory Commission, in federal and state courts, before the National Energy Board of Canada, as well as in arbitration cases in the U.S. and Canada. He has also testified before the Surface Transportation Board on rail issues.

Strategic Planning and Rail Negotiations – Escalation Consultants is actively involved in bid evaluations, strategic planning and rail negotiations totaling more than a billion dollars a year in rail spend with rail shippers.

Escalation Consultants Represents the Rail Shipper Community in many Projects

A few examples of recent projects follow:

- Escalation Consultants determined the cost of rail as an alternative to pipeline Crude Oil. The results were the only rail rate benchmarks presented to the National Energy Board of Canada
- Escalation Consultants analyzed all rates and volumes on the entire U.S. rail system to determine the impact of increased competitive access on railroads and shippers. The results were submitted to the Surface Transportation Board (STB) in Ex Parte 711 to support the National Industrial Transportation League's (NITL) competitive switching proposal
- Escalation Consultants determined the competitive status of all rail stations in the U.S. and summarized the degree of captivity by state and Congressional District. The results of the Study were sent to the President of the United States by a sitting member of Congress.
- Escalation Consultants determined the cost of non-competitive rates to the rail shipper's community. The study breaks down the economic impact of high rail rates and results are summarized by geographic area down to the five-digit commodity code level. The Study, which was performed for the American Chemistry Council.
- Analyzed the change in the economics of shipping Forest and Paper Products (F&P Products) by rail. The results were submitted to the STB in Ex Parte 701 (Sub- No. 1) to demonstrate why the exemption of F&P Products should be rescinded. A rebuttal Verified Statement was submitted in this same proceeding.

Education - B.S. Major in Accounting, University of Maryland, 1973.

EXHIBIT 2

Verified Statement of John Orrison

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte 711 (Sub.-No. 1)

Reciprocal Switching

**Reply Verified Statement of
John Orrison**

I, John Orrison, submit this verified statement in support of the Reply Comments of the Shipper Coalition for Rail Competition in the Ex Parte 711 (Sub-No. 1) proceeding.

Reciprocal switching will have little effect on the operating efficiencies that railroads have realized over the past three decades. Typically, the operational difference between reciprocal switching and single-line service is that the traffic will be switched to or from an existing interchange train instead of a road train. No additional handling will be necessary by the incumbent carrier, and thus, railroad service will not decline for either the customer seeking reciprocal switching or other rail customers.

To the extent reciprocal switching poses operational challenges, railroads are well-equipped to handle them with little impact on efficiency or service. Adaptability is a core competency of any Class I rail carrier. Class I railroads have invested heavily in sophisticated systems and developed processes to constantly monitor their operations and tweak their operating plans to accommodate changes in traffic volumes and patterns. Also, they have demonstrated that they can address challenges posed by unstable traffic volumes by entering long-term contracts with shippers.

Additionally, the Board's proposal to evaluate each reciprocal-switching request on a case-by-case basis is sufficient to identify infeasible proposals. Railroads themselves conduct

case-by-case assessments of operational impacts of traffic gains and losses to determine the adjustments they need to make to preserve efficiency and service performance. They also are able to use their sophisticated modeling tools to model scenarios under each reciprocal-switching request and combine various scenarios to develop an operating plan that addresses cumulative effects. Moreover, various factors affect the feasibility of each individual reciprocal-switching scenario, making a one-size-fits-all standard poorly suited for evaluating reciprocal-switching requests.

Railroad investment will not abate in light of reciprocal switching, as evidenced by the significant investments that railroads make in areas where they compete for traffic. Railroads will continue to use long-term contracts and other mechanisms to help justify investment in competitive traffic. Also, even where traffic volumes are unstable, railroads will invest to reduce operating costs.

I. Statement of Qualifications

I have worked for multiple Class I railroads in various operational capacities over the past 40 years. In 1976, I began my railroad career as a Norfolk Southern college intern. Upon graduating from college, I worked for NS as a Project Engineer for three years. I then attended Harvard Business School while staying on with NS as a Civil Engineer. From 1985-2000, I worked for CSX Transportation (CSXT) in over ten different capacities, beginning as an Assistant Terminal Trainmaster at CSXT's Hamlet, NC hump yard, and subsequently serving in such operating positions as Division Superintendent—Detroit Division, Vice President—Service Design, and culminating as Vice President—Network Planning. My responsibilities at CSXT included supervising and managing the development of CSXT's train profiles, freight-car blocks, and freight-car disposition rules, and implementing new operating plans to integrate Conrail and CSXT lines and operations. Also, at CSXT, I supervised CSXT witness Cindy Sanborn and UP

witness Thomas Haley. After spending two years as Executive Vice President—Strategic Planning for Pacer Stacktrain, I served as Assistant Vice President—Service Design & Performance for the Burlington Northern & Santa Fe Railway (BNSF) from 2005-11, where I led and directed the BNSF Merchandise Service Design & Performance team, which included analyzing and improving service reliability for certain commodity traffic.

Throughout my 40-year career, I have developed substantial experience with railroad switching. I have developed service design plans for yard switching, designed computer systems that generate car trip plans for customers and work orders for yard and local crews, and developed advanced technology to track work orders, such as conductor work-order computer applications to electronically report work events completed in real-time.

While at CSXT, I directed the development of the Interline Switching Agreement (ISA) between CSXT and all connecting carriers, including Union Pacific Railroad (UP), BNSF, and the Terminal Railroad Association of St. Louis (TRRA), and gained first-hand knowledge of CSXT's service design plans for interchanging traffic in Atlanta, GA and other locations. I also was CSXT's representative to the committee established by the Association of American Railroads (AAR) for developing ISAs for the railroad industry. I served as CSXT's representative for the Chicago Planning Group (CPG) and served as a co-chair of the CPG which presented to the AAR recommendations for the Chicago Transportation Coordination Office. Through my work on the CPG, I served as chairman of the Infrastructure Committee that presented recommendations to the AAR for key infrastructure-investment corridors pertaining to infrastructure that was assigned to the Chicago Region Environmental and Transportation Efficiency Program (CREATE).

While at BNSF, I led and directed the corporate program Best Way Gathering & Distribution (BWG&D) that focused initiatives to improve reliability of first-mile/last-mile switching services for over 700 BNSF local and yard jobs assigned to switch customers and interchanges. The BWG&D program increased switching reliability by improving the process for customer pre-notification, simplifying switching activities, and improving reporting of switching activities and daily operational performance. A CSXT delegation benchmarked BNSF's program to develop similar initiatives at CSXT.

Additionally, I have front-line experience with switching, which I gained at Southern Railway working as a switchman with a local crew in Meridian, MS and at CSXT working as Assistant Terminal Trainmaster at Hamlet, NC and as Division Superintendent—Detroit Division.

I have provided testimony on railroad operations in multiple STB proceedings. In the STB's Conrail acquisition proceeding,¹ I was the operating-plan expert witness for CSXT. Also, I provided operating-plan testimony in *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, STB Docket NOR 42121.

II. Reciprocal switching will have little impact on railroad operating efficiency.

Under typical circumstances, reciprocal switching will not affect operating efficiency and, thus, not result in degraded service across a carrier's network nor materially impact non-participating traffic. Class I railroads have demonstrated that they effectively handle the operational challenges that reciprocal switching presents. Moreover, reciprocal switching is not inherently inefficient. For the incumbent carrier, it typically involves the same level of handling and dwell times as single-line service. Even to the extent reciprocal switching may reduce traffic density on the incumbent carrier's system, the incumbent carrier will be able to adjust its service

¹ *CSX Corp. & CSX Transp., Inc., Norfolk S. Ry—Control & Operating Leases/Agreements—Conrail Inc. & Consol. Rail Corp.*, STB Finance Docket 33388.

plans to maximize efficiency based on its revised traffic base, and the line-haul carrier will achieve offsetting efficiency gains on its network.

A. Reciprocal switching does not present new operational challenges for railroads.

Railroads are well-equipped to handle reciprocal switching. Reciprocal switching occurs throughout the Class I railroad system without making the system inefficient or degrading service. To make this possible, railroads have developed various mechanisms and employ sophisticated tools to address the operational logistics of reciprocal switching without reducing efficiency or disrupting service.

Class I carriers and the Association of American Railroads have dedicated immense resources to establish Interline Service Agreements (ISAs) that ensure the efficient movement of traffic through interchanges. In an ISA, participating railroads may agree on interchange locations, days of the week for interchange, time for interchange delivery and pick-up, and other operational aspects of an interchange. To ensure that ISAs account for a dynamic operating environment, railroads meet regularly to develop new ISAs and evaluate existing ISAs. Thus, ISAs are a key mechanism that railroads use today to coordinate operations to reduce the operational impact of interchange traffic, including reciprocal switching.

Through ISAs and other agreements, railroads are able to reduce operating costs. For example, BNSF and UP have agreed to establish a reciprocal interchange switching agreement for Fort Worth, TX, under which each carrier assumes all responsibility for delivering and pulling interchange cars for alternating six-month periods. BNSF has agreed upon similar arrangements with other carriers at many other locations, such as between BNSF and Canadian National Railway in Memphis, TN. By leveraging economies of scale, this approach reduces operating costs, train crews, and locomotive use for the carriers when compared to the

conventional approach, under which each railroad would deliver interchange cars every day using a dedicated interchange job.

Railroads also share data so that they can better predict switching volumes. Class I carriers have developed waybill-record exchange databases that provide visibility of the expected interchange “pipeline” of loaded and empty cars moving toward terminals. These databases provide a sufficient horizon to plan for the receipt of cars through an interchange at a terminal.

While I was at BNSF, I used these waybill-record exchange databases to address multiple issues concerning traffic interchanges where the customer was able to shift volume between BNSF and another Class I carrier. For example, Suncor Energy, whose private railcar fleet exceeded 7,000 cars, had a Denver, CO, petroleum facility that both BNSF and UP served. Because the shifting of the facility’s traffic placed high demands on BNSF’s Globeville yard, I used the waybill-exchange data to identify Suncor’s car flows, volumes, and patterns and develop a solution to ease demand on the Globeville yard. Specifically, my team and I determined that BNSF could divert all inbound BNSF empty-car flows to a local terminal railroad, which could sort the cars into blocks for loading by Suncor, and then pick up the presorted blocks and deliver them directly to Suncor, thereby avoiding the Globeville yard.

Railroads regularly enter long-term contracts with shippers to secure stable, predictable traffic flows. And shippers with access to reciprocal switching commonly enter long-term contracts with a railroad guaranteeing volumes for specific destinations or groups of destinations. These contracts can prevent shippers from randomly splitting traffic between the incumbent and line-haul carrier on a daily basis and suddenly activating switching orders. They also provide predictability to railroads for planning purposes. For example, entering a contract enables the Class I railroad receiving the contract traffic to make adjustments to accommodate the traffic.

Also, it enables the other railroad to make adjustments for the expected volume reduction. Typically, the railroad who loses volume is able to adjust its operating plan to consolidate train operations and reduce network costs. Ultimately, by entering contracts with shippers, Class I carriers can ensure the movement of the traffic in well-planned service design plans that Class I railroads have fully vetted and developed using advanced service planning tools.

Although railroads may prefer predictable traffic volumes, they are accustomed to having little notice of changes in customer traffic flows. Where railroads compete for customer traffic, they often must accommodate significant traffic shifts. To address potential shifts, railroads coordinate in advance for potential changes in traffic flows. For example, where BNSF and UP compete for multi-year commercial contracts with plastics producers (this occurs in Texas), BNSF and UP together prepare to shift high car volumes when a commercial contract is nearing termination. Also, in the Conrail Shared-Asset Areas, where NS and CSXT compete against each other for traffic, NS and CSXT have demonstrated that they can plan for traffic-flow changes and accommodate these changes without disruption.

Railroads have shown that they can quickly adapt to volume changes caused by unstable and unpredictable traffic demand. During 2008-2009, Class I railroads essentially had no commercial marketing plan due to the banking crisis and broad lack of confidence in the outlook for the U.S. economy. Historical traffic patterns were useless for predicting traffic. Nevertheless, carriers adapted. Similarly, in 2006 and 2007, the U.S. housing market created great demands for center-beam lumber cars. I was at BNSF at this time, and this traffic created congestion at our Vancouver gateway. To reduce the congestion and increase car cycle utilization, we voluntarily routed the cars via another gateway, while agreeing on the same revenue division with the other carrier. However, we were forced to adapt again in 2008, when the housing market collapsed, by

placing the majority of BNSF-owned center-beam lumber cars into storage and eliminating the additional blocking and train frequency we had created for the traffic.

In fact, adaptability is more critical to maintaining efficient operations and avoiding service degradation than having predictable traffic flows. Railroads operate in a dynamic environment in which traffic volumes fluctuate constantly and often with little notice. Thus, to maintain operating efficiency and avoid service disruptions, railroads must be able to quickly adapt. Accordingly, within CSXT, for example, the churn of traffic patterns far outpaces the total changes in traffic volumes. Through operational research analysis conducted in 1990-1993 and again for the acquisition of Conrail in 1996, the CSXT network experienced a 40% churn in traffic patterns and pairings due to shipper/receiver shifts despite just 2% annual volume growth.

The manner in which railroads constantly monitor and analyze traffic to identify efficiency adjustments underscores the primary importance of adaptability. Class I railroads have teams of service-design planners who use sophisticated software to monitor traffic flows and patterns constantly and to identify cost savings and operational adjustments in response to traffic changes. While I was Vice President for Service Design at CSXT and Assistant Vice President for Service Design and Performance at BNSF, my service-design planners used advanced software to constantly survey traffic flows and determine which strategies to employ to increase efficiency. When I was at BNSF, I oversaw the installation of new service-design software developed by Innovative Scheduling called Integrated Railroad Blocking Optimization (IRBO) modeling software. This software enabled service-design planners to quickly and simultaneously develop multiple operating plans and overlap these plans with other plans in the same geographic region. Also, BNSF provided the software to all service-design planners (approximately 30 users), not just a select few power users. This resulted in faster responses to requests by

Divisions for changes to blocking and train operations. Although large network plans required approval of a regional vice president, the regional vice presidents reviewed proposed plans weekly, which enabled BNSF to implement operating plan adjustments on a weekly basis. Ultimately, this software enabled BNSF to quickly adjust its operating plans to reflect changes in customer traffic patterns and volumes.

Because of this process of continual monitoring and adjustment, volume shifts caused by reciprocal switching should not have a dramatic impact on network service. At BNSF, we found that, in most cases, new traffic volumes had little, if any impact, on our network service-design plans. To accommodate the traffic, our planners made incremental adjustments to service-design plans on a weekly basis as the traffic transitioned onto the system. These small, precise adjustments enabled BNSF to handle traffic changes with minor, if any, disruptions to our customers.

Also, reciprocal switching does not affect railroads' capacity to respond to traffic-flow disruptions caused by circumstances beyond their control. Railroads do not use the same resources to address reciprocal switching and other events, like changes in market conditions or weather disruptions. Railroads use network resources to respond to weather events and changes in market conditions, such as returning into active service the "stored-in-service" locomotives and "stored" freight cars. Division resources are available to respond to fluctuations in traffic at the shipper's facilities. These resources include local trains and yard jobs that are already programmed to provide these services. By contrast, the normal business processes that govern service planning would be used to manage service-design changes to accommodate fluctuations in reciprocal-switching traffic, which may or may not adjust blocking and train operations, as explained below.

B. Reciprocal switching is not inherently inefficient.

Railroad claims that reciprocal switching would inevitably create inefficiency are incorrect. From the perspective of an incumbent carrier, reciprocal-switching traffic generally involves the same amount of origin and destination handling as single-line traffic. Thus, traffic will generally experience the same amount of dwell time and use the same capacity in the incumbent's origin or destination yard, regardless of whether it travels in single-line or interchange service.

For the incumbent carrier, the operational difference between interchange and single-line service often is that the interchange cars are switched to/from an interchange train instead of a road train. For example, typical operations to originate single-line traffic can be distilled to four basic switching activities:

- Yard switch switches an empty car to a local train or yard switch.
- Local train or yard switch moves the empty car to the customer and spots it.²
- Local train or yard switch picks up a loaded car from the customer and transports it to the yard.
- Yard switch switches loaded car to outbound road train.³

The same four basic switching activities are necessary for the incumbent carrier to originate the traffic in interchange service, except that the final event involves switching the loaded car to an interchange train.⁴ In some circumstances, a carrier may be able to eliminate a switch for single-

² A local train or yard job can move a car in addition to spotting and picking it up. Contrary to Mr. Rennie's claims, there is no need for a "way train" to move the car and an industry switch to spot and pick up the car. STB Docket EP 711, Verified Statement of William J. Rennie 25 (submitted March 1, 2013). Regardless, adding steps for a way train and industry switch does not necessarily cause interchange traffic to incur additional handling over single-line traffic.

³ For terminating single-line traffic, these steps would be reversed, and instead of the switch to the outbound road train, there would be a switch from the inbound road train.

⁴ Because the inbound empty car will need to be switched to the yard either in single-line or interchange service, I have omitted this step.

line service that it would otherwise have to perform for interchange service. But, as a general matter, the same level of handling is necessary for the incumbent carrier to originate and terminate traffic in interchange service. To the extent there are scenarios where reciprocal switching may involve additional handling, the impact of this handling could be adequately evaluated as part of the Board's proposed case-by-case assessment of switching requests.

Similarly, an incumbent carrier generally will not experience increased dwell times for interchange service as compared to single-line service for the same traffic. The typical railroad yard has an average dwell time of 24 hours from car arrival to departure, regardless whether the car moves in interline or single-line service. Since, generally, dwell times for interline and single-line cars are equivalent and the incumbent performs the same level of handling for both types of traffic, the overall dwell on an incumbent's lines will be the same for interline and single-line service.

While the interchange of traffic may result in higher car cycle times compared to single-line service, this will not automatically result in more car volumes throughout the system. The incumbent railroad will not have more cars on its system because car handling and dwell times are the same for typical reciprocal-switching scenarios as compared to single-line service. Also, if a reciprocal-switching shipper uses railroad-owned cars, the cars will belong to the line-haul carrier and reside on the line-haul carrier's system. Thus, reciprocal switching may allow the incumbent carrier to maintain a smaller railcar fleet. Reciprocal switching also provides opportunities to reduce empty-car miles, because it provides more points for distributing empty cars. For example, when CSXT acquired Conrail, it gained access to shippers near many destinations on its system. Where these shippers used the same cars whose trips ended at these destinations, CSXT took advantage of opportunities to route the empty cars to the shippers rather

than back through its system. This ultimately saved CSXT hundreds of thousands of empty-car miles.

Private fleets also are unlikely to swell because of reciprocal switching. Car cycle time is only one of many variables affecting shipper fleet sizes. Often shippers allow receivers to use cars for in-car storage, which increases cycle times. Also, many shippers use cars for storage-in-transit, because they produce products in lots that exceed current demand. In many cases, the additional time required for reciprocal switching is insignificant compared to the amount of cycle time attributable to SIT or destination storage.

Reciprocal switching also will not automatically result in more interchange locations. Not all reciprocal switching requires additional interchange points. Instead, reciprocal switching may change the current interchange location between the same two railroads. Also, to the extent the change in interchange location creates additional switch events, these events will occur on the line-haul carrier, not the incumbent, as explained above.

Moreover, reciprocal switching may result in efficiencies over single-line service. In many cases, interchange service provides a shipper with less circuitous routing and, thus, quicker transit times over single-line service, even when considering the additional time required for the reciprocal switch. For example, traffic originating on NS in Birmingham, AL, for interchange in Chicago, IL, operates via Cincinnati, OH, in single-line service, but would operate via Nashville, TN in CSXT interchange service. Likewise, traffic originating on CSXT in Charlotte, NC, for transportation to Harrisburg, PA, travels via Richmond, VA in single-line service, but would travel via Hagerstown, MD in NS interchange service. Also, reciprocal switching may provide a shipper with access to new origin/destination pairs for the movement of empty cars, resulting in a reduction of empty-car mileage. For example, if, because of reciprocal switching, a loaded car

departing from a Texas plant to the East Coast could be routed to return to a Louisiana plant, a reduction in empty-car mileage could be realized. In these circumstances, reciprocal switching could ease demand on railroad infrastructure, reduce car cycle times, and provide better service compared to single-line service.

Also, there are many ways that an incumbent carrier can improve the operational efficiency of interchange traffic. Through the well-established ISA process, an incumbent carrier may be able to coordinate with the line-haul carrier to reduce dwell times for interchange traffic. Also, an incumbent may be able to use directional switching—switching that favors arrival and departure of cars moving in certain directional patterns—to reduce dwell times of interchange cars. For example, the BNSF Memphis hump yard, which makes direct interchange to connecting Class I railroads, employs directional switching and has reported average car dwell times as low as 15.3 hours. Incumbent carriers will often be able to deliver interchange cars directly to the interchange point with the line-haul carrier, thereby eliminating a switch of the interchange traffic in the incumbent's serving yard. Further, incumbent carriers can coordinate with customers so that customers provide their cars pre-blocked, which reduces the level of car sorting that the incumbent must perform.

Because reciprocal switching typically does not increase handling for incumbent carriers and may present opportunities to reduce handling, direct expenses will remain the same or may improve for the incumbent railroad. Also, because the incumbent carrier will be charging for reciprocal switching services, the incumbent will be compensated for its switching costs. Indirect expenses may decrease for the incumbent when the diversion of traffic from its line reduces congestion.

C. Reciprocal switching does not degrade service on the system.

Reciprocal switching poses little threat to railroad service. As explained above, it typically does not result in increased handling by any one carrier, it can open traffic to more efficient routing, and it will have minimal impact on the number of cars in the system. Also, carriers have developed advanced service-planning tools to avoid service degradation. And any efficiency losses to the incumbent from reduced traffic densities will be countered with efficiency gains from the increased density on the line-haul carrier.

Although reciprocal switching would divert traffic from the incumbent carrier, potentially reducing the incumbent's traffic density, this would have little impact on the incumbent's line-haul operations. Class I railroads try to block together cars and move them as far as possible without stopping for re-blocking. Increased traffic density enables a block to be larger, which can justify the resources to move the block further without stopping to gather more traffic. But, in addition to traffic volume, railroads consider other factors when determining how far to move a block, such as the cost of switching a car at particular locations, the cost of building the block, the average dwell time for the cars placed into the block at the origin yard, and the distance and cost of the transporting the block.

Also, even assuming that a block is sufficiently sized to bypass switching at intermediate yards, reducing the block's volume does not mean that the block will have to stop at intermediate yards for switching. In some cases, the volume drop may not be significant enough to warrant a change to how the block is handled. In other cases, the block may be eliminated and a new block may be built that also can bypass intermediate yards, thereby preserving some or all of the cost savings that the former block enabled.

Moreover, Class I railroads are well-equipped to respond to traffic density changes by identifying new, efficient car-blocking opportunities and adjusting their operating plans to move

traffic in the most efficient manner. Class I railroads employ sophisticated software to constantly monitor traffic flows and patterns and to optimize blocking and identify cost savings in response to traffic changes. For example, the software that I acquired for BNSF was capable of evaluating hundreds of thousands of blocking solutions to identify those with the most cost savings. It also included enhanced service design support, which reduced service-design analysis time from weeks to minutes. Thus, BNSF could adjust its operating plan weekly to provide for efficient handling in the wake of traffic changes.

A closer look at UP witness Haley's example of how reduced traffic density will impact UP operations between Houston and West Colton, CA, shows that the impact will likely be immaterial. According to UP witness Haley, if the volume of cars traveling from Houston to West Colton became insufficient to warrant a nonstop train from Houston to West Colton, UP would need to combine the West Colton cars with cars moving to intermediate points, such as El Paso and Tuscon, which would create delays because the train would have to stop in El Paso and Tuscon and be re-sorted and mixed with other cars.⁵

But, if UP could not build a nonstop train to West Colton, it would not simply mix West Colton cars with El Paso or Tuscon traffic. Instead, UP would build the West Colton block and then add a block of El Paso or Tuscon cars to the front of the train. At El Paso, the West Colton block would stay intact and the El Paso block would be removed from the front of the train and replaced with blocks of cars for Tuscon and West Colton in block order.⁶ Since the blocks at El Paso were already built before the arrival of the train, the train is able to perform the set-out, pick-up, crew change, inspection, and, if necessary, fueling within 90 minutes to two hours. Given that, with a journey of 1600 miles and an assumed average train speed of 25 MPH, the

⁵ Verified Statement of UP Witness Thomas C. Haley 7 (Oct. 26, 2016).

⁶ The new block order would be Locomotives/Tuscon/Tuscon (El Paso origin)/West Colton (El Paso origin)/West Colton.

estimated transit time for the trip is 64 hours, stops in El Paso and Tuscon to set-out and pick-up cars will not materially increase the transit time of the West Colton traffic.

Similarly, UP witness Haley's example of how reduced density between Houston and St. Louis create delays shows that any delay will be minimal. Mr. Haley claims that, if UP does not have sufficient cars to build a nonstop train from Houston to St. Louis, the train would have to stop in Little Rock to be combined with other cars for St. Louis. But all that needs to be done is for pre-blocked St. Louis cars to be attached to the train in Little Rock.⁷ Like with the West Colton example above, this should not take more than 90 minutes to two hours, which results in a minimal increase in transit times.

Even if reduced traffic density would have a negative operational impact on the incumbent carrier, the line-haul carrier is likely to experience countervailing positive operational impacts. Reciprocal switching simply shifts density from one carrier to another. Thus, if reduced density is expected to degrade the incumbent carrier's service, the density gained by the line-haul carrier conversely will enhance the line-haul carrier's service. By allowing the marketplace to determine which carrier handles the traffic, the net effect on both carriers' operations could be positive.

Further, railroad concerns about the cascading effects of missed trip plans are misplaced. AAR Witness Rennieke claims that, because reciprocal switching involves more handling, cars are more likely to miss connections under reciprocal switching, which imperils the trip plans and schedules for other cars, leading to service failures cascading throughout the system.⁸ This claim overlooks that the typical reciprocal switching scenario includes the same level of handling as single-line service for each carrier involved. Thus, the risk of missed connections and trip plan

⁷ Verified Statement of UP Witness Thomas C. Haley 7 (Oct. 26, 2016).

⁸ Verified Statement of AAR Witness William J. Rennieke 12 (Oct. 26, 2016).

failures cascading throughout a carrier's system in the typical reciprocal switching scenario is no different than in the corresponding single-line scenario. Additionally, Class I railroads have reserved buffer capacity in their yards to account for traffic surges and delayed train operations.

Likewise, railroad attempts to equate the impacts of reciprocal switching with service meltdowns in prior mergers are absurd. For example, the service meltdown following the UP and Southern Pacific Railroad merger arose because UP decided to quickly shutter yards and terminals to reduce operational costs and capital expenditures without any concern for operational impact. In fact, UP leadership deepened the service problems by continuing to pursue cost-savings deadlines without making mitigating operational changes. Reciprocal switching will not implicate operational changes in any way comparable to those in the UP/SP merger or rail mergers generally. Also, the UP/SP service meltdown arose from railroad leadership's blind pursuit of cost-savings without any consideration of operational impact. By contrast, the Board's reciprocal-switching proposal includes case-by-case assessments that consider the operational impact of reciprocal-switching requests.

The service meltdown accompanying the breakup and merger of Conrail into CSXT and NS also has little relevance to the Board's reciprocal-switching proposal. This service meltdown did not occur because of the cumulative impact of various elements of the transaction. Instead, it occurred because, on the day of the Conrail split, NS leadership loaded into live operations a locomotive database that was an old test database with incorrect locations of locomotives, trains, and train consists. As a result, all inventory locations were lost.

III. The Board's proposed case-by-case assessment of reciprocal-switching requests is sufficient to identify operating impacts.

Although railroads claim the Board's case-by-case assessment of reciprocal-switching requests is inadequate, it is similar to the approach that railroads would use to assess operational

impacts from shifts in competitive traffic. Also, a case-by-case assessment ensures that the complex switching scenarios similar to those that the railroads have posited in their comments receive appropriate scrutiny.

All Class I railroads have processes to review potential new business and determine operational adjustments necessary to accommodate it. They also use similar processes to review reductions in customer traffic. For example, at BNSF, I was the leader of the New Business Service Review process which collected information from the commercial department regarding potential new customers for BNSF. As part of the process, operations and service-design planners would use advanced computer modeling software to determine an operating plan that would accommodate the new business. Service planners could also use this software to generate a solution for reduced traffic levels. The rapid-fire process involved weekly status and update meetings with the expectation that BNSF would commit to new customer business within two weeks. The other Class I railroads have similar business-review processes.

These existing business-review processes can be used to effectively evaluate a reciprocal-switching request on a case-by-case basis. Service planners can easily model potential changes to customer traffic patterns and volumes under a reciprocal-switching proposal and determine the network effect of the proposal. As explained above, at BNSF we used commercial and service-design personnel to document and review the potential impacts of proposed new customer business opportunities. Under this process, we established a minimum volume threshold below which new business could be handled without additional review and above which we had to conduct a more thorough analysis to determine how to increase resources at the local serving yard and accommodate the traffic across the network.

Railroads can use case-by-case assessments and other tools to anticipate and address the impacts of reciprocal-switching orders. Through the highly sophisticated modeling technology they employ, Class I railroads can archive each reciprocal-switching case and various operational scenarios under each case. Railroads can use this archive to model any combination of cases and scenarios into a cohesive and comprehensive operating plan. Also, with the volume predictability that long-term contracts with shippers provide, railroads can fine-tune their assessment of operational impacts.

To the extent cumulative effects of reciprocal-switching orders may be difficult to assess, Class I railroads have a deep understanding of and broad experience addressing the cumulative effects of changes to network flows. They regularly generate extra trains and annual trains to address these effects. Also, railroads are able to quickly identify and address these effects through daily continuous monitoring of their networks at different levels of their organizations. Terminal managers or superintendents oversee local and yard operations; trainmasters and dispatchers oversee subdivision operations; division managers and superintendents oversee division operations; regional staffs oversee regions; and network staff oversee the network. Because this process leverages operational experience at many levels, it strengthens the ability of Class I railroads to overcome large, complex operational challenges while maintaining or improving efficiency. Also, by employing processes that involve continuous monitoring and tweaking of their systems, Class I railroads likely will mitigate any cumulative effects of reciprocal switching mechanically.

Also, the unnecessary complexity of the theoretical reciprocal-switching scenarios that railroads have presented underscore that a case-by-case review of reciprocal-switching requests is appropriate. Anyone can design a complex switching scenario on paper and pass it off as too

burdensome to be implemented in real life. Indeed, that is what AAR Witness Rennie has done. His example of typical switching requires 24 events to complete.⁹ The example overstates the total number of required events by having “way trains” performing all car movements and by counting all operational events of local trains moving a car, such as backing into a siding. In the real world, a local or yard job could both move the car and perform a related switch, and the railroads would assign a movement to a train, leaving it to the train crew to determine how to move the car. The incumbent railroad’s train that interchanges the loaded traffic would likely place the interchange cars ahead of the train so that it can spot the cars and proceed without having to use passing siding and runaround movements. Thus, railroads would simplify this scenario to 14 events. Also, many of these remaining events probably would be combined in the real world. For example, the line-haul carrier could have the yard job that spots the interchange both switch out the empty car from the origin yard and spot it at the interchange. The incumbent could have a yard job move cars between its yards, by both switching out the cars in one yard and setting them out in the other. Thus, in the real world, Mr. Rennie’s 24-step scenario would likely be simplified to ten steps. Perhaps some of the simplifications I have described may not be possible in certain circumstances, but this is exactly why a case-by-case approach is the best way to evaluate reciprocal-switching requests.

IV. Railroads will continue to invest in their networks despite reciprocal switching.

Reciprocal switching is unlikely to chill a Class I railroad’s investment in its network. Where they compete, Class I railroads invest in their networks to capture a greater market share. Also, they use long-term contracts with shippers to reduce investment risk. And, even where they

⁹ Verified Statement of AAR Witness William J. Rennie, Ex. 5 at 10 (Oct. 26, 2016).

do not have guaranteed traffic volumes, their investments also generate returns from other traffic through lower operating costs.

Railroads invest heavily in areas where they face intramodal competition for traffic. For example, UP and BNSF compete for traffic along the Texas and Louisiana coasts, especially in the Houston area. Nevertheless, UP is constructing a new hump yard near Hearne, TX, which will be one of the largest hump classification yards in the state.¹⁰ This investment strengthens UP's network in a geographic region where it faces strong competition from BNSF, allows UP to consolidate smaller less-efficient yards, and enables UP to design new blocking and train operations to improve customer traffic flows into the nationwide rail network. Likewise, BNSF has made enormous investments in this region, including investments in constructing a storage-in-transit (SIT) yard at Dayton, TX capable of staging and switching over 3,300 cars.

Also, where railroads face competition for traffic, they use long-term contracts with shippers to secure traffic and justify investment. While I was at BNSF, I was involved in winning Total Petrochemicals USA's traffic from UP, which required making investments in our network, including expanding BNSF's Dayton SIT yard. To justify these investments, we amortized our capital expenditures over the life of the contract.

Moreover, railroads do not avoid investing just because they may not be able to justify it with new business. Railroads will invest in infrastructure to lower their costs of operations. By lowering their costs, railroads often can achieve a return on investment that exceeds what they would otherwise achieve had they not invested in their network.

¹⁰ Press Release, Union Pac. Ry., Union Pacific's Proposed Freight Rail Yard in Robertson County Will Strengthen Texas' Role as a National Freight Transportation Hub (Oct. 2, 2014), *available at* http://www.uprr.com/newsinfo/releases/capital_investment/2014/1002_tx-railyard.shtml.

V. Conclusion

Typical reciprocal switching will not add handling for any particular carrier and thus will not jeopardize efficiency or service. Even if switching requires additional handling, railroads are masters at adjusting their operations to accommodate changes in traffic, while preserving efficiency and protecting service. While service meltdowns have occasionally occurred on some Class I railroads in the past, they were not caused by the types of traffic shifts that can be expected from reciprocal switching. Also, because Class I railroads effectively use contracts to secure stable traffic volumes from shippers who have competitive alternatives, they should be able to prevent traffic shifts that may impact their operations. And, as demonstrated by Class I railroads' continued investment in infrastructure used to handle competitive traffic, reciprocal switching will not likely result in decreased investment in railroad facilities. Where a reciprocal-switching request is infeasible, a case-by-case evaluation by the Board will protect the carrier from having to implement the request. Ultimately, railroads are capable of making reciprocal switching work while preserving efficiency and protecting service.

VERIFICATION

I, John Orrison, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on January 12, 2017



John Orrison

EXHIBIT 3

Verified Statement of Dr. Kevin W. Caves

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 711
(Sub No. 1)
Reciprocal Switching

Reply Verified Statement of
Kevin W. Caves, PhD
On Behalf of
The Shipper Coalition for Railroad Competition

Dated: January 9, 2017

Background	3
Summary of Conclusions	5
Qualifications	6
I. The Efficient Component Pricing Rule Protects Market Power and Does Not Promote Competition.....	6
A. The Logic of The Efficient Component Pricing Rule.....	8
B. Economists Recognize That The Efficient Component Pricing Rule Fails To Promote Competitive Pricing.....	10
II. The Standalone Cost Test Does Not Constrain Prices to Competitive Levels	12
A. The Railroad Economists Assume That Shippers Already Enjoy Competitive Pricing Due To SAC	12
B. Rate Regulation Based on SAC Does Not Replicate Competitive Outcomes.....	13
III. Claims Of Diminished Investment Assume that Conduct In the Industry is Already Competitive.....	15
A. The Railroad Economists Assume That Railroads' Extant Investment Decisions Are Procompetitive	16
B. Economists Recognize That Insufficient Competition May Diminish Investment Incentives	24
Conclusion	27
Verification	28
Appendix A – Curriculum Vitae of Kevin W. Caves	29

BACKGROUND

1. I have been asked by the Shipper Coalition for Rail Competition (“Shipper Coalition”) to respond to selected portions of expert testimony submitted by certain economic witnesses (the “Railroad Economists”) in the above-captioned matter. Although I have been asked to focus primarily on certain portions of the expert testimony of Professor Kevin Murphy,¹ I have also been asked to respond to certain portions of expert testimony submitted by Professors Joshua Wright² and Robert Willig.³

2. I understand that, under current regulations, a shipper remains captive to the railroad with which its shipment originated for as far along the shipper’s route as the origin railroad can carry the traffic on its own network, regardless of the proximity of other rail networks that might otherwise compete for the shipper’s business along the route. The STB’s Notice of Proposed Rulemaking (“NPRM”) in this proceeding proposes to modify current rules for granting captive shippers the right to obtain service from a nearby competitor railroad through reciprocal switching.⁴

3. Under the current rules, introduced by the Interstate Commerce Commission (“ICC”) in the mid-1980s, reciprocal switching could be prescribed only if the incumbent railroad “had used its market power to extract unreasonable terms or had shown a disregard for

¹ Ex Parte No. 711 (Sub No. 1), *Verified Statement Of Kevin Murphy* (October 26, 2016) [hereafter, “Murphy VS”]. I have been asked to address portions of the economic arguments presented in Section III of Professor Murphy’s testimony.

² Ex Parte No. 711 (Sub No. 1), *Verified Statement Of Joshua D. Wright* (October 26, 2016) [hereafter, “Wright VS”]. I have been asked to address the economic arguments presented in ¶¶89-99 of Professor Wright’s testimony.

³ Ex Parte No. 711 (Sub No. 1), *Verified Statement Of Robert Willig* (October 26, 2016) [hereafter, “Willig VS”]. I have been asked to address the economic arguments presented in Part III.C of Professor Willig’s testimony.

⁴ Notice of Proposed Rulemaking in Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching* (July 25, 2016) [hereafter, “NPRM”].

the shipper's needs by furnishing inadequate service.”⁵ Under this standard, “[f]ew requests for reciprocal switching have been filed...and in none of those cases has the Board granted a request for reciprocal switching.”⁶

4. Recognizing that reciprocal switching appears to be an unattainable remedy under the current rules,⁷ and that increased consolidation among Class I railroads “could lead to reduced competitive options for some shippers,”⁸ the NPRM proposes a revised standard. Under the NPRM’s two-pronged approach, shippers could be granted the right to reciprocal switching if it is found “practicable and in the public interest,”⁹ or “necessary to provide competitive rail service.”¹⁰ According to the NPRM, the new standard would involve “weighing issues such as competition and market power, rail service needs (for complaining and non-complaining shippers), the impact on the involved carriers, and whether specific facilities are appropriate for particular switching operations.”¹¹

5. The Railroad Economists raise several objections to the Board’s proposal. In this report, I will focus on (1) their claim that the access price paid by the competing railroad to the origin railroad should adhere to a framework generally referred to in the economic literature as the Efficient Component Pricing Rule (“ECPR”); (2) the Railroad Economists’ pervasive assumption that shippers are already protected from paying prices above competitive levels by rate relief obtainable through application of the standalone cost (“SAC”) test; and (3) their claim

⁵ NPRM at 4.

⁶ *Id.*

⁷ *Id.* at 8 – 9 (“The sheer dearth of cases brought under § 11102(c) in the three decades since Intramodal Rail Competition, despite continued shipper concerns about competitive options and quality of service, suggests that part 1144 and Midtec Paper Corp. have effectively operated as a bar to relief rather than as a standard under which relief could be granted.”)

⁸ *Id.* at 9.

⁹ *Id.* at 16.

¹⁰ *Id.*

¹¹ *Id.*

that reciprocal switching will inevitably lead to reduced investment (and consequently to diminished efficiency and degraded service quality), particularly if the ECPR is not adopted.

SUMMARY OF CONCLUSIONS

- The Efficient Component Pricing Rule advocated by the Railroad Economists is not and never has been intended to promote price competition. To the extent that a railroad's current prices to shippers exceed competitive levels, adoption of the ECPR will protect that market power and prevent shippers from benefiting from the price competition that a rival railroad could bring.
- This fundamental property of the ECPR is well recognized in the economics profession. For this reason, proponents of the ECPR operate under the assumption that prices to end-users (in this case, shippers) are already constrained to competitive levels, either by competition or by regulation that effectively mimics competition. This assumption is evident in the analyses presented by the Railroad Economists, including numerical examples in which railroads are assumed not to earn any supracompetitive profit. Put differently, the Railroad Economists assume away the need for any regulatory remedy (beyond the SAC test) to move prices closer to competitive levels.
- The Railroad Economists' assumption that prices to shippers are already constrained to competitive levels is unfounded. Rate regulation by SAC does not "mimic competition," and reliance on the SAC test has often prevented captive shippers from obtaining meaningful rate relief. As a consequence, reciprocal switching cannot be faulted for somehow forcing prices below competitive levels merely because some shippers may obtain lower rates than they can under the current regulatory regime—in which a costly, time-consuming, and uncertain appeal to the SAC test is their only recourse.
- The Railroad Economists also claim that reciprocal switching will inevitably lead to diminished investment (also resulting in diminished economic efficiency and degraded service quality). But these claims (like their claims regarding the ECPR) are predicated on the assumption that conduct in the industry is already competitive, and that investment levels are already economically efficient. For example, the Railroad Economists ignore the competing railroad's incentives to invest in its own network in order to compete more effectively for switched traffic, as well as the corresponding incentives of the origin railroad to increase investment in order to compete more effectively for previously captive traffic. These incentives would not exist if shippers remained captive to the origin railroad.
- Forcing prices below competitive levels would indeed result in inefficient investment decisions. However, economists and antitrust authorities recognize that a state of diminished competition, in which prices exceed competitive levels, can also create powerful disincentives for investment. As a consequence, reciprocal switching cannot be faulted for discouraging investment merely because it may allow some shippers to obtain lower rates than they could under the current regulatory regime.

QUALIFICATIONS

6. My name is Kevin W. Caves. I am a Vice President at Economists Incorporated, a premier economic consulting firm in the fields of law and economics, public policy, and business strategy. I served as Assistant Economist at the Federal Reserve Bank of New York before receiving my doctorate from the University of California at Los Angeles in 2005, specializing in applied econometrics and industrial organization. Prior to joining Economists Incorporated, I held positions at Deloitte & Touche, Criterion Economics, Empiris LLC, and Navigant Economics. I have prepared expert analyses and testimony in a variety of industries, including cable, broadcasting, telecommunications networks, freight rail, healthcare, mobile wireless, and pharmaceuticals. My academic and consulting work spans a variety of fields, including antitrust, applied econometrics, damages analysis, class certification, labor economics, merger simulation, net neutrality, public policy analysis, and vertical integration.

7. I am a regular contributor to peer-reviewed academic journals. My work has appeared in various popular and academic outlets, including *Antitrust*, *The Antitrust Source*, *The Atlantic*, *Broadcasting & Cable*, *The Capitol Forum*, *Communications & Strategies*, *Competition Policy International*, *Econometrica*, *The Economist*, *The Economists' Voice*, *Forbes*, *Information Economics & Policy*, *Journal of Competition Law & Economics*, *Labor Law Journal*, *Regulation*, *Research in Law & Economics*, *Review of Network Economics*, and *Telecommunications Policy*. A copy of my CV is attached at Appendix A.

I. THE EFFICIENT COMPONENT PRICING RULE PROTECTS MARKET POWER AND DOES NOT PROMOTE COMPETITION

8. The Railroad Economists opine that, if the Board's reciprocal switching proposal is implemented, the access price paid by the competing railroad to the origin railroad should adhere to a framework referred to in the economic literature as the Efficient Component

Pricing Rule. According to the ECPR, the appropriate access price is a fee equal to the origin railroad's total opportunity costs of providing access to its network. Critically, this includes not only the cost to the origin railroad of providing switching service, but also the foregone net revenue that the origin railroad would have earned had the entire movement taken place along its own network. Put differently, the origin railroad should, according to the ECPR, charge an access price that would leave it indifferent between (1) granting access to the competing railroad; and (2) providing service over its own network.

9. For example, Professor Murphy opines that the Board should set “an access price that covers both the serving railroad's actual cost of providing the switching service and its lost contribution from the long-haul that would exist under competition (such as the price that would be determined by a full SAC analysis).”¹² Similarly, Professor Wright claims that “[a]n access pricing rule must fully compensate the landlord railroads for the actual cost of providing the switching service and the lost contribution from line-haul that would exist under competition.”¹³ Professor Willig also endorses the ECPR, which “holds that prices for bottleneck components should not be set based on stand-alone or replacement costs of the narrow bottleneck,”¹⁴ and “can be described as setting the bottleneck price equal to the owner's total cost, inclusive of the opportunity cost of conferring access on a rival who, with that access, will cause the owner to lose the contribution to fixed and common costs otherwise forthcoming from the traffic the rival diverts.”¹⁵

¹² Murphy VS at 18.

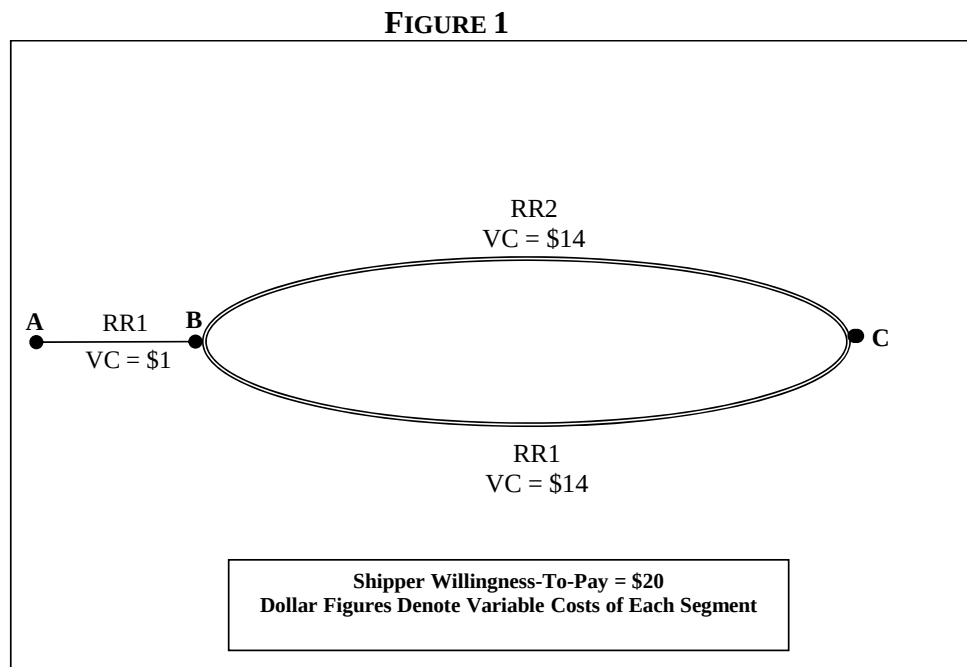
¹³ Wright VS ¶90.

¹⁴ Willig VS at 3. In his analysis, Professor Willig implicitly equates a reciprocal switch segment with a bottleneck route. The former is, for conceptual purposes, simply a shortened version of the latter.

¹⁵ *Id.* at 11, n. 19.

A. The Logic of The Efficient Component Pricing Rule

10. Figure 1 illustrates the logic of the ECPR. As seen below, the origin railroad (RR1) has a network that allows for single-line service from point A to point C, while a potential competitor (RR2) has a network between B and C, but not between A and B. In the absence of reciprocal switching, RR1 charges the shipper a price of \$20 for single-line service. RR1 incurs total variable costs of $\$1 + \$14 = \$15$ when it provides single-line service between A and C, and therefore earns $\$20 - \$15 = \$5$ in variable profit. These funds are available to pay down fixed costs, and to pay out returns to investors to cover the origin railroad's cost of capital—and, potentially, to be absorbed by the origin railroad as supracompetitive profit (i.e., monopoly profit).



11. For RR2 to compete with RR1 by offering service between points B and C, it must pay an “access price” to RR1 in exchange for the movement from A to B. According to the ECPR, this access price should be \$6: This would compensate RR1 for the \$1 in variable costs incurred to provide switching service between A and B, as well as the \$5 in variable profit

that RR1 would have earned, had the shipment continued over its own network. At this access price, RR1 is indifferent between moving the shipment from A to C along its own network, or interchanging with RR2 at point B. RR1 enjoys exactly the same profit under either scenario. This ensures that a less-efficient competitor cannot take business away from RR1. For example, if RR2 had variable costs of \$15, then RR2 could not offer service to the shipper for less than \$21 (equal to \$15 plus the access price of \$6).

12. The Railroad Economists ignore the fact, long recognized by economists, that the ECPR provides no incentives for the origin railroad to offer lower rates to captive shippers. As the example above makes clear, it would be economically irrational for RR1 to offer the shipper a rate below \$20. (If it did, its variable profit would fall below \$5). Moreover, RR2 has no incentive to offer a rate below \$20 either: Under the ECPR, RR2's variable costs are $\$14 + \$6 = \$20$. Thus, RR2 cannot offer the shipper a price below \$20 without incurring a loss. Therefore, unless the existing price of \$20 already is constrained to the competitive level, the ECPR will simply lock in a supracompetitive price.

13. Put differently, the ECPR prevents competition from fulfilling the fundamental economic function of eroding monopoly profit by moving prices closer to competitive levels. To illustrate, suppose that the competitive price for the shipment from A to C is \$16. By charging the shipper a price of \$20, the origin railroad enjoys a supracompetitive profit of \$4 (equal to $\$20 - \16). The ECPR requires that the competing railroad reimburse the origin railroad with an access price that includes every dollar of its supracompetitive profit. This leaves no scope for competition to drive the price below \$20. The origin railroad's \$4 of supracompetitive profit (a markup of 25 percent above the competitive level) is treated as a "cost of doing business," no different than any other cost.

14. Even if the competing railroad is more efficient than the origin railroad, the ability to price competitively is severely limited by the ECPR. For example, suppose that the competing railroad's variable cost for the movement from B to C is \$13, rather than \$14. Under the ECPR, the competing railroad would have to charge the shipper a price of at least \$19 (equal to the access price of \$6, plus the competing railroad's variable cost of \$13). The price to the shipper necessarily remains well above the competitive level of \$16.

B. Economists Recognize That The Efficient Component Pricing Rule Fails To Promote Competitive Pricing

15. Economists have recognized this fundamental limitation of the ECPR for decades. In an article published in 1994 in the *Yale Journal on Regulation*, the economist William Baumol introduced the concept of the ECPR and described its properties.¹⁶ In the very same issue of the same journal, the economists Alfred Kahn and William Taylor emphasized that the ECPR prevents competition from "eroding monopoly profits and promoting allocative efficiency."¹⁷ To the contrary, to the extent that the incumbent firm's prices for its final product (in this case, a railroad's current prices to shippers) exceed competitive levels owing to the exercise of market power, adoption of the ECPR will protect that market power and prevent its customers (in this case, shippers) from benefiting from the price competition that a competitor (in this case, rival railroad) could bring.¹⁸ As a consequence, prices must be constrained to

¹⁶ William Baumol and J. Gregory Sidak, "The Pricing of Inputs Sold to Competitors," 11 *Yale Journal on Regulation* 171 - 202 (1994) [hereafter, "Baumol & Sidak"].

¹⁷ Alfred Kahn and William Taylor, "The Pricing of Inputs Sold to Competitors: Comment," 11 *Yale Journal on Regulation* 225 - 240(1994) [hereafter, "Kahn & Taylor"], at 225.

¹⁸ *Id.* at 230 ("[A] firm subject to intense competition will seek to recover the net profits that it loses as a result of making any of its facilities available to competitors...But a monopolist too, will seek to recover those 'opportunity costs,' and by so doing recoup...such monopoly profits as it was previously earning from its direct retail sales.")

competitive levels by some other mechanism, either by competition or by regulation that effectively simulates competition.¹⁹

16. Similarly, a 1995 article by the economist Nicholas Economides explains how the ECPR protects profit earned through the exercise of market power, locking in prices above competitive levels, and preserving the economic inefficiency that results from supracompetitive pricing.²⁰ The paper concludes by emphasizing that, if pricing by an incumbent firm reflects “the exercise of market power, then the ECPR will protect that market power and prevent consumers from benefiting from the price competition that a rival (entrant) could bring,”²¹ and that “in real-world settings policy makers should be wary of blind devotion to the ECPR. It has dangers as well as benefits, and the real-world settings may well be ones in which the dangers outweigh the benefits.”²²

17. More recently, a World Bank publication noted that the ECPR “does not permit competition to fulfill other important functions of eliminating allocative inefficiency and eroding monopoly profits,”²³ and that translating the ECPR “into workable rules and actual access prices has been proven extraordinarily difficult and contentious.”²⁴ This economic consensus is evident in materials cited by the Railroad Economists, which state that the ECPR

¹⁹ *Id.* at 240 (explaining that prices must be “subject to effective regulation or, eventually, constrained by effective competition.”)

²⁰ Nicholas Economides and Lawrence White, “Access and interconnection pricing: how efficient is the ‘efficient component pricing rule’?” *The Antitrust Bulletin* 557 - 579 (Fall 1995).

²¹ *Id.* at 574.

²² *Id.* at 575.

²³ Ioannis N. Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition* (World Bank & Oxford University Press 2004), at 276.

²⁴ *Id.*

“has the ability to preserve an incumbent’s unacceptably high rates by their inclusion in the access rate calculation.”²⁵

II. THE STANDALONE COST TEST DOES NOT CONSTRAIN PRICES TO COMPETITIVE LEVELS

A. The Railroad Economists Assume That Shippers Already Enjoy Competitive Pricing Due To SAC

18. To justify their endorsement of the ECPR, the Railroad Economists operate under the assumption that shippers are already protected from paying prices above competitive levels due to rate relief available via the SAC test. Professor Murphy opines that “[w]hen a shipper prevails under the SAC test, the railroad is required to set rates based on competitive market principles,”²⁶ and that the SAC test is “both sufficient and preferred...as a regulatory tool for protecting captive shippers.”²⁷ Professor Willig opines that “the Board’s standalone cost test adequately protects shippers from paying unreasonable rates on the through movement in situations involving bottleneck service.”²⁸

19. In the numerical example proffered in Professor Willig’s testimony, the origin railroad is assumed to charge a price just high enough to cover its incremental costs for a given movement and the fixed costs of the necessary network infrastructure: The origin railroad is assumed to incur total fixed costs of $\$10 + \$5 = \$15$ and total variable costs of $\$3 + \$2 = \$5$ for a movement from point A to point C. The origin railroad is assumed to charge a price of \$20 for this movement—just enough to cover its costs. Thus, Professor Willig assumes that the origin railroad does not earn any supracompetitive profit.²⁹

²⁵ InterVISTAS, “An Examination Of The STB’s Approach To Freight Rail Rate Regulation And Options For Simplification,” (September 14, 2016), at 149. (Cited in Wright VS, n. 72).

²⁶ Murphy VS at 14.

²⁷ *Id.* at 18.

²⁸ Willig VS at 14. As noted above, Professor Willig implicitly equates a reciprocal switch segment with a bottleneck route.

²⁹ Willig VS at 12-13.

20. In the numerical example given in Professor Wright’s testimony, the origin railroad charges \$15 per ton and is assumed to incur variable costs of \$10 per ton. Professor Wright assumes that all of the \$5 in variable profit is needed to cover the origin railroad’s line-haul contribution, again leaving no room for supracompetitive profits;³⁰ the origin railroad’s line-haul contribution is assumed to be that which would “exist under competition.”³¹

21. By assuming that shippers pay prices already constrained to competitive levels, and that supracompetitive profits are therefore absent, the Railroad Economists avoid the negative implications of the ECPR. Of course, if this assumption were accurate, then competitive remedies such as reciprocal switching would be unnecessary and undesirable from an economic perspective. Put differently, the Railroad Economists assume away the need for any regulatory remedy (beyond SAC itself) to move prices closer to competitive levels.

B. Rate Regulation Based on SAC Does Not Replicate Competitive Outcomes

22. Despite repeated claims to the contrary by the railroads and their experts,³² rate regulation based on SAC does not actually replicate competitive outcomes. The SAC test was designed to prevent entry from inefficient competitors and to prevent cross subsidies, not to prevent prices from rising above competitive levels.³³ The SAC framework was designed for an

³⁰ Wright VS ¶¶94-97.

³¹ Wright VS ¶90; ¶92; ¶101; ¶113-¶114; ¶116.

³² In addition to the claims of the Railroad Economists in this proceeding, the railroads and their experts have consistently claimed that regulation based on SAC produces competitive outcomes for shippers. *See, e.g.,* STB Docket No. Ex Parte 722, *Verified Statement Of Gerald R. Faulhaber: Stand-Alone Cost—Response To Comments* (September 5, 2014) [hereafter “Faulhaber Reply”] at 1-4 (citing and rebutting various claims, including that SAC is the “gold standard” for rate reasonableness, that SAC “mimics competition,” and that SAC is “designed to afford shippers that lack effective competition the protection they would enjoy in a contestable market”).

³³ *See, e.g.,* Russell Pittman, “Against the Stand-Alone-Cost Test in U.S. Freight Rail Regulation,” 38 *Journal of Regulatory Economics*, 313-326 (2010), at 319-320. *See also* Verified Statement of Kevin Caves and Hal Singer STB Ex Parte No. 722 (*Railroad Revenue Adequacy*), *Reply Comments of Concerned Shipper Associations* – Appendix B (November 4, 2014), [hereafter, “Caves & Singer.”] *See also* Public Hearing, STB Docket No. Ex Parte 722 & STB Docket No. Ex Parte 664, *Consolidated Hearing Testimony of Jeffrey O. Moreno*,

industry in which all prices are subject to regulation, and the regulated firm is constrained to earn zero economic profit.³⁴ As Professor Faulhaber (the original author of SAC) has observed, “the use of Stand-Alone Cost in railway rate regulation is so far from the models in which it was originally developed as to be unrecognizable.”³⁵

23. The SAC test assumes that the only relevant competitive constraint is a new rail entrant, which would have to construct a *de novo* rail system from scratch in order to compete.³⁶ The SAC test therefore fails to replicate competitive conditions in an economically relevant way: To the extent that some shippers are able to negotiate more competitive prices than others, this occurs because railroad pricing is disciplined by real-world competitive constraints—for example, competition from *existing* railroads and/or *existing* intermodal competitors—not by a non-existent *de novo* entrant that must construct a new rail network from the ground up in order to compete at all. Thus SAC fails to “mimic competition” consistent with the economic realities of the industry; as Professor Faulhaber concludes, “it is not even close.”³⁷

24. The inability of SAC to provide meaningful rate relief was highlighted in a 2015 report by the National Academy of Sciences’ Transportation Research Board (“TRB”), whose authors include several distinguished economists.³⁸ The TRB Report highlighted SAC’s

Paul M. Donovan, Dr. Kevin W. Caves, Thomas D. Crowley, and Henry J. Roman On Behalf of the Concerned Shipper Associations, Surface Transportation Board (July 23, 2015) [hereafter, “Caves Testimony”].

³⁴ See, e.g., Gerald Faulhaber, “Cross-Subsidy Analysis With More Than Two Services,” 1(3) *Journal of Competition Law & Economics* 441-448 (2005), at 446 (“The SAC tests are not helpful under conditions of positive economic profits.”) See also Faulhaber Reply at 2. See also William Baumol, “Contestable Markets: An Uprising in the Theory of Industry Structure,” 72(1) *The American Economic Review*, 1-15 (1982), at 4 (“[A] contestable market never offers more than a normal rate of profit—its economic profits must be zero or negative, even if it is oligopolistic or monopolistic.”)

³⁵ Faulhaber Reply at 2.

³⁶ *Id.* at 6.

³⁷ *Id.* at 8.

³⁸ Transportation Research Board, *Modernizing Freight Rail Regulation*, Special Report 318, National Academies of Sciences, Engineering, and Medicine (2015) [hereafter, “TRB Report”], at 260-264.

“questionable applicability to railroad regulation.”³⁹ The TRB Report concluded that SAC lacks “a sound economic rationale,”⁴⁰ and is “unusable by most shippers,”⁴¹ and that “the SAC test...has produced large and prolonged inequalities in shipper access to the law’s maximum rate protections.”⁴² To provide economically meaningful rate relief, the TRB recommends abandoning SAC in favor of statistical benchmarking methods that would simulate real-world competitive conditions by comparing the prices paid by captive shippers to the prices paid by shippers in more competitive markets.⁴³ Of course, if shippers already enjoyed access to competitive rates due to regulation based on SAC, these recommendations would be unnecessary.

III. CLAIMS OF DIMINISHED INVESTMENT ASSUME THAT CONDUCT IN THE INDUSTRY IS ALREADY COMPETITIVE

25. The Railroad Economists claim that reciprocal switching will inevitably lead to reduced investment, diminished efficiency, and degraded service quality, particularly if the ECPR is not adopted. Professor Murphy opines that “the public interest is not served when regulators can force a firm that is not engaged in anticompetitive conduct to share its assets with a potential competitor,”⁴⁴ and that “[i]f railroads lack the incentives to make the investments they would make in a competitive market, it is ultimately their customers that will suffer.”⁴⁵ Professor Wright opines that “an access pricing model that does not consider lost contribution from line-haul that would exist under competition will under-compensate railroads and reduce

³⁹ *Id.* at 124-126.

⁴⁰ *Id.* at 197-200.

⁴¹ *Id.*

⁴² *Id.* at 199-200.

⁴³ *Id.* at 141 - 144, and at 213 (“access to rate relief on the basis of the competitive rate benchmarking system would end the necessity for elaborate evidentiary procedures such as SAC presentations.”)

⁴⁴ Murphy VS at 9.

⁴⁵ *Id.* at 11-12.

their incentive to invest in track maintenance, expansion, and innovation.”⁴⁶ Professor Willig opines that “[w]ithout the ability to cover their full costs, railroads will not be able to attract capital and make long-term investments in infrastructure and equipment, leading to disinvestment, rising prices, and service quality deterioration.”⁴⁷

26. As explained below, the Railroad Economists assume as their starting point that railroads’ extant investment decisions are procompetitive. As before, this assumes away the need for any regulatory remedy: If railroads’ prices, output, and investment decisions were already competitive, then any policy that significantly distorted these outcomes would indeed be unnecessary and undesirable from an economic perspective. However, economists and antitrust authorities recognize that a state of diminished competition, in which prices exceed competitive levels, can create powerful disincentives for investment. Thus, to the extent that some shippers do not enjoy the competitive conditions that the Railroad Economists assume, reciprocal switching cannot be faulted for discouraging investment merely because it may allow some shippers to obtain lower rates than they can under the current regulatory regime.

A. The Railroad Economists Assume That Railroads’ Extant Investment Decisions Are Procompetitive

27. The Railroad Economists’ claims regarding investment (like their claims regarding the ECPR) are predicated on the assumption that conduct in the industry is already competitive, and that railroads’ pricing and investment decisions are consequently motivated by procompetitive concerns. For example, in offering his opinion that reciprocal switching will reduce investment incentives, Professor Murphy observes that “when determining what other investments to make, a railroad should be motivated only by concerns about how such

⁴⁶ Wright VS ¶101.

⁴⁷ Willig VS at 14.

investments will enable it to compete better—to keep and win business traditionally shipped by rail as well as to win business from other transportation modes.”⁴⁸

28. To illustrate his claim that reciprocal switching would deprive origin railroads of “the incentives to make investments they would make in a competitive market,”⁴⁹ Professor Murphy offers a hypothetical example in which a shipper is assumed to successfully petition for reciprocal switching. This is assumed to result in increased demand for switching service and congestion, causing UP to consider “making additional investments in order to continue to serve its own customers well while also providing the mandated switching service.”⁵⁰ Professor Murphy opines that UP’s incentives to make such investments would be diminished because, if demand were to decline such that the competing shipper no longer needed the switching service, UP would bear the full cost of the stranded investment.⁵¹ Professor Murphy offers no evidence that reciprocal switching would tend to significantly increase congestion, as his hypothetical assumes.⁵² In addition, Professor Murphy ignores (1) the incentives of the competing railroad to invest in its own network in order to compete more effectively for switched traffic; and, (2) the corresponding incentives of the origin railroad to increase investment in order to compete more effectively for previously captive traffic. Without reciprocal switching, these incentives would not exist.

⁴⁸ Murphy VS at 9.

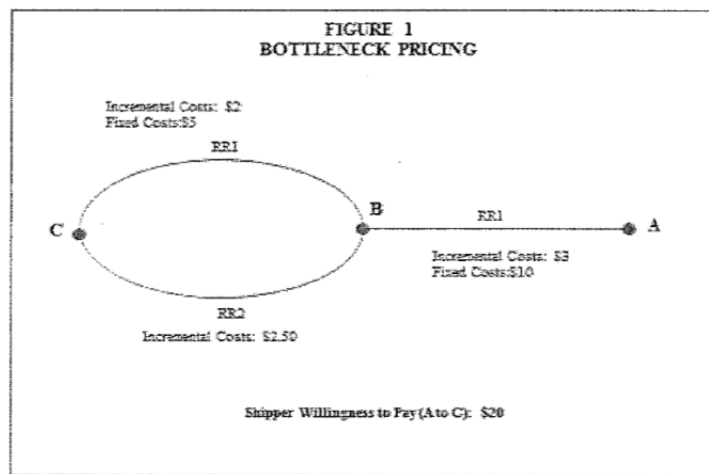
⁴⁹ *Id.* at 12.

⁵⁰ *Id.* at 11 (“Assume, for example, that a shipper successfully petitions for forced switching at a UP terminal in Texas, and that, because of the increased demand for switching services and resulting congestion, UP considers making additional investments in order to continue to serve its own customers well while also providing the mandated switching service.”)

⁵¹ *Id.*

⁵² The Shipper Coalition has presented the Reply Verified Statement of John Orrison, which disputes the potential for such congestion from reciprocal switching, and offers evidence of the rail industry’s historical ability to efficiently adjust operations to manage ever-changing traffic patterns.

29. Professor Willig's numerical example (replicated below) clarifies the Railroad Economists' assumptions regarding competition and investment. Professor Willig uses this example to illustrate his claim that the SAC test "adequately protects shippers from paying unreasonable rates on the through movement in situations involving bottleneck service."⁵³ As seen below, for the movement from A to C, the origin railroad is assumed to incur total costs of \$20 (including fixed costs of $\$10 + \$5 = \$15$ and variable costs of $\$3 + \$2 = \$5$). Critically, the shipper is assumed to pay *exactly* the same amount (\$20), owing to the SAC price ceiling.⁵⁴



30. Under these assumptions, it is obvious that any reduction in the origin railroad's revenue below \$20 necessarily reduces its ability and incentives to invest, because \$20 is the amount that the railroad must earn to cover all of its costs, inclusive of a competitive return to investment.⁵⁵ However, this is no longer the case if the assumption of zero supracompetitive

⁵³ Willig VS at 14.

⁵⁴ *Id.* ("The example illustrates that the Board's standalone cost test adequately protects shippers from paying unreasonable rates on the through movement in situations involving bottleneck service. The SAC test ensures that rates will generate only enough revenue to cover the costs that would be incurred by an efficient new entrant to provide service on the full through route. In the example, RRI's costs are \$20 to provide the A-to-C service. Assuming that an efficient stand-alone railroad would incur the same costs as RRI, any rate for A-to-C service that exceeds \$20 would be reduced to \$20 as a result of a SAC analysis").

⁵⁵ The \$20 in revenue is assumed to cover the necessary returns to capital investment. (For example, Professor Willig opines that "any rate for A-to-C service that exceeds \$20 would be reduced to \$20 as a result of a

profit for the origin railroad is relaxed: Suppose that, instead of charging the shipper a price exactly equal to its total cost (inclusive of competitive returns to investment), the origin railroad were able to charge \$30, earning supracompetitive profits of \$10. Here, there is ample scope for the competing railroad to offer a lower price that the origin railroad could match while still covering all of its costs, and without reducing competitive investment incentives. In Professor Willig's example, any price between \$20 and \$30 would satisfy these criteria. Professor Willig is able to rule out this scenario only by assuming that competition (or regulation that perfectly mimics competition) has already eliminated all supracompetitive profit from the system.

31. Professor Willig also opines that reciprocal switching would drive the price for the full A-to-C route below the assumed competitive price of \$20.⁵⁶ But this result is obtained only by assuming that the increased competition resulting from reciprocal switching would inevitably drive prices down to incremental costs.⁵⁷ This assumption is unfounded. Economists recognize that competing duopolists will price at incremental cost only under very strict assumptions.⁵⁸ Under more general economic models, this result does not hold.⁵⁹ For example, if firms interact repeatedly over time (as is the case here), prices do not fall to incremental cost.⁶⁰ The ability of oligopolistic firms to exercise substantial market power is also recognized by the antitrust agencies. A market served by a duopoly exhibits a Herfindahl-Hirschman Index

SAC analysis." *Id.* A SAC analysis would account for investment returns as a cost that the hypothetical entrant must recover).

⁵⁶ *Id.* at 12-15.

⁵⁷ *Id.* at 12.

⁵⁸ This result emerges from a single-period, homogeneous-product Bertrand model of duopoly pricing. See, e.g., DENNIS CARLTON AND JEFFREY PERLOFF, MODERN INDUSTRIAL ORGANIZATION (Pearson 4th ed. 2005), at 174 ("[T]he Bertrand equilibrium is counterintuitive: So long as there are at least two firms, the Bertrand price is the competitive price (marginal cost). This last result, however, depends on strong assumptions: The output is homogeneous, the market lasts only for one period, and any firm can produce as much as it wants at constant marginal cost. If any of these assumptions is relaxed, the Bertrand price does not equal marginal cost.")

⁵⁹ *Id.* at 191-192.

⁶⁰ *Id.* at 174.

(“HHI”) of at least 5,000—more than twice the threshold considered “highly concentrated” by the agencies, and presumed likely to reflect the exercise of significant market power.⁶¹ Even a market served by four competitors exhibits an HHI of at least 2,500, and is therefore considered highly concentrated.⁶²

32. If Professor Willig’s assumption were valid, then any shippers currently facing competition from two or more railroads would pay prices equal to incremental cost, and these routes would contribute nothing to railroads’ revenue adequacy—indeed, they would detract from it, as shippers would pay a price below the average cost of the shipment. There is no evidence that this is the case. To the contrary, UP itself has testified in Ex. Parte 722 that the ability to raise rates on competitive traffic has been a major factor in its ability to achieve revenue adequacy.⁶³ Under Professor Willig’s assumption, it would also be economically harmful to the industry for railroads to undertake investments in the infrastructure needed to handle intermodal traffic, because these investments allow multiple entities to compete for a given shipper’s business. For example, if UP and BNSF both make investments to serve Pacific ports, then both railroads (as well as long-haul trucking companies) may compete to transport shipping containers arriving from Asia. According to Professor Willig’s assumption, this should drive UP’s and BNSF’s prices towards incremental costs, irrespective of their fixed costs. The fact that railroads have continued to invest billions in intermodal infrastructure for decades

⁶¹ United States Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (August 19, 2010) [hereafter “Merger Guidelines”] §5.3. The Merger Guidelines define a “highly concentrated” market as one with a HHI of 2,500 or higher. The HHI is computed by squaring the market share of each firm and then summing the total across all firms in the market. For a duopoly, the HHI is therefore $S^2 + (100 - S)^2$, where S is the market share of one duopolist and $(1 - S)$ is, by definition, the market share of the other. The smallest possible HHI for a duopoly occurs when the duopolists split the market evenly, yielding an HHI of 5,000 (equal to $50^2 + (100 - 50)^2$).

⁶² A market served by four firms yields an HHI of at least an HHI of at least $4 \times 25^2 = 2,500$ *Id.*

⁶³ STB Docket No. Ex Parte 722, *Opening Comments of Union Pacific Railroad*, (filed Sept. 5, 2014), at 22-23.

indicates that railroads can charge sufficiently high prices to recover their variable costs and earn a competitive return on these investments, even in this relatively competitive segment of the industry.⁶⁴

33. Professor Wright’s numerical illustration also maintains the assumption that reciprocal switching would harm investment by forcing prices below competitive levels. Professor Wright opines that his numerical example demonstrates “that an access pricing rule that does not fully compensate the landlord railroad for its lost [line-haul] contribution...can lead to reduced investments..”⁶⁵ In Professor Wright’s example, the origin railroad’s variable profit is assumed to be free of supracompetitive profit; the origin railroad’s line-haul contribution is assumed to be that which would “exist under competition.”⁶⁶ By assumption, anything less would distort the railroad’s incentives to make competitive investment decisions.

34. Professor Wright also offers the example of the telecommunications industry, where intermodal competition has transformed the marketplace since passage of the Telecommunications Act of 1996. Under the access pricing regime promulgated by the Federal Communications Commission (“FCC”), Incumbent Local Exchange Carriers (“ILECs”) were obligated to lease Unbundled Network Elements (“UNEs”) to Competitive Local Exchange Carriers (“CLECs”), which generally owned little (if any) network infrastructure.

⁶⁴ Association of American Railroads, *Rail Intermodal Keeps America Moving* (May 2016), available at: <https://www.aar.org/BackgroundPapers/Rail%20Intermodal.pdf> (“Rail intermodal—transporting shipping containers and truck trailers on railroad flat cars—has been growing rapidly for many years. U.S. rail intermodal volume in 2015 was a record 13.7 million containers and trailers, breaking the previous record set in 2014. In 2015, intermodal was the largest single source of U.S. freight rail revenue. Intermodal represents a competitively priced, environmentally friendly alternative to excessive reliance on highways to transport freight. It has grown in large part because railroads have invested billions of dollars on new intermodal terminals, track upgrades, and other infrastructure projects that have made rail intermodal more reliable and cost effective.”)

⁶⁵ Wright VS ¶98.

⁶⁶ *Id.* ¶90; ¶92; ¶101; ¶113-¶114; ¶116. As noted above, in Professor Wright’s numerical example, the origin railroad charges \$15 per ton and is assumed to incur variable costs of \$10 per ton. Professor Wright assumes that all of the \$5 in variable profit goes towards the origin railroad’s “lost line-haul contribution,” again leaving no room for supracompetitive profits. Wright VS¶¶94-97.

35. Professor Wright opines that access pricing proved ineffectual in the telecommunications industry because there existed sufficient competition to induce the ILECs to behave competitively; the source of this pricing discipline is head-to-head competition for retail customers among so-called “facilities-based” providers, which offer competing services to end-users via proprietary networks. As Professor Wright explains, the FCC’s “line sharing” requirement allowed CLECs to lease the high-frequency portion of ILEC voice lines at regulated wholesale rates, and to use the shared link to provide data services to retail customers.⁶⁷ The FCC removed the line-sharing requirement in 2003, reasoning that doing so would better incentivize ILECs to undertake the investments necessary to compete directly with other facilities-based Internet service providers, such as broadband cable operators.⁶⁸ Similarly, Professor Wright also notes that the FCC’s 2015 *Open Internet Order* left peering and Internet traffic exchange arrangements to commercial negotiations, instead of requiring networks to peer with one another. Here again, the FCC’s rationale for its light touch approach to regulation was predicated on the existence and continuation of “robust competition”⁶⁹ in the market, maintained by “vigorous antitrust enforcement.”⁷⁰

36. The applicability of Professor Wright’s telecommunications analogy therefore depends on the assumption that shippers benefit from robust facilities-based competition (or regulation that effectively simulates such competition) to a degree similar to that of

⁶⁷ Wright VS ¶¶101-107.

⁶⁸ *Id.* See also FCC Adopts News Rules for Network Unbundling Obligations Of Incumbent Local Phone Carriers, CC Docket 01-338 (News Release, February 20, 2003).

⁶⁹ Federal Communications Commission, *In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28, (March 12, 2015), ¶203.

⁷⁰ *Id.* (“Our ‘light touch’ approach does not directly regulate interconnection practices. Of course, this regulatory backstop is not a substitute for robust competition. The Commission’s regulatory and enforcement oversight...is complementary to vigorous antitrust enforcement...[I]t will remain essential for the Commission, as well as the Department of Justice, to continue to carefully monitor, review, and where appropriate, take action against any anti-competitive mergers, acquisitions, agreements or conduct.”)

telecommunications consumers. In telecommunications, intermodal entrants such as cable operators and mobile wireless operators have been eroding ILEC market shares for decades. For example, ILECs' share of the residential voice market has fallen to less than 20 percent in recent years.⁷¹ In contrast, captive rail shippers do not benefit from comparable competitive discipline, given that SAC does not mimic competitive conditions.⁷²

37. There are also important distinctions between the Board's proposal and the access pricing regime adopted in the telecommunications industry, as Professor Wright acknowledges.⁷³ The FCC's access pricing regime involved a transfer of revenue from a facilities-based competitor (the ILEC), to a competitor that might invest little (if anything) in its own network infrastructure (the CLEC). Yet under reciprocal switching, both the origin railroad and the competing railroad own and operate extensive proprietary networks, and the variable profits that the competing railroad earns as a result of reciprocal switching are available to pay down its own fixed costs. In addition, unbundled network elements in telecommunications often comprised a large fraction of the total infrastructure necessary to serve the end-costumer. In the case of so-called UNE platform (UNE-P), one hundred percent of the network infrastructure necessary to serve an end-customer was unbundled at regulated rates.⁷⁴ In contrast, reciprocal switching implicates only the segment of track necessary to transfer traffic from the customer's facility on the incumbent railroad's network to the nearest working interchange with the competing railroad's network.

⁷¹ See, e.g., Federal Communications Commission, *Local Telephone Competition: Status as of June 30, 2013*, Tables 2 and 18 (showing 78.5 million ILEC connections, 56.6 million Non-ILEC connections, and 305.7 million mobile wireless subscriptions).

⁷² See, Part II.B, *supra*.

⁷³ Wright VS ¶102, n. 114 (acknowledging that the InterVISTAS report cited by Professor Wright "analyzed the distinctions between the railroad and telecommunications industry, and concluded that such differences render the high degree of rate regulation and the access pricing rule adopted in the telecommunications industry inapplicable to the railroad industry.")

⁷⁴ See, e.g., <https://www.techopedia.com/definition/26166/unbundled-network-elements-platform-une-p>

B. Economists Recognize That Insufficient Competition May Diminish Investment Incentives

38. As the Railroad Economists correctly observe, competition often spurs investment.⁷⁵ Professor Johnathan Baker (former Director of the of the FTC Bureau of Economics)⁷⁶ has emphasized that “[c]ompetition indisputably creates powerful incentives for sellers to take steps to attract customers;”⁷⁷ firms may compete by lowering their prices, and also by making investments that make their products or service offerings more attractive and valuable to their customers.⁷⁸ Conversely, economists and antitrust authorities recognize that a state of diminished competition can create powerful disincentives for investment. A lack of competitive discipline can incentivize firms to restrict investment in a variety of ways, including diminished capacity, reduced product quality, and curtailment of research and development efforts.

39. For example, when analyzing the potential for anticompetitive effects of a proposed merger, the DOJ/FTC *Horizontal Merger Guidelines* recognize that anticompetitive mergers may induce firms to engage in various forms of output suppression, including reduced investment in capacity, or even disinvestment in pre-existing production capabilities:

⁷⁵ Murphy VS at 9-10.

⁷⁶ Professor Baker served as the Chief Economist of the Federal Communications Commission from 2009 to 2011, and as the Director of the Bureau of Economics at the Federal Trade Commission from 1995 to 1998. Previously, he worked as a Senior Economist at the President’s Council of Economic Advisers, Special Assistant to the Deputy Assistant Attorney General for Economics in the Antitrust Division of the Department of Justice, and as Attorney Advisor to the Acting Chairman of the Federal Trade Commission.

⁷⁷ Johnathan Baker, “Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation,”⁷⁴ *Antitrust Law Journal* 575 - 602 (2007) [hereafter “Baker”], at 577.

⁷⁸ *Id.* (“Competition among firms indisputably creates powerful incentives for sellers to take steps to attract customers, most obviously by keeping prices low. A firm that does not reduce its price after a close rival cuts price risks losing its customers—so can be expected to lower price in response. Or the firm can attract buyers by making improvements in product attributes closely related to price and valued by consumers, like supplying more rapid delivery, offering higher product quality, offering more colors or styles or other additions to product variety, or providing additional post-sale services. Firms know that steps like these will help them sell more, so they may act first, stealing a march on their rivals by cutting costs and lowering prices or improving quality. The result of competition is, thus, cheaper and better products and greater production—to the immediate benefit of buyers but also, importantly, to the benefit of society as a whole. Competition is good because it leads firms to make more and better goods and sell them for less.”)

[T]he Agencies may evaluate whether the merged firm will find it profitable unilaterally to suppress output and elevate the market price. A firm may leave capacity idle, refrain from building or obtaining capacity that would have been obtained absent the merger, or eliminate pre-existing production capabilities.⁷⁹

40. Consequently, the antitrust agencies consider a variety of information when evaluating the likely effects of a proposed merger. In addition to evidence regarding the merger's likely effect on output and prices, the agencies consider evidence relevant to the merger's likely effects on investment and innovation. Thus, the *Merger Guidelines* specify that

Explicit or implicit evidence that the merging parties intend to raise prices, reduce output or capacity, reduce product quality or variety, withdraw products or delay their introduction, or curtail research and development efforts after the merger, or explicit or implicit evidence that the ability to engage in such conduct motivated the merger, can be highly informative in evaluating the likely effects of a merger.⁸⁰

41. Economists have identified key mechanisms through which a lack of competition can stifle investment and innovation. In a seminal 1962 article, Nobel Laureate Kenneth Arrow explained that a monopolist that undertakes significant investments to enhance its product offerings (by improving productivity, product quality, and so on), may find that its investments do not yield much in the way of additional business, because the monopolist's market share was already quite high to begin with.⁸¹ In contrast, a competitor making the same investments would expect to profit more, because its improved product offerings would allow it to gain a substantial share of the market that had previously been served by the monopolist. This disincentive for investment by incumbent firms (the "Arrow Effect" or "Replacement Effect") tends to be strongest when entry or expansion by competitors is difficult, such that the incumbent firm need not be concerned that a would-be competitor will undertake the investment and steal away its business. Conversely, the Replacement Effect is weaker when the incumbent

⁷⁹ *Merger Guidelines*, *supra*, §6.3.

⁸⁰ *Id.* §2.2.1.

⁸¹ Kenneth Arrow, "Economic Welfare and the Allocation of Resources for Invention," in *The Rate And Direction Of Economic Activities: Economic And Social Factors* 609 (Richard Nelson, ed., 1962).

firm perceives that its competitors may successfully compete for market share by undertaking new investments.

42. Empirical economists have found substantial support for the Replacement Effect and related hypothesis regarding the interplay between competition and investment incentives. Professor Carl Shapiro⁸² notes that the available empirical evidence “strongly supports the general proposition that greater competition spurs innovation,”⁸³ and emphasizes that “the empirical evidence overall gives powerful support for the proposition that heightened competitive pressure causes firms to invest more to improve their efficiency.”⁸⁴ Similarly, Professor Baker reviews empirical studies which “independently found that in one important industry after another, including both manufacturing and services, greater product market competition among firms within a nation leads to higher productivity for firms in that country,”⁸⁵ as well as “empirical studies that document productivity gains in those individual industries...that have grown more competitive over time for reasons (such as increased import competition) unconnected with the past performance of the specific industry under study.”⁸⁶ Of course, the rail industry itself is frequently cited as an example in which increased competitiveness and falling prices coincided with increased investment after passage of the Staggers Act.⁸⁷

⁸² Professor Shapiro has served on the President’s Council of Economic Advisers, and also as Deputy Assistant Attorney General for Economics at the DOJ Antitrust Division.

⁸³ Carl Shapiro, “Competition and Innovation: Did Arrow Hit the Bull’s Eye?,” in *The Rate and Direction of Inventive Activity Revisited*, Josh Lerner and Scott Stern, eds., National Bureau of Economic Research, (University of Chicago Press 2012), at 370.

⁸⁴ *Id.* at 382.

⁸⁵ Baker at 585-586.

⁸⁶ *Id.* at 586.

⁸⁷ See, e.g., Murphy VS at 7; see also Wright VS ¶23; see also *Statement of the United States Department of Transportation, The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, STB Ex Parte No. 658, at 1.

CONCLUSION

43. It is well understood in the economics profession that ECPR does not promote price competition and instead protects any supracompetitive profits earned by incumbents. By assuming that shippers pay prices already constrained to competitive levels, and that supracompetitive profits are absent, the Railroad Economists assume away the need for any regulatory remedy (beyond SAC itself) to provide rate relief to captive shippers. Similarly, the Railroad Economists assume as their starting point that railroads' investment decisions are the outcome of a competitive process, and that any regulation that distorts these decisions would force prices below competitive levels and impede incentives to invest efficiently.

44. The assumptions underlying the Railroad Economists' conclusions are not justified. Regulation according the SAC test does not allow shippers to avail themselves of competitive pricing because SAC does not replicate competitive conditions. It is simply not reasonable to assume that captive shippers have access to competitive rates when a costly, time-consuming, and uncertain appeal to the SAC test is their only recourse. It is also not reasonable to assume that a railroad constrained only by the SAC test will necessarily make competitive investment decisions. When firms are not sufficiently constrained by competition, they may be incentivized to restrict investment relative to economically efficient levels. As a consequence, reciprocal switching cannot be faulted for somehow forcing prices or investment below competitive levels merely because some shippers may obtain lower rates than they can under the current regulatory regime.

VERIFICATION

I, Kevin W. Caves, declare under penalty of perjury that my Reply Verified Statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed on January 9, 2016

A handwritten signature in black ink, appearing to read 'Kevin W. Caves', is written over a horizontal line.

Kevin W. Caves

APPENDIX A – CURRICULUM VITAE OF KEVIN W. CAVES

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Director, Navigant Economics, March 2011 to December 2013

Associate Director, Navigant Economics, February 2010 to March 2011

Vice President, Empiris LLC, September 2008 to February 2010

Senior Economist, Criterion Economics LLC, October 2006 to September 2008

Senior Consultant, Deloitte & Touche LLP, September 2005 to October 2006

Teaching Fellow, Department of Economics, UCLA, January 2002 to June 2004

Assistant Economist, Federal Reserve Bank of New York, August 1998 to June 2000

Publications and Research Papers

[Identification Properties of Recent Production Function Estimators](#), 83(6) *ECONOMETRICA* 2411-2451 (November 2015), co-authored with Daniel Akerberg and Garth Frazer.

[On the Utility of Surrogates for Rule of Reason Cases](#), *COMPETITION POLICY INTERNATIONAL* (May 2015), co-authored with Hal J. Singer.

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Bundles in the Pharmaceutical Industry: A Case Study of Pediatric Vaccines (prepared with support from Novartis, co-authored with Hal J. Singer, July 2011).

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Econometric Tests of Common Impact, Covington & Burling LLP, Washington, DC., (May 23, 2013).

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Reviewer

Review of Network Economics

International Journal of the Economics of Business

Honors and Awards

Howard Fellowship for Excellency in Teaching, University of California at Los Angeles, Spring 2005.

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EXHIBIT 4

EP 711 Filings Incorporated by Reference
Into Shipper Coalition Reply Comments

**EP 711 Filings Incorporated by Reference
Into Shipper Coalition Reply Comments¹**

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Date	ID	Filed By	Document Name
8/15/2016	241287	National Industrial Transportation League	The National Industrial Transportation League's Reply in Opposition to the AAR Petition for Extension of Time
3/25/2014	235699	National Industrial Transportation League	Presentation of The National Industrial Transportation League
3/4/2014	235547	National Industrial Transportation League	The National Industrial Transportation League Revised Notice of Intent to Participate in Public Hearing
5/30/2013	234338	National Industrial Transportation League	Reply Submission of The National Industrial Transportation League
3/1/2013	233892	National Industrial Transportation League	Opening Submission of The National Industrial Transportation League
7/7/2011	230578	National Industrial Transportation League	Petition For Rulemaking of The National Industrial Transportation League

U.S. GOVERNMENT

Date	ID	Filed By	Document Name
10/26/2016	241889	U.S. Department of Agriculture	Comments of the U.S. Department of Agriculture
10/25/2016	241859	U.S. Department of Transportation	Opening Comments of the United States Department of Transportation
3/25/2014	235702	U.S. Department of Transportation	Public Hearing on Petition for Rulemaking To Adopt Revised Competitive Switching Rules
5/29/2013	234310	U.S. Department of Agriculture	Reply Comments of the U.S. Department of Agriculture
3/1/2013	233874	U.S. Department of Transportation	Opening Comments of the United States Department of Transportation
2/28/2013	233862	U.S. Department of Agriculture	Comments of the U.S. Department of Agriculture
7/27/2011	230716	U.S. Department of Agriculture	Reply

¹ See [Reciprocal Switching](#), STB Docket No. EP 711 (Sub-No. 1) (Jan. 12, 2017).

FILINGS IN SUPPORT

Date	ID	Filed By	Document Name
1/12/2017	242429	Pennsylvania Chemical Industry Council	Support Statement
1/11/2017	242409	Virginia Manufacturers Association	Support Statement
1/11/2017	242410	Georgia Chemistry Council	Comment
1/10/2017	242404	The Massachusetts Chemistry & Technology Alliance (MCTA)	Comment
1/9/2017	242387	The Chemical Industry Council of Illinois	Support Statement
1/6/2017	242376	West Virginia Manufacturers Association	Comment
1/6/2017	242371	The Chemical Industry Council of Delaware	Comment
1/5/2017	242365	Michigan Chemistry Council	Comment
1/5/2017	242366	Louisiana Chemical Association	Comment
1/4/2017	242358	New York State Chemistry Council	Comment
1/4/2017	242361	Chemical Industry Council of California	Comment
12/15/2016	242270	Private Railcar Food and Beverage Association, Inc.	Comment
11/15/2016	242085	Honorable Amy Klobuchar	Comment
11/2/2016	241947	Thomas J. Brugman	Comment
10/28/2016	241928	National Grain and Feed Association	Interested Agricultural Organizations Supporting and Aligning Themselves with the Opening Comments of the National Grain and Feed Association
10/27/2016	241925	Next Michigan Development	Support Statement
10/26/2016	241914	The Shipper Coalition For Railroad Competition	Comments submitted by The Shipper Coalition For Railroad Competition
10/26/2016	241878	G3 Enterprises, Inc.	Initial Comments of G3 Enterprises, Inc.
10/26/2016	241874	Runyon Industries	Support Statement
10/26/2016	241876	Ineos USA LLC	Initial Comments of Ineos USA LLC
10/26/2016	241877	National Mining Association	Comment
10/26/2016	241886	Cargill, Incorporated	Comments of Cargill, Incorporated
10/26/2016	241883	Northern Indiana Public Service Company	Opening Comments of Northern Indiana Public Service Company
10/26/2016	241884	The Chemours Company	Comment
10/26/2016	241894	Western Coal Traffic League and Minnesota Power	Joint Comments of Western Coal Traffic League And Minnesota Power
10/26/2016	241896	Highroad Consulting, LTD.	Comments of Highroad Consulting, LTD.
10/26/2016	241902	Dow Chemical Company	Comments of The Dow Chemical Company

10/26/2016	241903	National Grain and Feed Association	Opening Comments of The National Grain and Feed Association
10/26/2016	241905	Lansdale Warehouse Company	Support Statement
10/26/2016	241887	Freight Rail Customer Alliance	Support Statement
10/26/2016	241911	National Grain and Feed Association	Interested Agricultural Organizations Supporting and Aligning Themselves with the Opening Comments of the National Grain and Feed Association
10/26/2016	241918	Alliance For Rail Competition, et al.	Opening Comments of Alliance For Rail Competition, et al.
10/26/2016	241913	Shiawassee Economic Development Partnership	Support Statement
10/26/2016	241917	Lapeer Development Corporation	Support Statement
10/26/2016	241916	Diversified CPC International, Inc.	Comments of Diversified CPC International, Inc.
10/26/2016	241919	Sandy Creek Energy Associates, Brazos Sandy Creek Electric	Initial Comments of Sandy Creek Energy Associates, Brazos Sandy Creek Electric Cooperative, and Lower Colorado River Authority
10/26/2016	241920	Freeport-McMoRan Inc.	Comments of Jason Tininenko, Transportation Manager, Freeport-McMoRan Inc.
10/26/2016	241871	M & G Polymers USA, LLC	Opening Comments of M & G Polymers USA, LLC
10/26/2016	241869	Shell Chemical LP	Comment
10/26/2016	241870	Kent Corporation	Support Statement
10/25/2016	241848	USRail.desktop	Support Statement
10/25/2016	241860	Runyon Industries	Support Statement
10/25/2016	241851	Kraft Heinz Foods Company	Support Statement
10/25/2016	241858	Tucker Company Worldwide, Inc.	Support Statement
10/24/2016	241843	Solvay America, Inc.	Support Statement
10/24/2016	241844	Olin Chlor Alkali Products And Vinyls	Support Statement
10/24/2016	241838	American Truck & Rail Audits, Inc.	Support Statement
10/21/2016	241836	Evonik Corporation	Support Statement
10/20/2016	241823	Bonduelle Americas	Support Statement
10/20/2016	241825	Twin City Foods Inc.	Support Statement
10/20/2016	241824	National Frozen Food Corporation	Support Statement
10/19/2016	241807	Boardman Foods, Inc.	Support Statement
12/15/2014	237237	The Fertilizer Institute	Comment
10/10/2014	236810	Honorable David Vitter	Comment
4/22/2014	235948	Alliance For Rail Competition	Comment
3/26/2014	235696	Highroad Consulting, Ltd.	Comments of Diversified CPC International, Inc.

9/27/2013	234907	Indorama Ventures EO & Glycols, Inc.	Comment
9/23/2013	234855	Arkansas Electric Cooperative Corporation	Arkansas Electric Cooperative Corporation's Notice of Intent to Participate in Public Hearing
9/23/2013	234856	Chlorine Institute Inc.	Comment
5/30/2013	234313	Dow Chemical Company	Support Statement
5/30/2013	234337	Alliance for Rail Competition, et al.	Reply Comments of Alliance For Rail Competition, et al.
5/30/2013	234332	National Grain and Feed Association, et al.	Joint Reply Submission of The National Grain and Feed Association, et al.
5/30/2013	234323	Arkansas Electric Cooperative Corporation	Responsive Comments of Arkansas Electric Cooperative Corporation
5/30/2013	234322	Olin Corporation	Reply Comments of Olin Corporation
5/30/2013	234329	American Chemistry Council	Reply Comments of The American Chemistry Council
3/1/2013	233893	Highroad Consulting, LTD.	Comments of Highroad Consulting, LTD.
3/1/2013	233886	National Grain and Feed Association	Comment
3/1/2013	233895	Roanoke Cement Company	Comments of Roanoke Cement Company
3/1/2013	233871	Glacial Lakes Energy, LLC	Comment
3/1/2013	233894	Diversified CPC International, Inc.	Comments of Diversified CPC International, Inc.
3/1/2013	233877	Chlorine Institute	Comments of The Chlorine Institute, Inc.
3/1/2013	233884	American Chemistry Council	Comments of The American Chemistry Council
3/1/2013	233882	Olin Corporation	Initial Comments of Olin Corporation
3/1/2013	233880	Alliance For Rail Competition, et al.	Opening Comments of Alliance For Rail Competition, et al.
8/17/2011	230825	Steel Manufacturers Association	Reply
7/27/2011	230711	Heartland Consumers Power District	Reply
7/27/2011	230714	American Chemistry Council	Statement of the American Chemistry Council in Support of the Petition
7/27/2011	230715	International Warehouse Logistics Association	Reply
7/27/2011	230712	PPG Industries, Inc.	Reply
7/27/2011	230718	Cargill Incorporated	Reply
7/27/2011	230719	PPL Corporation	Reply
7/27/2011	230701	The Fertilizer Institute	Reply
7/27/2011	230704	Bayer Materialscience LLC	Reply
7/27/2011	230736	Chlorine Institute Inc.	Comments of The Chlorine Institute, Inc. in Support of the Petition

7/27/2011	230706	National Grain and Feed Association	Comments of National Grain and Feed Association in Reponse to Petition
7/26/2011	230696	Portland Cement Association	Reply
7/26/2011	230697	Alliance of Automobile Manufacturers	Reply
7/26/2011	230688	Cemex Inc.	Reply
7/26/2011	230686	Dow Chemical Company	Reply
7/25/2011	230673	Paper and Forest Industry Transportation Committee	Reply
7/22/2011	230668	Interstate Asphalt Corp.	Reply
7/22/2011	230669	Olin Corporation	Olin Corporation's Statement in Support
7/22/2011	230666	AkzoNobel	Reply
7/22/2011	230667	Glass Producers Transportation Council	Reply
7/21/2011	230652	Consumers United For Rail Equity	Reply of Consumers United For Rail Equity

EXHIBIT 5

Statements Demonstrating
A Need To Change
The Current Reciprocal Switching Rule

Statements Demonstrating A Need To Change

The Current Reciprocal Switching Rule

STB Docket No. EP 711 (Sub-No. 1), Reciprocal Switching; STB Docket No. EP 711, Petition for Rulemaking to Adopt Revised Competitive Switching Rules

U.S. GOVERNMENT

The US Department of Agriculture (“USDA”) noted that “[t]he rail industry is clearly different than it was 30 years ago and USDA lauds the Board for recognizing this fact and taking the effort to update its policies accordingly. Today railroads face much less competition and are much more profitable than they were in the past. Both of these facts point to the need for regulation that better balances the needs of shippers and carriers. If implemented correctly, competitive switching can help provide that balance, while also increasing competition and enhancing efficiency in controlled and limited ways.”¹

COMPANIES

Cargill, Incorporated stated that current circumstances “have opened the door for the STB to adopt measures to enhance rail-to-rail competition and to restore some of the competition that has been lost through longer post-merger bottleneck segments by making reciprocal switching more widely available to rail customers.”²

CEMEX, Inc. provided that the type of reform in the League’s proposal is “especially needed” at this time.³

The Chemours Company (“Chemours”)⁴ “strongly believes that the new switching standards go a long way to promote the healthy carrier-to-carrier competition that is so lacking.”⁵

Diversified CPC International, Inc. provided that “it has become evident in recent years that there is a need to improve competition in the rail industry” and that it “strongly support[s] the Board’s decision to adopt new competitive switching rules.”⁶

¹ Comments of U.S. Dep’t of Agric. at 2, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016); see also Comments of U.S. Dep’t of Agric. at 2, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Feb. 28, 2013); Reply Comments of U.S. Dep’t of Agric., Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (May 29, 2013).

² Comments of Cargill, Inc. at 4, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

³ CEMEX, Inc. Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 26, 2011).

⁴ Chemours was created on July 1, 2015 from the Performance Chemicals Businesses of E.I. du Pont de Nemours and Company.

⁵ The Chemours Co. Letter in Support at 2, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

⁶ Comments of Diversified CPC International, Inc. at 3, 5, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016); see also Comments of Diversified CPC International, Inc., Reciprocal Switching, STB Docket No. EP 711 (Mar. 1, 2013).

The Dow Chemical Company (“Dow”) “anticipates that reciprocal will create greater rail competition that will benefit Dow, its customers, and the overall public interest” and that “[t]he Board’s Notice correctly recognizes that the time has come or the Board to take a more balanced approach towards implementing the ‘effective competition’ and ‘revenue adequacy’ rail transportation policies.”⁷

G3 Enterprise, Inc. (“G3”) “applaud[ed] the STB for recognizing that its current reciprocal switching rules do not offer shippers a meaningful opportunity to obtain reciprocal switching relief” and “urge[d] the STB to revise its reciprocal switching rules in a manner that, consistent with the overriding purpose of the Rail Transportation Policy, 49 U.S.C. § 10101(1), promot[ing] competition ...”⁸

Highroad Consulting, Ltd. “applaud[ed] the Board’s decision to adopt new rules for reciprocal switching, as it has become evident in recent years that there is a need to improve competition in the rail industry.”⁹

INEOS USA LLC (“INEOS”) “believes that the current competitive rail regulations must be revised in order to effectuate the intent of their enabling statutes and to provide a realistic opportunity for shippers to obtain access to a rail carrier.”¹⁰ INEOS expressed “that it is necessary for the STB, consistent with its statutory mandate, to remedy the current lack of competitive-switching access.”¹¹

Interstate Asphalt Corp. (“ICA”) provided “[a]n example of serious injury from the absence of rail competition illustrat[ing] why ICA strongly support[ed] the Petition filed by NITL.”¹²

Kraft Heinz Foods Company provided that “[i]f enacted, these changes would allow all shippers to more effectively move freight with more railroad options, which would effectively help control prices for everyday grocery staples and in turn, costs to the consumer.”¹³

⁷ The Dow Chemical Co. Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 27, 2011); see also Comments of The Dow Chemical Co. at 3, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016); The Dow Chemical Co. Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (May 30, 2013).

⁸ Initial Comment of G3 Enterprise, Inc. at 5, 10, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

⁹ Comments of Highroad Consulting, Ltd. at 3, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016); see also Comments of Highroad Consulting, Ltd. Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Mar. 1, 2013).

¹⁰ Initial Comments of INEOS USA LLC at 2, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

¹¹ *Id.* at 4.

¹² Interstate Asphalt Corp. Reply in Support of Petition for Rulemaking at 3, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 22, 2011).

¹³ Kraft Heinz Foods Company Letter in Support, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 25, 2016).

Lansdale Warehouse Company¹⁴ “agree[s] that new switching rules are needed” and that “[t]he rail industry today is vastly different than the industry of the 1980s.”

M&G Polymers USA, LLC generally supported the rules proposed by the Board in the NPRM.¹⁵

Northern Indiana Public Service Company (“NIPSCO”) stated “that revised reciprocal switching rules are sorely needed due to the nearly insurmountable hurdles accompanying use of the current rules, and that expanded access to reciprocal switching is imperative to facilitate rail competition in accord with the national rail transportation policy of 49 U.S.C. § 10101.”¹⁶

Olin Corporation (“Olin”) has stated that “[r]evised rules are necessary to return meaning to the statutes that were enacted to encourage competition, so that competition, rather than monopolistic power, can regulate rates.”¹⁷

PPG Industries, Inc. (“PPG”) has reemphasized a prior request for “the Board to change its competition policies to provide captive shippers with greater access to competitive rail services,” including “changes to the Board’s rules governing reciprocal switching arrangements.”¹⁸

Roanoke Cement Company “confirm[ed] the fact there is a need to improve competition in the rail industry.”¹⁹

Sandy Creek Energy Associates, Brazos Sandy Creek Electric Cooperative, Inc. and Lower Colorado River Authority, co-own the Sandy Creek Energy Station (“Station”) and “believe that it is necessary for the STB, consistent with its statutory mandate, to remedy the current lack of competitive-switching access [which] would in turn allow the Station to operate on a cost-competitive basis, such that the significant investments in the facility can be justified and so at to provide reliable base-load generation to homes and businesses in Texas.”²⁰

Shell Chemical LP (“Shell”) noted that it “commends the Board’s decision and supports its authority to reform and broaden the Competitive Switching regulations to facilitate increased rail competition.” It also stated that “Shell depends on reliable and affordable rail service throughout the United States to remain competitive in a global market [and] [r]eliable and affordable rail service is the outcome of access to railroad competition which is, unfortunately, not present in

¹⁴ Lansdale Warehouse Company Letter in Support, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

¹⁵ Opening Comment of M&G Polymers USA, LLC at 1, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

¹⁶ Opening Comments of Northern Indiana Public Service Company at 1, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

¹⁷ Olin Corp. Statement in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 27, 2011).

¹⁸ PPG Indus., Inc. Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 27, 2011).

¹⁹ Comments of Roanoke Cement Company at 3, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Mar. 1, 2013).

²⁰ Initial Comments of Sandy Creek Energy Associates, Brazos Sandy Creek Electric Cooperative, Inc. and Lower Colorado River Authority, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

many of our rail networks today.”²¹

Tucker Company Worldwide applauded the STB “for opening this rulemaking proceeding and agree[s] that new switching rules are needed.”²²

TRADE ASSOCIATIONS

The 1-69 International Trade Corridor of the Next Michigan Development Corporation (“NMDC”) expressed its “support of the adoption of new reciprocal switching rules that will help facilitate greater rail competition.”²³

American Chemistry Council (“ACC”) stated that “shippers have presented compelling information to STB documenting the challenges facing rail-dependent shippers and the need for policy reforms to promote greater rail to rail competition.”²⁴

The Alliance for Rail Competition and other committees, commissions and groups representing producers and shippers of agricultural commodities in the Western U.S. (collectively, “ARC, et al.”) “are supporting the regulations proposed in this proceeding, and calling on the Board to adopt changes making switching remedies more effective ... [because] for many single-served shippers, the possibility of shifting their business to another railroad is the only hope the shipper has of getting reasonable rates and/or a reasonable level of service quality from the railroad they currently use.”²⁵

The Chlorine Institute has also agreed “that the rules currently applicable to reciprocal switching should be revised.”²⁶

Consumers United For Rail Equity (“CURE”) stated that new competitive access rules are “one of the important changes ... that the Board should make to ensure rail to rail competition in the national freight rail system.”²⁷

The Fertilizer Institute (“TFI”) has “expressed its support for the League’s competitive switching proposal and to urge[d] the Board to “move this proceeding forward expeditiously

²¹ Comment of Shell Chemical LP at 1, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

²² Tucker Company Worldwide Letter in Support, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 25, 2016).

²³ 1-69 International Trade Corridor of the Next Michigan Development Corporation Letter of Support, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 27, 2016).

²⁴ Comments of the American Chemistry Council at 1, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Mar. 1, 2013); Statement of the American Chemistry Council in Support of the Petition, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 27, 2011).

²⁵ Opening Comments of the Alliance for Rail Competition et al. at 2, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Mar. 1, 2013).

²⁶ Comments of The Chemical Institute at 1, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Mar. 1, 2013).

²⁷ Reply of Consumers United for Rail Equity at 2, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 21, 2011).

towards adoption of revised rules.”²⁸

Freight Rail Customer Alliance (“FRCA”) “strongly supports the reciprocal switching relief” proposed by the Board stating that it was “long overdue and has the potential to help harness the forces of competition to provide relief for captive shippers...”²⁹

International Warehouse Logistics Association “believes that the League’s proposal represents a fair-and-balanced effort to improve the state of competition in the rail transportation industry [and] would provide increased competition for captive shippers without harming the carriers.”³⁰

The National Grain and Feed Association (“NG&FA”), 11 national agricultural producers and agribusiness organizations, as well as the 16 State and Regional Agribusiness Associations affiliated with the NG&FA “have long been advocates for changes to the Board’s reciprocal switching rules to make them workable and useable.”³¹ As such, the agricultural parties have consistently “voiced concerns over decreased rail-to-rail competition for agricultural commodities and products” in prior STB proceedings.³² noting that “nearly 75 percent of agricultural geographic areas lost rail competition between 1992 and 2007.”

National Mining Association has stated that “[t]he proposed rule has the potential to introduce much needed competition in the shipment of mine products if properly implemented.”³³

Private Railcar Food and Beverage Association, Inc. provided that “[r]eal competition amongst the railroads, will stabilize pricing, improve service and provide shippers with a comfort level that will bring more freight back to rail.”³⁴

Steel Manufactures Association stated that “SMA views expanded access to reciprocal switching as a necessary method to promote competition in rail markets in which competition is

²⁸ The Fertilizer Institute Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Dec. 15, 2014); see The Fertilizer Institute Letter in Support at 1, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 27, 2011).

²⁹ Freight Rail Customer Alliance Letter in Support, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

³⁰ International Warehouse Logistics Association Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 27, 2011).

³¹ Interested Agricultural Organizations Supporting and Aligning Themselves with the Opening Comments of the National Grain and Feed Assoc., Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 28, 2016); Opening Comments of the National Grain and Feed Association, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

³² Joint Opening Submission of the National Grain and Feed Assoc., et al. at 2, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Mar. 1, 2013);

³³ National Mining Association Letter in Support, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

³⁴ Comments of the Private Railcar Food and Beverage Association, Inc., Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Dec. 15, 2016).

too often severely strained.”³⁵

Western Coal Traffic League and Minnesota Power (“WCTL/MP”) support changes to the Board’s reciprocal switching rules, including the removal of the requirement for shippers to demonstrate the incumbent carrier has engaged in anticompetitive conduct before the shipper can obtain reciprocal switching relief.³⁶

STB Docket No. EP 705, Competition in the Railroad Industry

U.S. GOVERNMENT

The US Department of Agriculture was direct in its support of “mandatory reciprocal switching:” “USDA urges the Board to use mandatory reciprocal switching agreements as one means to increase rail-to-rail competition.”³⁷

COMPANIES

Dow Chemical Company (“Dow”) indicated that it particularly supports changes to expand access to reciprocal switching.³⁸

E.I. du Pont de Nemours and Company (“DuPont”) argued that the agency’s current reciprocal switching standards are too stringent, and urged the STB to adopt a reciprocal switching system similar to the Canadian system for inter-switching, which requires no costly or time-consuming regulatory proceedings and costs are known up front.³⁹

Olin Corporation (“Olin”) indicated that broadened reciprocal switching is needed to provide competitive service to captive shippers. Olin indicated that “[m]andatory reciprocal switching is a logical way to deal with the lack of competition”⁴⁰

PPG Industries, Inc. (“PPG”) stated that the agency should “revise its competitive access rules to facilitate rail competition through expanded reciprocal switching.”⁴¹

Total Petrochemicals USA, Inc. (“Total”) asked the Board to consider aspects of the Canadian

³⁵ Steel Manufactures Association Letter in Support, Petition for Rulemaking to Adopt Revised Competitive Switching Rules, STB Docket No. EP 711 (Jul. 17, 2011).

³⁶ Joint Comments of Western Coal Traffic League and Minnesota Power at 2, 5, Reciprocal Switching, STB Docket No. EP 711 (Sub-No. 1) (Oct. 26, 2016).

³⁷ See Comments of U.S. Dep’t of Agric. at 6, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

³⁸ Comments of The Dow Chemical Co. at 1, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

³⁹ Comments of E.I. du Pont de Nemours & Co. at 12, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

⁴⁰ Comments of Olin Corp. at 12, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

⁴¹ Comments of PPG Indus., Inc. at 8, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

interswitching policy as it considers its own policy changes to enhance rail-to-rail competition.⁴²

Westlake Chemical Corporation (“Westlake”) urged the Board to affirmatively promote reciprocal switching.⁴³

TRADE ASSOCIATIONS

Consumers United For Rail Equity (“CURE”) in separate comments recommended that reciprocal switching should be reformed by removing Midtec’s “competitive abuse” test.⁴⁴

The Fertilizer Institute (“TFI”) in its separate comments stated flatly that “[i]t is time for the Board to revisit and revamp its competitive access rules on reciprocal switching.”⁴⁵

The “**Interested Parties**,” a group of twenty-five individual associations of shippers, of which the League is a member, who represent a broad cross section of industries including agriculture, clay, chemicals, coal, glass, paper, petroleum and others urged the Board to implement changes to its rules on reciprocal switching.⁴⁶

⁴² Comments of PPG Indus., Inc. at 8, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

⁴³ Comments of Westlake Chem. Corp. at 5, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

⁴⁴ Comments of Consumers United for Rail Equity at 12, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

⁴⁵ Comments of The Fertilizer Institute at 8, Competition in the R.R. Indus., STB Docket No. EP 705 (Apr. 12, 2011).

⁴⁶ Comments of The Am. Chemistry Council et al. at 67, Competition in the R.R. Indus., STB Docket No. EP 705, (Apr. 12, 2011).