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SURFACE TRANSPORTATION BOARD**

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RECIPROCAL SWITCHING

**REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

**John M. Scheib
Randal S. Noe
David L. Coleman
Garrett D. Urban
Aarth S. Thamodaran**

**Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657**

**Raymond A. Atkins
G. Paul Moates
Matthew J. Warren
Richard E. Young
Hanna M. Chouest**

**SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000**

Counsel for Norfolk Southern Railway Company

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I. INTRODUCTION

The Surface Transportation Board (“Board” or “STB”) has proposed a forced switching rule whose radical departure from precedent and sound policy would wreak havoc on the rail industry. It is a wolf in wolf’s clothing.¹ Although the Board seeks balanced regulations with minimal impacts,² this proposal will instead upset the careful balance struck by Congress, the Interstate Commerce Commission (“ICC”), and (until now) the Board in regulating rail rates. It would throw open the door for shippers who desire an alternative path to rate regulation that has been rejected by the Board, federal courts, and Congress. Indeed, certain parties are unapologetic in their hunger to use forced switching to thwart the industry’s ability to engage in the differential pricing that is essential to its financial viability and to the public’s access to competitive, safe, and efficient rail service.

The scope of the proposed rule is breathtaking. Under the “public interest” prong of Section 11102(c), a staggering 76 percent of non-exempt Class I traffic would have been eligible for forced switching in 2014, because the traffic originated or terminated within a station served by multiple carriers or within 10 miles of an interchange with another rail carrier.³ Even under the “necessary to provide competitive rail service” prong of Section 11102(c), approximately seven percent of non-exempt Class I traffic would have been eligible for forced switching—four times

¹ See *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (“Frequently an issue of this sort will come before the Court clad, so to speak, in sheep’s clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.”).

² See Decision, *Reciprocal Switching*, Ex Parte No. 711 (Sub-No. 1) at 33 (served July 27, 2016) (“Decision”) (Vice-Chairman Miller, commenting) (stating that “it is my hope that the Board will rarely be called upon to impose the reciprocal switching remedy”).

³ See Opening Comments of AAR, Verified Stmt. of Michael R. Baranowski, at 4-5 (“V.S. Baranowski”).

the amount that the Board regards as “significant.”⁴ Yet the Board undertook no inquiry into the financial consequences of its Decision and performed no benefit-cost analysis of its proposed rule. The agency itself had compelled parties to submit detailed evidence of the consequences of forced access, only to pay it no attention and thus irrationally blind itself to the harm to network efficiency, capital investments, and long-term industry viability.

In these Reply Comments, Norfolk Southern Railway Company (“NS”) reiterates why the Board must abandon this proposal. It also responds to some of the shippers’ proposals put forward in their opening comments, which if accepted would push the Board’s proposed rule even further toward a forced switching regime that is inconsistent with congressional directives and years of court and agency interpretation. **Section II** of these Reply Comments exposes the true desire of the shippers who support the Board’s proposed rule: impermissible back door rate regulation. **Section III** reviews two shipper proposals, in particular, that are unlawful and fundamentally inconsistent with Section 11102 and past precedent. For example, shippers would have the Board regulate the rate for forced access even where railroads reach agreement as to an appropriate rate—contrary to the clear words of the statute. And shippers would have the Board impermissibly allow forced switching for distances of 100 miles or more—again contrary to the clear intent of the statute. Finally, **Section IV** exposes the significant constitutional, statutory, and economic flaws in shippers’ rejection of the principle of lost contribution; that is, allowing the railroads to receive full compensation for any traffic lost as a result of forced access.

⁴ V.S. Baranowski at 5; Decision at 34 (Commissioner Begeman, dissenting in part) (noting that the Department of Transportation estimated that NITL’s proposal would affect 2.1 percent of revenue and 1.3 percent of carloads, “figures that are considered significant inside the agency”).

II. SHIPPERS HAVE LAID BARE THEIR DESIRE TO USE THE BOARD'S PROPOSAL TO CREATE AN UNLAWFUL ALTERNATIVE PATH TO RATE REGULATION.

Shippers' opening comments make clear that they do not seek forced access to address service or competitive failures, but instead view the proposed rule as an alternative path to rate regulation. Shippers intend to use the proposed rule to side-step the congressionally mandated rate regulatory mechanisms available to them. And in doing so, shippers would have the Board reject differential pricing, a mechanism approved by Congress that is "crucial to the viability of the industry."⁵ Consistent with repeated congressional directives and judicial holdings, the Board must not allow shippers to circumvent established rate reasonableness mechanisms in favor of forced access as a back door path to rate relief.

A. Shippers are seeking back door rate relief in an effort to erode lawful and necessary differential pricing.

The opening comments of the shippers and shipper groups supporting the Board's proposal make clear that they are seeking to obtain lower rates by using forced switching as an end-run around the rate reasonableness provisions of the ICC Termination Act ("ICCTA"). For example:

- The Alliance For Rail Competition ("ARC") and other parties observe "[t]he Board's concern seems to be that switching relief might be sought as a means to obtain competitive rail rates. ARC et al. regard such efforts as *entirely legitimate* given the shortcomings of rate case alternatives currently offered by the STB." ARC et al. Opening Comments 4, 10 (emphasis added).

⁵ *Intramodal Rail Competition – Proportional Rates*, 1990 MCC LEXIS 70 at *8 (April 17, 1990). See also *Coal Rate Guidelines, Nationwide*, STB Ex Parte No. 347 (Sub-No. 1), 1 I.C.C.2d 520, 529-32 (ICC served Aug. 8, 1985) (describing how differential pricing allows carriers to recover their total costs while maximizing overall shipper welfare); H.R. REP. NO. 1035, 96th Cong., 2d Sess. 39-40 ("In the absence of the regulatory flexibility which permits differential pricing, all shippers would be harmed.").

- INEOS USA argues that “[a]t present, the absence of a viable competitive-switching remedy is exacerbated by what is essentially a lack of alternative methods of challenging high rates that evolve from monopoly power at numerous sites of INEOS and its customers.” INEOS Initial Comments 2-3.
- The Freight Rail Customer Alliance (“FRCA”) asserts that the Board’s proposal “is long overdue and has the potential to help harness the forces of competition to provide relief for captive shippers in fulfillment of the statutory requirements of 49 U.S.C. §10701(d) that rates for captive shippers must be reasonable. . . . *Reciprocal switching should thus exist in addition to, not in lieu of, the availability of more direct relief for unreasonable rates.*” FRCA Opening Comments 1, 4 (emphasis added).

This is not the first time that shippers have urged the Board to use forced switching as an alternative vehicle for regulating the railroads’ rates. In just the last five years, shippers have taken the same position in two other Board proceedings: Ex Parte No. 705, *Competition in the Rail Industry* (“EP 705”), and Ex Parte No. 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rates* (“EP 711”), as a sample of their comments demonstrates:

- “What captive shippers desperately need is a recourse to effective regulatory remedies that force market dominant railroads to moderate their rate gouging by ensuring that the rates on captured shippers are reasonable” Testimony of ARC witness Terry Whiteside in June 22, 2011 public hearing in EP 705, Tr. 228.
- “[T]o the extent that the railroads have been exercising undue market power to charge excessive rates, competitive switching has the potential to introduce competition to keep that power in check.” Testimony of American Chemistry Council witness Jeffrey Moreno in March 26, 2014 public hearing in EP 711, Tr. 106.
- “Under competitive switching, the subsidy of other shippers by captive shippers and the distortion in allocation of capital would be mitigated.” CEMEX Supporting Statement in EP 711, at 1.⁶

⁶A table listing and quoting the parties in these three proceedings who argued that reciprocal switching should be an alternative to traditional rate regulation is set forth in Appendix A hereto.

The shippers' comments cannot be reconciled with the holdings of the D.C. Circuit that switching cannot be a mechanism for shippers to achieve rate relief.⁷ For example in *Midtec Paper Corp. v. United States*, the D.C. Circuit, consistent with the concept of differential pricing, squarely rejected the notion "that section 1110[2] was intended to be an alternative means of obtaining rate relief. . . ." *Midtec*, 857 F.2d at 1505. The court further stated:

[I]f the Commission were authorized, as *Midtec*'s argument entails, to prescribe reciprocal switching or terminal trackage whenever such an order could enhance competition between rail carriers, it could radically restructure the railroad industry. We have not found even the slightest indication that Congress intended the Commission in this way to conform the industry more closely to a model of perfect competition.⁸

Federal district courts have similarly recognized that forced access would be an unlawful alternative to rate regulation. In *Association of American Railroads v. Public Service Commission of West Virginia*, the court invalidated a West Virginia statute that would have compelled forced competitive access and empowered the state Public Service Commission ("PSC") to set a "reasonable" access fee when the railroads could not agree. 745 F. Supp. 1175 (S.D. W. Va. 1989). Citing the D.C. Circuit's *Midtec* decision, the court concluded that in setting access fees, "the PSC is engaging in direct rate regulation for that purpose." *Id.* at 1194-95. Furthermore,

⁷ See *Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988); *Union Pacific R.R. Co. v. ICC*, 867 F.2d 646, 648-49 (D.C. Cir. 1989) (rejecting an application for reciprocal switching which was directed at "the level of rates that customers are charged by the incumbent railroad"); *Richard Best Transfer, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 42149 (served Dec. 22, 2016) ("The U.S. Court of Appeals for the District of Columbia Circuit has held that, where a railroad's challenged practice is 'manifested exclusively in the level of the rates that customers are charged,' the challenge is to the level of the rate, and it may therefore only be challenged under the Board's rate reasonableness procedures.").

⁸ *Id.*

“by allowing captive shippers and other carriers relief from supracompetitive prices through the mechanism of permitting an accessing carrier to compete with the access carrier so as to force the ultimate rates down,” the statute and regulations “constitute[d] an indirect form of rate regulation that contravenes the modified rate regulation scheme devised and established by the [Interstate Commerce Act (“ICA”)].” *Id.* at 1195.

Nor can shippers’ comments be reconciled with past statements by this agency. The Board has been direct and plainspoken; “competitive access rules were promulgated not to provide shippers with an alternative form of rate relief, . . . but to offer a competitive remedy where a bottleneck carrier has exploited its market power.” *Central Power & Light Co. v. Southern Pac. Trans. Co.*, 1 S.T.B. 1059, 1068 (1996).

Indeed, a party may not bring a challenge purportedly based on some non-rate provision of ICCTA when the challenge actually centers on the level of the carrier’s rates. For example, in *National Grain & Feed Ass’n v. Burlington Northern R.R. Co.*, the ICC held that a “complainant simply cannot disguise a rate reasonableness challenge as a challenge to the mechanism used to establish the rate levels,” and a shipper therefore could not bring a challenge to the carrier’s profits resulting from its Certificate of Transportation program as an unreasonable practice. 8 I.C.C.2d 421, 432 (1992). Similarly, the Board denied a railroad’s petition to provide alternative emergency service on another carrier’s line (pursuant to 49 U.S.C. § 11123 and 49 C.F.R. § 1146) due to the alleged inadequacy of existing service, because the application was based on the alleged unreasonableness of the incumbent carrier’s rates. *See Keokuk Junction Ry. Co. – Alternative Rail Service Line on Toledo, Peoria and Western Ry. Corp.*, STB Finance Docket No. 34397 (served Oct. 31, 2003) (“*Keokuk Junction*”). Although the applicant argued that an

inadequate service finding may be made “when traffic cannot move because rates are cost-prohibitive,” the Board concluded that such an allegation constituted a rate dispute, which “do[es] not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. § 11123.” *Id.* at 5-6. The Board explained that its regulations implementing Section 11123 were “intended to provide temporary relief on an accelerated basis [and] are not intended to be a surrogate for rate reasonableness proceedings.” *Id.* at 6.

Similar attempts to circumvent certain statutory provisions of the ICA and ICCTA have been rejected by courts for nearly a century. *See, e.g., Pittsburgh, Cinn., Chic. & St. L. Ry. Co. v. Fink*, 250 U.S. 577, 582-83 (1918) (“Estoppel could not become the means of successfully avoiding the requirement of the [ICA] as to equal rates, in violation of the provisions of the statute”); *Pace v. CSX Transp., Inc.*, 613 F.3d 1068, 1070 (11th Cir. 2010) (plaintiff could not use state law nuisance claim to circumvent ICCTA); *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1373 (Fed. Cir. 2002) (“To find that Inter-Coastal could nevertheless sidestep the ICA jurisdictional limitation by using the [Contract Disputes Act] would mean that we had at a minimum paid less than exacting deference to the express constraints that Congress itself has placed on lawsuits of this kind”); *Brae Corp. v. United States*, 740 F.2d 1023, 1053-60 (D.C. Cir. 1984) (ICC could not use its exemption authority under Section 10505 to re-determine the car hire relationship and thereby circumvent the car hire provisions of Section 11122).

Like the statute and regulations at issue in these prior cases, the forced switching provision was not intended to be “a surrogate for rate reasonableness proceedings.” *See Keokuk Junction* at 6. As NS described in its Opening Comments, Congress intended that Section 11102(c) of ICCTA be used narrowly, as a mechanism for remedying service failures and inefficiencies resulting from

anticompetitive conduct, in the same way that remedy had been applied since the 1930's under the ICA. Nothing in the text or legislative history of Section 11102(c) suggests that it was intended to be used as an alternative to traditional rate reasonableness regulation. *See* NS Opening Comments at 23-36. And as NS described in its Opening Comments, Congress has explicitly and repeatedly rejected attempts to convert Section 11102(c) into an alternative path to rate regulation. *See* NS Opening Comments at 44 & n.34.

In short, forced switching is not, and never has been, a rate relief mechanism. Instead, under ICCTA, shippers have the right to challenge a rate as unreasonably high, and there are multiple specific rate case procedures from which shippers may select in doing so. *See* 49 U.S.C. §§ 10701(a), (b). Moreover, as described in NS's Opening Comments, in the recently-enacted Surface Transportation Board Reauthorization Act of 2015, Congress amended Section 10701 to expedite rate reasonableness cases and mandate the preservation of simplified methodologies. NS Opening Comments at 26-27. However, Congress changed neither the Board's forced access standards nor the Board's well-established interpretation of Section 11102(c). *Id.* Indeed, Congress rejected requests to transform forced access into an alternative pathway to lower rates a whopping 18 times. *Id.* at 44. As the Supreme Court cautioned, "Congress is the proper agency to change an interpretation of the Act unbroken since its passage, if the change it be made." *Blau v. Lehman*, 368 U.S. 403, 413 (1962).

B. The STB must protect differential pricing.

The shippers in this proceeding impermissibly seek to supplant market forces and drive rates below those prescribed by rate regulations and sound economic principles, thus denying the railroads the ability to engage in otherwise necessary and lawful demand-based differential pricing. Congress, the courts, and the agency

have all rejected such a result, and the Board should do so again here. As described above in Part A, the shippers who support the Board's proposed rule in this proceeding are motivated only by short-term, self-serving interests, regardless of long-term consequences and third party impacts. In contrast, as the regulatory agency, the Board must protect differential pricing to best serve the interests of the entire industry and shipper community.

Congress directed the agency to permit demand-based differential pricing. NS Opening Comments at 6. It recognized that differential pricing is in the best interests of all shippers because it enables carriers to earn revenues sufficient to support adequate service and capital investment. *Id.* (citing H.R. REP. NO. 96-1035, at 39 (1980) ("The Committee understands the necessity of such differential pricing, and has designed a regulatory system which allows for such pricing decisions. In the absence of the regulatory flexibility which permits differential pricing, all shippers would be harmed.")). Nothing in the ICCTA or Surface Transportation Board Reauthorization Act of 2015 ("Reauthorization Act") altered Congress's core directive that the railroads must be permitted to engage in differential pricing.⁹ If anything, differential pricing was reinforced by Section 16 of the Reauthorization Act, which explained that revenue adequacy included the ability to fund "infrastructure and investment needed to meet the present and future demand for rail services."

Allowing the railroads to engage in differential pricing is required for the Board to meet its congressionally mandated duty to assist carriers to achieve and sustain revenue adequacy. *See* 49 U.S.C. § 10704(a)(2). The ICC and the Board have

⁹ *See* InterVISTAS Consulting Inc., *Surface Transportation Board: An Examination of the STB's Approach to Freight Rail Rate Regulation and Options for Simplification* 16 (Sept. 14, 2016) ("InterVISTAS Report").

recognized that revenue adequacy and differential pricing are inextricably linked. The ICC stated that it has “consistently recognized that differential pricing is crucial to the viability of the industry. This is economically sound pricing.”

Intramodal Rail Competition – Proportional Rates, 1990 MCC LEXIS 70 at *8 (Apr. 17, 1990). Similarly, in *Major Issues in Rail Rate Cases*, the Board stated that “the core regulatory principle in the rail industry is that a railroad must be able to engage in some form of demand-based differential pricing to have the opportunity to earn adequate revenues.” STB Ex Parte No. 657 (Sub-No. 1) at 20 (served Oct. 30, 2003). The Board explained:

The need for such demand-based differential pricing is due to the presence of traffic with competitive alternatives. If the carrier were required to charge all its shippers the same markup over cost, the competitive traffic with lower-cost alternatives would be diverted to those other transportation alternatives . . . [It] would lose that traffic for which the demand would not support the price assigned.¹⁰

The critical importance of differential pricing to railroads’ efforts to achieve revenue adequacy has also been recognized by the courts. *See* NS Opening Comments at 46 & n.36. In *MidAmerican Energy Co. v. STB*, for example, the Court of Appeals for the Eighth Circuit noted that the Board had recognized that differential pricing is “an important part of achieving revenue adequacy.” 169 F.3d 1099, 1106-07 (8th Cir. 1999). The court therefore affirmed the Board’s ruling that rail carriers are not required to provide separately challengeable “bottleneck” rates,

¹⁰ *Id.*; *see also* *Carolina Power & Light Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42072, at 33 (served Dec. 23, 2003) (“Demand-based differential pricing is essential in the railroad industry because railroads serve a mix of captive and competitive traffic, and ‘non-demand-based’ cost apportionment methods do not necessarily reflect the carrier’s ability (or inability) to impose the assigned allocations and cover its costs.”) (citing *Coal Rate Guidelines*, 1 I.C.C.2d 520, 526 (1985)).

because requiring the railroads to do so would restrict their ability to engage in differential pricing and “impede the industry’s efforts to achieve revenue adequacy which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system.” *Id.* at 1108. In sum, allowing railroads to achieve and sustain revenue adequacy and engage in differential pricing is necessary to maintain a rail system that best serves the interests of all stakeholders, including shippers, labor, ports and the thousands of communities through which the railroads operate.

Notwithstanding Congress’s mandates and this long-established principle, many shippers here urge the Board to move toward what is, in effect, marginal cost pricing—*i.e.*, rates that they would obtain under “perfect competition.” As noted above in Part A, the D.C. Circuit correctly rejected such an approach because it could restructure the railroad industry in contravention of Congress’s intent. *See Midtec*, 857 F.2d at 1505. And consistent with the Staggers Act, the ICC rejected any mechanism which adopted marginal cost pricing in *Coal Rate Guidelines*, when it acknowledged that “the marginal cost of rail service is less than the average cost” and the “differential between marginal costs and average costs . . . must be covered through differential pricing.” *Coal Rate Guidelines*, 1 I.C.C.2d at 526.

In addition to being contrary to law, a marginal cost approach would jeopardize the financial health of the railroad industry, reduce the railroads’ incentives and ability to make the capital investments necessary to ensure adequate service to customers, and reduce the efficiency of rail service. NS Opening Comments at 2, 46-55. More than 30 years ago, the ICC found that “at least at current traffic volumes, strict marginal cost is not likely to produce revenues sufficient to make the carriers financially viable.” *Coal Rate Guidelines*, 1 I.C.C.2d at 531. That remains the case today. *See Study of Competition in the Freight Railroad Industry*, STB Ex Parte No. 680, Letter from U.S. Department of

Transportation 1 (filed Dec. 19, 2008) (noting that “the industry must be able to engage in differential pricing to remain viable”).¹¹

III. SHIPPERS ARE TEMPTING THE BOARD TO GO EVEN FURTHER ASTRAY FROM THE STATUTE IN THEIR SINGLE-MINDED EFFORT TO UNDERCUT DIFFERENTIAL PRICING.

Shippers not only are using the proposed rule to attempt to establish a new mechanism for rate relief, but also are asking for modifications to the Board’s proposed rule that would push the Board even further beyond that which is permissible by statute in an effort to undercut differential pricing. First, shippers argue that the Board should set compensation, even where the railroads voluntarily agree. Second, shippers seek forced switching for distances of 100 miles or more. Neither proposal may be adopted under the current statutory scheme.

A. Shippers would have the Board violate the statute by dictating compensation terms even where railroads voluntarily agree.

Shippers argue that the Board should set compensation terms, even in the event that the rate is agreed to by the railroads. For example, Western Coal Traffic League states that “reciprocal switching fees—either fees agreed upon by the carriers or those set by the Board—must be set at competitive levels for reciprocal switching to provide an effective competitive alternative.” Western Coal Traffic League & Minnesota Power (“WCTL/MP”) Opening Comments at 23. The National Grain and Feed Association (“NGFA”) similarly argues that “the standards the Board should apply to challenges to the switch fees agreed upon by the railroads are just as significant—indeed, we would argue are more significant—as the rules governing the establishment of compensation when the carriers don’t agree.” NGFA

¹¹ See also InterVISTAS Report at 16 (noting that ICCTA did not “alter the railroads’ ability to carry out demand-based differential pricing”).

at 13. *See also id.* at 14 (“In cases where the railroads agree to a reciprocal switching fee that the shipper believes is too high . . . shippers must have a clearly defined and efficient means to challenge the agreed-upon reciprocal switching fee before this Board.”).

The Concerned Shippers take a slightly different position, attempting to distinguish the Board’s jurisdiction in rate cases and forced switching cases. The Concerned Shippers would have the Board ignore the well-established Bottleneck precedent, as discussed below, and evaluate the rate “in the context of the bottleneck segment for which the party seeking reciprocal switching desires to create rail competition.” Concerned Shippers Opening Comments at 44.

These shippers’ urge an unlawful expansion of the Board’s jurisdiction to set compensation under Section 11102(c). Explicit in the statutory language itself is the provision that the agency may set compensation only “if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time.” 49 U.S.C. § 11102(c)(1). The Board cannot intervene to establish a rate where the carriers otherwise agree.

Similarly, the Board is prohibited from prescribing the divisions on joint routes at a shipper’s request. *Great Northern Railway v. Sullivan* establishes the bedrock principle that a shipper cannot challenge a division or other compensation between the carriers; the shipper’s only interest is that the resulting transportation rate from origin to destination shall be reasonable as a whole. 294 U.S. 458, 462-63 (1935). *See also Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234 (1925) (a shipper has no right to challenge the reasonableness of a portion of a joint through rate because “the shipper’s only interest is that the joint rate be reasonable as a whole”).

The Board has acknowledged a carrier's right to establish its own rates, holding that "a rail carrier 'may establish any rate for transportation or other service' that it provides, and, pursuant to that initiative, may choose to establish local, joint, or proportionate rates." *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 1 S.T.B. 1059, 1064-65 (1996) ("*Bottleneck I*"). And the Board has reaffirmed that allowing a shipper to require a railroad to establish a separately challengeable local rate on a through movement "would defeat a railroad's right to determine, at the outset, the rates that it will use to respond to requests for through service." *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 2 S.T.B. 235, 237 (1997) ("*Bottleneck II*"). In affirming the Bottleneck decisions, the Eighth Circuit agreed that "it is usually at the discretion of the carrier how it wishes to satisfy its duty to provide rates and service. . . . Consequently, a carrier may in most circumstances provide service in the form of a joint rate with another railroad." *Mid-American Energy Co.*, 169 F.3d at 1106.

Shippers would have the Board ignore plain statutory language and bedrock Supreme Court precedent by intervening in the rate-setting authority granted to the railroads. The statute is crystal clear, however. Absent a failure to agree, the Board cannot intervene to override the compensation agreed to by the carriers following a forced-access order by the STB.

B. Shippers aim to expand upon the Board's already unlawful proposed rule by seeking forced switching for distances of 100 miles or more.

In its Opening Comments, Norfolk Southern identified significant flaws with the Board's proposal to allow a shipper to obtain an order of forced switching if the shipper's facility is "within a reasonable distance" of what "is or can be a working interchange." NS Opening Comments at 36; Decision at 18-19, 21; proposed 49

C.F.R. §§ 1145.2(a)(1)(ii), 1145.2(a)(2)(iii). The language in the proposed rule unlawfully expands upon the statute by permitting forced switching at interchanges beyond a terminal area. *See* NS Opening Comments at 36-39.

Now, shippers seek to take the Board's already problematic proposed language and stretch it well beyond anything that could be considered reasonable—in some instances, by proposing that the Board grant forced switching up to 100 miles from a working interchange. *See* NGFA Opening Comments at 6-7 (“The NGFA is not opposed to the Board setting a maximum distance of 100 miles, beyond which reciprocal switching relief generally would not be granted—while still allowing individual shippers to argue for a longer distance on a case-by-case basis.”); WCTL/MP Opening Comments at 17 (calling for a distance of 30 miles or 10% of the total rail route, whichever is greater). The Concerned Shippers argue that “a reasonable distance between a shipper’s facility and a working interchange for the purpose of reciprocal switching should be longer than a reasonable distance beyond a terminal with respect to terminal trackage rights.” Concerned Shippers Opening Comments at 37. And Concerned Shippers’ witnesses Crowley and Fapp suggest that 100 miles would not be unreasonable. Concerned Shippers Opening Comments, V.S. Crowley/Fapp at 31-32.

The shippers’ proposed 100-mile “reasonable distance” standard is untenable when contrasted against the “terminal area” standard long applied under Section 11102(c) by the ICC, the courts, and the Board itself.¹² “Reciprocal switching occurs

¹² The shippers’ proposal is also in stark contrast to prior Board trackage rights cases. Assuming *arguendo* that the Board has the authority to order a forced switch to a point of interchange that is a “reasonable distance” outside a terminal area—which it clearly does not—it has never contemplated 100 miles even in the context of a trackage rights case. Even at its most expansive, the “reasonable distance outside of a terminal” has never extended anywhere near 100 miles from a terminal facility. *See Rio Grande Indus., Inc., et al. – Purchase Related Trackage Rights – Soo Line R.R. Co. Line between Kansas City, MO*

at stations or terminals served by more than one carrier. A *common station or terminal area* is, therefore, a prerequisite for such switching.” *Central States Enterprises, Inc. v. ICC*, 780 F.2d 664, 675 (7th Cir. 1985) (emphasis added).¹³ At no time have the statute or subsequent interpretations of the statute contemplated injecting a “reasonable distance” outside of a terminal area into the forced switching provision, as forced switching has always been understood to be permissible only in a commonly served “terminal area.” Even 35 years ago, the ICC could already say that “[i]t has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching.” *Switching Charges and Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65, 70 (1971).¹⁴

The uniformity and longevity of this interpretation should not be lightly cast aside. There is no legitimate reason to deviate from this settled interpretation of Section 11102(c). There is only the shippers’ thinly veiled and clearly unlawful attempt to broaden the scope of the Board’s proposal—which already would capture 76% of all industry traffic—to make sure that forced switching provides an alternative path to lower rates for one and all.

and Chicago, IL, Docket No. 31505 at 9 (served Nov. 15, 1989) (rejecting a proposed 42-mile movement, noting that the distance “exceeds anything we have previously ordered”).

¹³ See also *Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules and Practices*, 1 I.C.C.2d 700, 702 (1985) (“Reciprocal switching involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at *commonly served terminal areas* in an arrangement under which one of the carriers acts as the switching carrier.”) (emphasis added).

¹⁴ See also *Increased Switching Charges at Kansas City, Missouri-Kansas*, 344 I.C.C. 62, 63 (1972) (“It is the practice for the railroads serving Kansas City to engage in *reciprocal switching*. This means that a carrier on whose lines an industry is located will switch cars to or from that industry as an incident to the road-haul movement of those cars by another carrier whose tracks in *the terminal area* do not extend to the industry in question.”) (emphases added).

IV. TO ACHIEVE THEIR STRATEGY OF ERODING DIFFERENTIAL PRICING, SHIPPERS WOULD FLOUT THE CONSTITUTION, SOUND ECONOMICS, AND THE STATUTE BY DENYING A RAILROAD FULL COMPENSATION.

No mission to exploit forced access to erode differential pricing would be complete without a “compensation” methodology that does not fully compensate a railroad for being compelled to turn over traffic to a competitor. Indeed, shipper groups oppose *any* lost contribution being factored into the access price. But the shippers disregard a railroad’s constitutional and statutory right to full compensation for any loss incurred as a result of forced access. Moreover, shippers’ claims that offering a railroad full compensation for that taken by government fiat would “defeat the purpose” of a forced access regime only confirm that shippers’ true “purpose” in supporting (and expanding) the Board’s proposal is to create an unlawful alternative pathway to lower rates and to erode otherwise lawful and necessary differential pricing.

A. Shipper proposals reject lost contribution.

In their opening comments, a number of shippers expressly call on the Board to reject any compensation methodology that includes a lost contribution component. For example, some call on the Board to adopt a pricing methodology that would “not consider lost contribution.” Concerned Shippers Opening Comments at 53-54; *id.*, V.S. Crowley/Fapp at 28-30. As another example, Cargill “stresses its complete objection to including ‘lost contribution’ in the access fee” and claims that “a reasonable charge should provide no greater compensation to the incumbent than is necessary for it to recover the variable cost of its switching operation, a proportionate share of the fixed costs, and a reasonable return.” Cargill Opening Comments at 7. Similarly, Sandy Creek believes “that in no event should a ‘Lost Contribution’ or ‘Opportunity Costs’ element be added to the switching charge.”

Sandy Creek Energy Associates Opening Comments at 13. Instead, Sandy Creek believes that a switching fee “should be limited to, at most, the incumbent carrier’s fully allocated costs.” *Id.*

Each of these shippers would reject Efficient Component Pricing (“ECP”)¹⁵ in favor of a variety of compensation models that would deny the railroads the full compensation that they are due for use of their property. As discussed below, the shippers impermissibly ignore the commands of the statute, sound economic policy, and the Constitution.

B. Railroads are entitled to compensation that provides the “full and perfect” equivalent for what is taken by federal fiat.

Only where the railroads cannot agree may the STB establish “compensation” for a forced switching agreement, as discussed above in Section III. 49 U.S.C. § 11102(c)(1). To interpret this statutory directive, it is necessary to determine what Congress intended by the term “compensation.” This is nomenclature with a long history in Supreme Court and ICC jurisprudence.

The Supreme Court has interpreted the term “compensation” to mean the “full and perfect equivalent for the property taken.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). The Court explained that “[t]he noun ‘compensation’ standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished by punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment.” *Id.* The Court explained that even without a qualifier like “just,” the “natural import” of a provision that requires “compensation” is the “full and perfect equivalent for the property taken.” *Id.*

¹⁵ Also referred to as the Efficient Component Pricing Rule (“ECPR”).

And the ICC has embraced that same interpretation of the term “compensation.” Interpreting the requirements for compensation in a trackage rights case, the ICC declared that “[t]he term ‘compensation’ presents the idea of balancing one thing against another. To compensate is to render something which is equal to that taken or received. It is difficult to conceive of any ‘compensation’ that is unjust and the word ‘just’ is used evidently to intensify the meaning of the word ‘compensation,’ to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, ample.” *Hastings Commercial Club v. Chicago, Milwaukee & St. Paul Ry. Co.*, 107 I.C.C. 208, 212 (1926).

The recognition that railroads are entitled to full compensation for that taken by the agency’s mandate is hardly novel. Ninety years ago, the ICC recognized “the constitutional right of a carrier to just compensation in the event that its property, or any portion of it, was taken for public use.” *Hastings*, 107 I.C.C. at 212. In doing so, the ICC acknowledged that Congress was, in passing the terminal access legislation, “faced with the necessity of . . . satisfying the constitutional prohibition that private property shall not be taken for public use without just compensation.” *Id.* Since *Hastings*, the ICC has repeatedly applied this same intuitive principle to other “compensation” provisions, providing a uniform interpretation of the term “compensation” that cuts across statutory provisions. *See Chicago & N.W. Ry. Co. – Construction and Operation Exemption – City of Superior, Douglas County, WI – Petition for Issuance of an Order Pursuant To 49 U.S.C. 10901(D)*, STB Finance Docket No. 32433 (Sub-No. 1), 1995 WL 472967 at *3 (ICC served Aug. 11, 1995) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) (setting “compensation” in crossing case using the fair market value of the rail

property taken by the crossing carrier because “[t]his standard comports with the minimum value guaranteed by the taking clause of the Constitution.”).¹⁶

Naturally, shipper groups have no interest in assuring compensation for the railroads “equal to that taken” or “the full and perfect equivalent for the property taken” or the “real, substantial, full, ample” equivalent for that taken by forced access. After all, their goal is to erode lawful and necessary differential pricing, not to protect it. But forced access would deprive the incumbent railroad of lawful contribution to the joint and common costs of its network that it would have earned had it not been compelled to turn over traffic to a competitor. The lost contribution thus represents the revenue the railroad would have earned on the long-haul, minus the amount covering the variable costs of that move. Depriving the incumbent railroad of that lost contribution—as proposed by the shipper groups—unmistakably fails to “compensate” the railroad in an amount “equal to that taken.”

The only pricing mechanism consistent with the statute and these constitutional principles is ECP. ECP “is the only [access charge] that preserves the contributions to a carrier’s fixed production costs—contributions that have been determined by rail transport prices that respect all of the Board’s regulatory policies.” NS Opening Comments, V.S. Armstrong/Sappington at 11. As a result, “ECPR access charges can ensure industry cost minimization while consistently

¹⁶ See also *San Joaquin Valley R.R. Co. – Abandonment Exemption – in Tulare Cty. CA In the Matter of a Request to Set Terms and Conditions*, STB Docket No. AB 398 (Sub-No. 7X), at 3, 5 (served Aug. 26, 2008) (noting that the “Board may not set a price that is below the [fair market value] of the line” and that the rail carrier is entitled to “the minimum value guaranteed by the Takings Clause of the Constitution”); *The Burlington N. & Santa Fe Ry. Co. – Pet. for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, STB Fin. Docket No. 33740, at 9 n.18 (served June 22, 2001) (“If called upon, we will determine the appropriate compensation based on the fair market value of KJRY’s rail property. This standard comports with the minimum value guaranteed by the taking clause of the Constitution.”).

precluding the erosion of contributions to fixed and common costs.” *Id.* at 14. Only by accounting for lost contribution can the Board ensure that its pricing scheme fully compensates incumbent railroads for the true cost of forcing switching.

C. Providing full compensation will not “defeat the purpose” of forced switching—or at least, not a legitimate purpose.

Shippers claim that ECP defeats the purpose of forced access by ensuring that traffic will not be diverted to another railroad. *See, e.g.*, Concerned Shippers Opening Comments at 28-29 (“ECP attempts to ensure that production will not be diverted to an inefficient producer.”). But shippers’ objections to ECP are rooted in their mistaken belief that the purpose of forced access is back door rate regulation and erosion of differential pricing. As demonstrated above, forced access must not be an alternative to or a replacement for the Board’s rate regulation mechanisms and the Board must preserve differential pricing. Thus, the “purpose” that shippers believe is served by forced access—using forced access to regulate transportation rates and erode differential pricing—is itself unlawful.

The Concerned Shippers also assert that “ECP would prevent shippers from benefitting from the competition provided by reciprocal switching.” Concerned Shippers Opening Comments, V.S. Crowley/Fapp at 28. This is an argument that has long been used by critics of ECP “to argue that regulators should accord competitors terms of interconnection more favorable than those principles would require, typically by excluding part or all of the lost contribution from the interconnection charge.”¹⁷ However, this argument against ECP has been rejected by reputable economists and academics.

¹⁷ Alfred E. Kahn & William E. Taylor, Comment, *The pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 225, 233 (1994).

For example, Professors Kahn and Taylor reject this argument, noting that the “rationale comes down to the historic infant industry argument: achieving the goal of an effectively competitive market may require temporarily handicapping incumbents or offering preferences to their inexperienced, fledgling rivals.”¹⁸ Kahn and Taylor argue that “most economists would question [the] wisdom” of such arguments, noting that “if commissions adopt such recommended policies as identifying new entrants as struggling infants, they will continue to find themselves for years subject to similar entreaties by billion-dollar ‘infants,’ suitably diapered and with mendicant bowls in hand, continuing to play the game of regulatory rent-seeking, in order to avoid having their merits subjected to an unbiased market test.” *Id.* 234-35.

Professors Baumol and Sidak further criticize the shippers’ argument by noting that a pricing methodology that offers a lower price than that offered by ECP results in “competition by means of subsidies provided by the bottleneck proprietor,” which “would just ensure the sort of pseudo-competition that is obtainable by tilting the playing field in favor of the bottleneck service buyer, and bringing business to that firm even when it is the less efficient provider. This result surely is but a caricature of true competition and hardly the way to promote economic efficiency.”¹⁹

Thus, ECP will not “defeat” the purpose of real competition, such as competition over service and competition over routing options. Instead, ECP will “defeat” the artificial competition desired by shippers to drive rates lower towards marginal costs (thereby eroding the differential pricing that remains essential to the financial health of the railroad industry and to overall shipper welfare). This is

¹⁸ *Id.*

¹⁹ William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors: Rejoinder and Epilogue*, 12 YALE J. ON REG. 177, 179 (1995).

of course a virtue, not a flaw, of ECP, because it protects the differential pricing that Congress and the federal courts have found essential for the railroad industry.

Indeed, only ECP can provide an unyielding bulwark to thwart any unlawful attempt by a shipper to use the forced access provisions as an alternative to rate regulation. As noted above, this proceeding is a wolf in wolf's clothing, an unabashed effort to erode lawful and necessary differential pricing. In any individual request for forced access—even under the current standards—a shipper seeking lower rates will never again be this obvious. Rather, the shippers will come to the Board as a wolf in sheep's clothing. They will disguise themselves in a seemingly legitimate concern about inadequate service, or some alleged public benefit, when the true goal is the same: a path to lower rates. The Board will be unable to distinguish the sheep it should protect from the wolves it must fend off. However, adopting ECP would separate the sheep from the wolves. By compensating the incumbent railroad with full lost contribution, no shipper whose desire is simply to use forced access as an alternative to rate regulation will bother to try to deceive the Board. Instead, only shippers who believe that a carrier is truly engaged in some anticompetitive conduct will petition the Board for relief, as intended by Congress. In sum, ECP would thwart the unlawful use of forced switching to erode the lawful and necessary exercise of differential pricing.

D. The InterVISTAS report does not disavow the use of ECP.

Shippers incorrectly claim that the InterVISTAS report disavows ECP. *See* Concerned Shippers Opening Comments, V.S. Crowley/Fapp at 29. Crowley and Fapp claim that “the InterVISTAS Report stated a major flaw of ECP is its preservation of any existing unreasonable exercise of market power by an incumbent operator in a non-competitive situation.” *Id.* But shippers misinterpret that report.

What the InterVISTAS Report confirms is that ECP cannot be used for rate regulation from origin to destination. InterVISTAS states only that ECP, standing alone, cannot ensure reasonable rates for shippers, not that ECP is invalid. *See* InterVISTAS Report at 109-110. In fact, InterVISTAS acknowledges that ECP promotes the Board’s congressionally mandated duty to assist carriers in achieving and sustaining revenue adequacy. *See id.* at 110 (“ECPR methodology . . . is intended to preserve the revenue adequacy of the incumbent carrier while potentially injecting actual competition or a meaningful threat of competition for a shipper’s traffic.”).

The InterVISTAS observation that ECP cannot ensure reasonable rates, standing alone, is not controversial. ECP is not designed to regulate the total rate from origin to destination; it is instead a mainstream economic theory for how to set compensation for forced access. As Professor Willig has explained, rather than establishing rate reasonableness for a through route through ECP, it is “the SAC test [that] 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.” CSXT Opening Comments, V.S. Willig at 14. In contrast, ECP “governs the pricing of bottleneck inputs.” *Id.* at 3. “ECP holds that prices for bottleneck components should not be set based on stand-alone or replacement costs of the narrow bottleneck. Rather, where their regulation is necessary, bottleneck component prices should be set at competitively neutral levels that reflect the prices the incumbent railroad charges its own customers for use of the bottleneck asset. This principle fosters competition where regulation is necessary, while preserving the railroad’s ability to recover fixed and common costs that is essential to the ongoing financial viability of the industry.” CSXT Opening Comments, V.S. Willig at 3.

In a rejoinder to critics of ECP, Professor Baumol has explained that he has long “been most explicit about [the] requirement that, in addition to the efficient component-pricing rule, final product prices must be constrained by market forces or regulation so as to preclude monopoly profits.”²⁰ The STB has a robust set of complementary rules designed to preclude monopoly profits and to promote consumer welfare. As described above, shippers can use the SAC test and other rate reasonableness procedures to challenge unreasonable rates, and shippers overall benefit from the railroads’ ability to engage in lawful, necessary differential pricing.

Indeed, InterVISTAS recognizes that ECP has a meaningful role to play in establishing differential pricing. As the report explains, “Ramsey pricing allows the railroads to use differential pricing based on the willingness of the shippers to pay for the service, thus generating the needed revenue to cover costs and a reasonable return but with the minimum traffic or economic efficiency loss. None of the papers we analyzed propose changing this fundamental view.” InterVISTAS Report at 121. And the report further concludes that pricing access to reflect an incumbent’s net opportunity costs “by implication, invokes the Ramsey pricing principles implicit in modern U.S. railroad ratemaking.” *Id.* at xv.

In sum, InterVISTAS’s findings are consistent with the testimony of witnesses in this proceeding, including Professor Willig, who noted that ECP is not a substitute for the Board’s rate regulatory processes, including SAC. *See CSXT Opening Comments*, V.S. Willig at 14 (“The Board’s stand-alone cost test adequately protects shippers from paying unreasonable rates on the through movement in

²⁰ William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors: Rejoinder and Epilogue*, 12 YALE J. ON REG. 177, 178 (1994); *see also* William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 YALE J. ON REG. 171, 195 (1994) (“The efficient component pricing rule plays its full beneficial role only when adopted as part of a set of complementary rules designed to promote consumer welfare.”).

situations involving bottleneck service.”). However, contrary to shippers’ selective citations, InterVISTAS supports ECP as an access pricing methodology that furthers the STB’s congressionally-mandated duties to allow railroads to engage in differential pricing and to assist railroads in achieving and sustaining revenue adequacy.

E. Providing railroads the required “full and perfect” equivalent for what is taken by forced switching will promote network investment that benefits shippers.

Shippers also criticize ECP on the grounds that “ECP has been shown to make networks inefficient and lead to higher prices for customers.” Concerned Shippers Opening Comments, V.S. Crowley/Fapp at 28-9. But this criticism is both unsupported and ignores the reality that, by preventing railroads from recovering their full lost contribution, railroads are, in turn, less likely to make investments in infrastructure that will benefit shippers. Indeed, as Professors Armstrong and Sappington testified in this proceeding, “ECPR access charges can ensure industry cost minimization while consistently precluding the erosion of contributions to fixed and common costs. By preventing such erosion, ECPR access charges can help to ensure that rail carriers are able to finance the ongoing infrastructure investment that is required to deliver high-quality transport services to shippers.” NS Opening Comments, V.S. Armstrong/Sappington at 14. And therefore, failure to include any opportunity cost will mean that railroads will lack the incentives and financial ability to invest in infrastructure that would benefit shippers. *See id.* at 11. *See also* NS Opening Comments at 66-67. Professor Grajek concurs with the investment-related concerns raised by Professors Armstrong and Sappington, noting that the forced switching regulations will compromise “the ability of the industry to meet the transportation needs of the U.S. economy in the coming decades, especially if those regulations are coupled with access conditions that do not adequately compensate

the infrastructure owners, for instance, by ignoring the opportunity cost in the Efficient Component Pricing Rule.” NS Opening Comments, V.S. Grajek at 9. As a result, “by ignoring the opportunity cost in the [ECPR, the proposed rule], will put a significant strain on the future investment in U.S. rail infrastructure and the ability of the industry to meet the transportation needs to he U.S. economy in the coming decades.” *Id.*

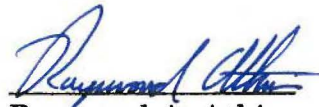
If the Board were to adopt forced access regulations that set compensation at anything less than what ECP would demand, it would not only be the railroads who suffer. Having lost income, or even if faced with the risk of such lost income, railroads would in turn be less likely to make investments in infrastructure that benefit shippers and improve service. *See* NS Opening Comments, V.S. Friedmann at 7-8. The heightened risk of traffic loss as a result of the proposed regulations would result in a modification of the investment decision-making process that would be based on more stringent standards, the result being that “far fewer lines in NS’s network would qualify for reinvestment” or even regular improvements to track, sidings, or other infrastructure. *Id.* at 7. In short, the entire shipping community would suffer if the Board proceeds with this ill-advised regulatory sea change.

V. CONCLUSION

For the foregoing reasons, Norfolk Southern requests that the Board reject the various unlawful proposals offered by shippers, withdraw its proposed rule, and terminate this proceeding.

John M. Scheib
Randal S. Noe
David L. Coleman
Garrett D. Urban
Aarthy S. Thamodaran

Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
(757) 629-2657



Raymond A. Atkins
G. Paul Moates
Matthew J. Warren
Richard E. Young
Hanna M. Chouest

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Norfolk Southern Railway Company

January 13, 2016

Appendix A

<u>Shipper(s)</u>	<u>Comment</u>
Ex Parte No. 711 (Sub-No. 1)	
Opening Comments of Alliance for Rail Competition et al., at 4, 8, 10 (filed Oct. 26, 2016)	“The reason for our position in this proceeding is simple. 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.” “Effective rate regulation might have offset some of the problems resulting from the consolidations that have led to some 95% of rail freight being controlled by the four largest Class I railroads (BNSF and UP in the West, and NS and CSX in the East). However, in over 35 years since the Staggers Rail Act of 1980, the ICC and STB have developed only one rate reasonableness methodology, full SAC, that has helped a handful of captive shippers obtain rate relief. And SAC is universally recognized (including by Congress) to be prohibitively expensive for 99% of captive rail customers.” “The Board’s concern seems to be that switching relief might be sought as a means to obtain competitive rail rates. ARC, et al. regard such efforts as entirely legitimate, given the shortcomings of rate case alternatives currently offered by the STB.”
Initial Comments of Sandy Creek Energy Associates, Brazos Sandy Creek Electric Cooperative, and Lower Colorado River Authority, at 3-5, 13 (filed Oct. 26, 2016) (internal footnote and citations omitted)	“The Station is captive to UP. Despite the fact that it is highly efficient, and one of the newest coal-fired power plants in the United States, the Station often does not generate electricity at a cost that is competitive, and so may be ‘dispatched’ in the regional (i.e., Electric Reliability Council of Texas (‘ERCOT’)) marketplace, because the rates for coal transportation on UP are too high. . . . The Sandy Creek co-owners believe that it is necessary for the STB, consistent with its statutory mandate, to remedy the current lack of competitive-switching access. This 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 as to provide reliable base-load generation to homes and businesses in Texas.” “Permitting the incumbent railroad to retain some or all of its existing monopoly rate return as part of the competitive-switching fee is not appropriate, because it would defeat the very remedy supposedly being provided The combination of such ‘loss contribution or opportunity

<u>Shipper(s)</u>	<u>Comment</u>
	costs,’ together with the newly competing carrier’s charges (which will include a return, of course) and the fee for competitive switching, likely would exceed the preexisting monopoly rate charged by the incumbent carrier in the absence of competitive switching.”
Supporting Statement of Runyon Industries, Inc., at 2 (filed Oct. 26, 2016)	“The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Opening Comments of Northern Indiana Public Service Co., at 6 (filed Oct. 26, 2016)	“The Board should make clear that any [access] price set between the railroads is challengeable by the shipper.”
Initial Comments of INEOS USA LLC, at 2-3 (filed Oct. 26, 2016) (internal footnote omitted)	“At present, the absence of a viable competitive-switching remedy is exacerbated by what is essentially a lack of effective alternative methods of challenging unduly high rates that evolve from monopoly power at numerous sites of INEOS and its customers. Given the cost, complexity, and recent outcomes of chemical shippers’ efforts to challenge rail rates at the STB under the ‘stand-alone cost’ methodology, INEOS has no desire to file a complaint challenging rail rates at the STB.”
Comments of Cargill, Inc., at 3,5, 6, 7, 8 (filed Oct. 26, 2016)	“Due to its high dependence upon rail transportation, Cargill requires meaningful and effective regulatory constraints upon the exercise of market power by rail carriers at Cargill’s captive facilities. Currently, such constraints are non-existent. The idea that existing regulations constrain rates on captive traffic is unrealistic, since the railroads know that the economics do not justify a rate case even at the exceedingly high levels of recent rate increases.” “Greater competition among rail carriers through reciprocal switching has the potential to open up more markets to American farmers in the interior. Rail carriers influence the markets available to a farmer by virtue of the rates they charge. For example, a bottleneck rail carrier that has a longer haul to west coast ports than to gulf coast ports may price its transportation to render the gulf coast export market uneconomical.” “Second, if reciprocal switching is required, there may need to be a second phase to determine reasonable conditions and compensation if the rail carriers cannot agree or if the shipper believes

<u>Shipper(s)</u>	<u>Comment</u>
	that the agreed-upon conditions and/or compensation are unreasonable.” “If the Board were to adopt ECP, it would completely undermine the very objective of reciprocal switching by setting an access fee that effectively ensures the shipper will pay the same price for the full origin to destination movement regardless of which carrier it uses.” “Conceivably, the two rail carriers may reach agreement upon an access fee that the shipper believes is unreasonable and non-competitive. The shipper undoubtedly has a right to challenge that rate under the statute.”
Comments of The Dow Chemical Co., at 11, 12 (filed Oct. 26, 2016)	“If the Board were to adopt ECP, it would completely undermine the very objective of reciprocal switching by setting an access fee that effectively ensures the shipper will pay the same price for the full origin to destination movement regardless of which carrier it uses.” “Conceivably, the two rail carriers may reach agreement upon an access fee that the shipper believes is unreasonable and non-competitive. The shipper undoubtedly has a right to challenge that rate under the statute.”
Opening Comments of Kansas City Power & Light Co., Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Co. d/b/a WE Energies, at 19-20 (filed Oct. 26, 2016) (internal footnote omitted)	“It is well-established that even where an actual, operationally feasible transportation alternative is present, if the cost to the shipper of accessing a potential alternative transporter is at a level that still allows the incumbent to engage in monopoly pricing, ‘effective competition’ within the meaning of Section 10707 does not exist. . . . And in order to evaluate the economic feasibility of an alleged transportation alternative, evidence must be presented regarding the actual cost of that alternative, including the rate(s) that the erstwhile competitor would charge. <i>See Tex. Muni. Pwr.</i>, 6 S.T.B. at 584 (‘With no assurance of rate reductions sufficient to reduce [TMPA’s] overall transportation cost . . . we cannot conclude that the build-out option . . . provides sufficient competitive pressure to effectively discipline BNSF’s rate.’)[.] The foregoing principles must be applied in full to any claim that a directed switching order under Section 11102(c)(1) negates a finding of market dominance under Section 10707 for a rate complainant whose traffic arguably is covered by the order.”
Comments of Shell Chemical LP, at 2 (filed Oct. 26, 2016)	“Provide standards for access pricing to be used when carriers cannot agree on a price or when a shipper sees an access price as unreasonably high.”

<u>Shipper(s)</u>	<u>Comment</u>
Supporting Statement of Kent Corp. (filed Oct. 26, 2016)	“The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Opening Comments of National Grain and Feed Association, at 14 (filed Oct. 26, 2016)	“In cases where the railroads agree to a reciprocal switching fee that the shipper believes is too high . . . shippers must have a clearly defined and efficient means to challenge the agreed-upon reciprocal switching fee before this Board.”
Supporting Statement of Lansdale Warehouse Co. (filed Oct. 26, 2016)	“The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is unreasonable.”
Supporting Statement of Freight Rail Customer Alliance, at 1, 2, 3, 4 (filed Oct. 26, 2016)	“The reciprocal switching proposed in the Notice is long overdue and has the potential to help harness the forces of competition to provide relief for captive shippers in fulfillment of the statutory requirements in 49 U.S.C. § 10701(d)(1), that rates for captive shippers ‘must be reasonable.’ A meaningful reciprocal switching option is particularly vital for the many captive shippers that are unable to obtain any benefit from the stand-alone cost (‘SAC’) test and the Board’s other existing unreasonable rate methodologies.” “The difficulties and limitations in the Board’s regulation of railroad rates have also become more apparent during this 30-year period. The observed problems include the: ✓ Immense cost (financial and time allocation) to bring a rate case(s); ✓ Fact that SAC cases do not work for most shippers, particularly those that do not utilize unit train service; and, ✓ Lack of desirable or attractive alternatives to the SAC test. Under these circumstances, it is certainly permissible and reasonable for the Board to conclude that reciprocal switching relief should be more readily available and that a showing of anti-competitive conduct should not be required.” “The notion of using competitive access where direct rate regulation is ineffective, infeasible,

<u>Shipper(s)</u>	<u>Comment</u>
	undesirable, or otherwise subject to limitations is hardly radical or even novel.” “The greater risk, in FRCA’s review, is that the carriers might respond to forced access on one segment of a movement by increasing their rates on ostensibly competitive segments, such that the shipper receives little or no benefit, despite the presumed availability of reciprocal switching relief.” “Reciprocal switching should thus exist in addition to, not in lieu of, the availability of more direct relief for unreasonable rates. Substantial uncertainty attaches to both reciprocal switching and direct rate relief, which includes whether relief is available at all, the actual rates that result where relief is available, and the associated litigation cost and delay. In view of such uncertainty, a shipper should not be required to choose between the two, but should have the option to pursue either or both and select the outcome that is most favorable.”
Supporting Statement of Kraft Heinz Foods Company, at 1 (filed Oct. 25, 2016)	“Kraft Heinz Foods Company encourages the STB to elaborate to the fullest extent possible the conditions under which the Board would be prepared to grant alternate access to enable . . . [an a]lternative for shippers limited to one railroad to obtain cost based transportation rates (captive shippers pay, on average, 30% more than dual served shippers according to a 2012 ACC Rail Issues Survey report).”
Supporting Statement of Tucker Company Worldwide, Inc. (filed Oct. 25, 2016)	“The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Supporting Statement of Runyon Industries, Inc., at 1, 2 (filed Oct. 25, 2016)	“My facility has been held hostage to a Rule 11 move costing over \$800 per car just to get across town and access other class I rail carriers due to being designated ‘closed to reciprocal switching’ by the CN railroad. . . . [T]he lack of reciprocal switching has cost my company over \$250,000 in just the last two years alone.” “The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Supporting Statement of Solvay	“The Board should adopt reasonable and straightforward procedures to establish the access fee

<u>Shipper(s)</u>	<u>Comment</u>
America, Inc. (filed Oct. 24, 2016)	either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Supporting Statement of Olin Chlor Alkali Products and Vinyls, at 2 (filed Oct. 24, 2016)	“The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Supporting Statement of Evonik Industries (filed Oct. 21, 2016)	“The Board should adopt reasonable and straightforward procedures to establish the access fee either when the railroads cannot agree on the fee or when the party seeking the switch believes the fee is not reasonable.”
Ex Parte No. 711	
Comments of Alliance for Rail Competition et al., at 1-2 (filed Apr. 22, 2014)	“In fact, since the last major rail merger in 2000, rail rates have increased nearly three times as fast as inflation and trucking rates. . . . Stated simply, we believe that whenever reasonably possible, rail customers should be able to receive competing bids for their business.”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 97-98, 101-102, 105-106, 146 (Mar. 26, 2014) ¹ (testimony of Jeffrey Moreno on behalf of the American Chemistry Council)	“As a result of this increased captivity the rail industry has been able to impose significant rate increases over just a very short period of time. These rate increases reduce the ability of U.S. chemical producers to increase economic output and to create new jobs. The NIT League’s competitive switching proposal has the potential to restore some of the rail competition that has been lost through past mergers.” “Canada has long had interswitching. And interswitching is a far more liberal form of competitive switching than what the NIT League has proposed. Within this study that was commissioned by ACC it compared 2010 rail rates to U.S. destinations from Canada origins and from U.S. origins and found that 40 percent of the Canadian origin chemical traffic had R/VC ratios below 180 percent, whereas only 23 percent of the U.S. origin chemical traffic had R/VCs

¹ Transcript is available at [https://www.stb.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/87bcf1b8ee1f7c8285257cf3006d74b4/\\$FILE/final%20transcript%20for%20March%2026%202014-%20EP-711.pdf](https://www.stb.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/87bcf1b8ee1f7c8285257cf3006d74b4/$FILE/final%20transcript%20for%20March%2026%202014-%20EP-711.pdf).

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	below 180 percent. The competition that interswitching creates at Canadian origins clearly gives Canadian chemical production facilities an advantage over U.S. locations. And competitive switching would do much to level that playing field for domestic chemical producers. Restoring competitive balance to the rail industry would reduce the rate premium paid by chemical shippers and would allow the U.S. chemical industry to increase economic output and create more jobs.” “In this proceeding the rail industry had described the NIT League proposals as a wealth transfer that is motivated solely by rate reductions. Well, there can be no denying that rapidly rising rail rates have been an important factor in developing this competitive switching. But the attainment of reasonable rate levels is a central objective of competition. So to the extent that the railroads have been exercising undue market power to charge excessive rates, competitive switching has the potential to introduce competition to keep that power in check.” “But we still have a lot of passengers out there who choose to fly through connections because they get a better rate that way. And for them it’s not as important to get the direct flight and to pay for the direct flight.”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 111-112, 112, 112-113 (Mar. 26, 2014) (testimony of Eddie Johnston on behalf of E.I. du Pont de Nemours and Co.)	“As the Board considers this proposal I urge you to recognize that competitive switching rules stop short of actually creating competition. They make competition possible. Unless the invitation to compete is met with a willingness to compete shippers will not benefit by rates that are set by market forces. And so the Board must not interpret competitive switching rules as creating competition per se.” “[T]he Board cannot rely on competitive switching rules to discipline railroad pricing or limit oversight to the first or last 30 miles without evidence that pricing from origin to destination is indeed being set by competitive market forces.” “If railroads able to compete choose not to compete under competitive switching rules, just as they are doing today, shippers are exposed to market dominance and its attendant rates. The opportunity to bring a rate case challenging unfair rates must be preserved with or without revised competitive switching rules.”
Public Hearing in the Matter of Petition for Rulemaking To	“The railroads disregarded our warnings and ultimately priced Diversified out of the business. It is extremely unfair for railroads to encourage customers to develop business that will require

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Adopt Revised Competitive Switching Rules, at 117-118 (Mar. 26, 2014) (testimony of Sandra Dearden on behalf of Diversified CPC International, Inc.)	capital investments and to subsequently chase the business away with irresponsible pricing practices. This is only one example of inadequate competition in the railroad industry.”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 127-128 (Mar. 26, 2014) (testimony of David Kepler on behalf of The Dow Chemical Co.)	“Therefore, U.S. rail policy should not put a captive manufacturer at a disadvantage versus, say, importers that have a choice of competitive entry points. The chemical industry, for example, pays on average 20 to 30 percent higher than it pays at competitive locations with less service options. . . . So we believe that there is a responsibility today, along with the tools we have, to address the current competitive imbalance between shippers and railroads. Those include promoting this switching to address captivity over short distances, establishing bottleneck rates and making sure the rate case process becomes more accessible by reducing the cost, time and effort of these cases.”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 169-170 (Mar. 26, 2014) (testimony of Phillip Rine on behalf of Indorama Ventures)	“Conrail testified that when they had two railroads competing, them being one of them, the rates were about 30 percent less. If they had three railroads competing the rates were lower than that.”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 155-157 (Mar. 26, 2014) (testimony of Tom O’Connor on behalf of Indorama Ventures)	“And what I find is that when I’m dealing with a captive situation, almost invariably, the rates are significantly higher, holding all else equal. And that goes across companies. It goes across railroads. It is almost axiomatic, that as the captivity of the traffic increases the rates go up. As the absence of competition increases the rates go up. . . . And if you have two people competing you’re going to get a better deal. There’s almost no question about it.”

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Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 84 (Mar. 25, 2014) ² (testimony of Nick DiMichael on behalf of the National Industrial Transportation League)	“Well, what I sort of see here is the first thing he does is to call up his rail carrier and says, ‘You know, the rates you’re charging me are too high and I really want something less,’ and then there is, you know, a back and forth with that. If the shipper doesn’t get, you know, satisfaction there, then probably what the shipper will do is to say, ‘Well, you know, there is this process at the STB about competitive switching’”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, 90 (Mar. 25, 2014) (testimony of Jay Roman on behalf of the National Industrial Transportation League)	“So, for an awful lot shippers, even the movements that aren’t impacted, a shipper can have greater leverage in negotiating better rates for those, or preventing big rate increases in those, because as the CSP could create more competitive traffic for them, they’d have greater negotiating leverage with the railroad.”
Public Hearing in the Matter of Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 92-93 (Mar. 25, 2014) (testimony of Karyn Booth on behalf of the National Industrial Transportation League)	“We know that the railroads would like access fees to be put in place that would include lost contributions, so to speak, such that there really would be -- the incumbent carrier would really be made entirely whole. There would be no rate reduction, in essence. You know, our view of that is that that would gut, you know, the entire point of adopting a competitive switching regime and proposal here.”
Public Hearing in the Matter of	“The same elasticity consideration that makes it appropriate to engage in differential pricing in

² Transcript is available at [https://www.stb.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/ca918297a4af5d5e85257cf3006dceb2/\\$FILE/final%20transcript%20for%20March%2025%202014-%20EP-711.pdf](https://www.stb.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/ca918297a4af5d5e85257cf3006dceb2/$FILE/final%20transcript%20for%20March%2025%202014-%20EP-711.pdf).

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Petition for Rulemaking To Adopt Revised Competitive Switching Rules, at 246 (Mar. 25, 2014) (testimony of Michael Nelson on behalf of Arkansas Electric Cooperative Corp.)	the first place, also makes it appropriate to apply rate compression to higher rated traffic, as would occur under the NITL proposal.”
Comments of The Chlorine Institute, Inc., at 2 (filed Sept. 23, 2013)	“Although the number of rate disputes may reduce if revisions to the competitive switching rules take place, the potential for rate challenges will likely still remain and the Board’s role in regulating reasonableness in these challenges will continue to be a crucial factor to ensure fairness in the rail transportation market.”
Responsive Comments of Arkansas Electric Cooperative Corp., at 2, 7, 9 (filed May 30, 2013)	“On the contrary, as AECC shows below, under current market conditions, where the large Class I railroads have achieved the robust financial health that was one of the objectives of the Staggers Act, CMP <u>requires</u> the implementation of new policies and practices to rein in excess differential pricing.” (emphasis in original) “For these reasons, ‘compression’ of rates for traffic with the highest markups and least elastic demand has been recognized from the outset of differential pricing as being not only consistent with, but integral to, implementation of CMP where unfettered differential pricing would produce supracompetitive earnings. . . . Earnings over the revenue adequacy level are a per se indicator of competitive abuse, under any credible definition of the term. At least for the four Class I mega-systems that collectively now are revenue-adequate, the NITL proposal, which introduces limited market forces for traffic that experiences the highest levels of differential pricing, is far more consistent with CMP principles, the appropriate exercise of railroad market power, and sound regulatory practices than is the railroads’ ‘business as usual’ scenario.” “For example, suppose that reciprocal switching is introduced in a market in which the incumbent monopolist has the more efficient route, but is currently exercising excessive differential pricing. The new competitor can undercut the current rate to obtain the traffic, but the incumbent with the more efficient route can (and presumably would) drop its rate to undercut the competitor and retain the traffic while still earning a higher contribution than could the new competitor. Thus, if

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	the incumbent has the more efficient route for a movement, it may face pricing pressure due to the introduction of reciprocal switching, but it would still be the strongest competitor for, and therefore likely to retain, the movement. Excessive differential pricing would be curtailed without the traffic shifting to a less efficient route.”
Reply Submission of National Industrial Transportation League, at 64, 66 (filed May 30, 2013)	“Most railroads and shippers are businesses (many of which are publicly traded and have fiduciary duties to their shareholders) and would be unlikely to expend the resources to participate in a Board proceeding unless some potential monetary impact is involved.” “If the rate being charged to the shipper is low, the shipper will have no reason to come to the Board to obtain a second competitor; more importantly, even if the shipper applies for and obtains competitive switching, the new competitor is unlikely to offer a rate – plus the access fee – that is lower than that which the shipper is already paying”
Reply Comments of Olin Corp., at 3, 4-5 (filed May 30, 2013)	“But the goals in revising existing rules will be frustrated if any new rules for competitive switching fail to preserve a shipper’s overall right to a rate case. The purposes of the Staggers Act are frustrated if shippers do not pursue remedies provided under its rules. The same would be true under revised rules if the use of competitive switching rules adversely impact a shipper’s right to bring a rate case.” “Ample evidence was developed in EP 705 to show that existing rates are not reasonable, and the Staggers Act was not meant to pit reasonable rates and safe, reliable, and efficient service against one another as an either/or proposition; the existence of bumps in various paths to reform considered by the Board should not distract from the need for that reform. While it is difficult to comment on any proposed switching rules so long as their effect on a captive shipper’s access to a rate case is unclear, Olin respectfully submits that the Board must act swiftly to revise its rules under the Staggers Act to not only enable and preserve safe, efficient and reliable service, but also to ensure reasonable rates”
Reply Comments of Alliance for Rail Competition et al., at 2-4 (filed May 30, 2013)	“As was made clear in the opening comments of ARC, et al., we do not regard enhanced opportunities for rail competition as a panacea. . . . Put another way, access to a second railroad does not guarantee any reduction in rail rates, let alone a reduction in rail rates to reasonable levels. . . . Based on these and other concerns, ARC, et al. have consistently called on the Board

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	to improve the effectiveness of regulatory (as opposed to competitive) remedies for abuses of railroad market power, including unreasonable rates, charges and practices. . . . However, it does not follow that NITL’s proposed competitive switching remedy is unsound, as a matter of law or as a matter of policy. Even if it helps a relatively small number of captive shippers, more effective rail competition would represent progress. To the extent that competitive remedies are successful, i.e. lead to less excessive rates and/or better service quality, that success could lead to improved and expanded competitive remedies, as railroads learn to cope with, and benefit from, competition.”
Comments of Roanoke Cement Co., at 6-7 (filed Mar. 1, 2013)	“[R]ates that apply for shipments in our private cars were above market levels, and the rates did not reflect volumes and costs absorbed by Roanoke Cement to furnish cars for high volume lanes. . . . Rail is important to our operation, but we need to control our costs if we are to maintain business. Some of our competitors are larger than Roanoke Cement and have a broader geographic reach, so we could potentially lose business if we are not cost competitive and a competitor decides to target customers in our service territory. For these reasons, we support the need for changes in competitive switching rules so Roanoke Cement will have access to competitive switching should we need it in the future.”
Comments of American Chemistry Council, at 3-5, 5 (filed Mar. 1, 2013)	“The Escalation Consultants report shows: • In 2010, three-quarters of all chemical traffic that originated or terminated in the U.S. had rates greater than 180% RVC. As a result, the premium charged to chemical shippers for rates above 180% RVC totaled more than \$3.9 billion. . . . Key findings from the <i>ACC Rail Issues Survey Results Report</i> include: . . . • In the past five years, railroads have leveraged their market power in setting rates, charges, and service requirements. Three-quarters of companies reported that rail freight rates have increased faster than rates for other transportation modes. Three-fifths of companies reported substantial increases in other ancillary charges. • Shippers face significant barriers to challenge uncompetitive rail rates. . . . Together, these two studies demonstrate how railroads have increasingly leveraged their unique

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	market power, while harming U.S. manufacturers and the economy as a whole. This further supports the League’s proposal for competitive switching to promote competitive rates for a greater number of freight shipments.” “According to the League’s analysis, the proposed framework could impact a total of 1.2 million carloads and provide potential benefits of approximately \$1.3 billion on an annual basis. Chemical shipments have the largest potential savings of any commodity group, with approximately 400,000 carloads gaining access to competitive switching and a total potential premium reduction of about \$500 million. Rate reductions for chemical products and other commodities achieved through competitive switching will drive economic growth and be reinvested in the economy.”
Comments of Diversified CPC International, Inc., at 10 (filed Mar. 1, 2013)	“One of our plants that is currently served by a single rail carrier, shipped only one rail car in 2011 – the remainder of the outbound shipments moved via truck. This plant was established to serve customers in the region but rail rates have been so high that shipments moved by truck and shipments to one high volume receiver moved rail from another Diversified CPC plant that is 835 miles more distant. . . . Under this type of scenario, access to a second carrier could be a practical solution – the railroads would benefit from increased business, and Diversified CPC would improve the efficiency of its supply chain and head off the potential loss of a plant and jobs in a rural area.”
Supporting Statement of Steel Manufacturers Association (filed Aug. 17, 2011)	“Many of SMA’s electric arc furnace (‘EAF’) steel producer member companies – particularly those that are captive to a single Class I railroad – have been subjected to rapidly increasing rail rates. With a lack of effective alternate means of transportation, these companies have had no choice but to accept the increasing rates, which are at times combined with bidding programs and other non-competitive practices. These increased costs threaten the competitiveness of U.S. EAF steel producers versus our global trading partners. . . . SMA views expanded access to reciprocal switching as a necessary method to promote competition in rail markets in which competition is too often severely strained.”
Reply of Heartland Consumers Power District, at 2 (filed July	“The Petition’s Competitive Switching Rules would potentially provide the LRS and other similarly situated facilities with access to a second rail carrier and, thus, increase competition

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27, 2011)	among rail carriers. This increased competition would, in turn, lower the transportation costs incurred by Heartland and other utilities, allowing them to potentially reduce their customers' rates."
Supporting Statement of PPL Corp., at 2 (filed July 27, 2011)	"Coal is currently shipped via NS to PPL generating stations under a rail transportation contract. Once that contract expires, PPL will be able to file a rate case challenging the level of NS coal rates as excessive. However, if it is possible to bring competitive pressure to bear, either through competitive switching or in other ways, and if such competition is effective, constraining NS rates to reasonable levels and possibly resulting in improved service, PPL wants to explore such alternatives to rate litigation."
Comments of The Chlorine Institute, Inc. in Support of the Petition, at 1 (filed July 27, 2011)	"During the Ex Parte 705 proceedings, the Institute and several of its members submitted testimony regarding the substantial reduction in rail to rail competition that has been observed over the last few years. This reduction in competition has resulted in very dramatic increases in the rail rates applied to the movement of chlorine and other chemical products shipped and received by Institute members, and similar, if perhaps less dramatic increases in rates paid by other shippers and receivers of other commodities as well. . . . There plainly is a need to restore the balance between railroad financial health and the rights of shippers to have their commodities moved at fair and reasonable prices."
Supporting Statement of Bayer MaterialScience LLC, at 2 (filed July 27, 2011)	"This means the vast majority of our rail shipments are captive to a single railroad on either the origin or destination end. Lacking the negotiation flexibility and bargaining power that competition provides, rail freight rates continue to rise unchecked, even in times of recession."
Supporting Statement of CEMEX, Inc. (filed July 26, 2011)	"However, double digit annual freight rate increases borne by many captive shippers during the excess capacity of the recent recession demonstrate that rail freight rates do not reflect market forces. The ratio of variable to total cost (R/VC) on construction materials rail shipments is routinely 300-400+%, but because these commodities are exempt, shippers have no other remedy. Under competitive switching, the subsidy of other shippers by captive shippers and the distortion in allocation of capital would be mitigated."
Supporting Statement of Glass	"Many of our members' plants are captive to one of the Class One railroads and consequently,

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Producers Transportation Council, at 1 (filed July 22, 2011)	the availability of competitive switching is of critical importance to our industry. Historical lack of competition has driven up rail transportation costs for our members' in-bound raw materials, making them extremely vulnerable to foreign import competition, as well as other consequential threats to the continued health and viability of the North American glass industry."
Statement in Support of Olin Corp., at 1 (filed July 22, 2011)	"Revised 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."
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Joint Supplemental Comments of Consumers United for Rail Equity, at 2-3 (filed July 25, 2011)	"Denied reasonable access to rail-to-rail competition, these rail-dependent companies must access the rate regulation protections of the Board. However, the bundling practices of the freight railroads, the confiscatory tariff rates that are applied by the railroads to force companies to sign unfavorable contracts, and the limitation on damages recoverable under the simplified rate case processes of the Board all converge to deny rail dependent customers reasonable access to the remedies of the Board. . . . For these reasons, the undersigned rail-dependent shippers ask the Board to modify its rules to allow increased access to potentially competing railroad systems."
Reply Comments of Olin Corp., at 9 (filed May 27, 2011)	"If railroads simply charged reasonable rates, shippers would have no need to advocate for meaningful application of statutory competitive access provisions."
Comments of The Fertilizer Institute, at 10 (filed Apr. 12, 2011)	"The Board, however, cannot simply stop at the creation of reciprocal switching; it must ensure that the switch rates are reasonable. There are terminals with reciprocal switching today that are effectively closed because the rates have become too high. In the 1990's, grain products had a nearly universal switching fee of just over \$100 per car. Today, those fees are \$500-600 per car."
Comments of Olin Corp., at 15 (filed Apr. 11, 2011)	"[H]owever, any [access] pricing mechanism that is adopted must allow for actual price-reducing competition to take place. Although the pricing mechanism should allow railroads to recover the necessary costs of maintaining their tracks and terminals, it should not allow them to recover the lost revenue that they currently receive from overcharging captive shippers."
Public Hearing in the Matter of	"You know, there are going to be instances in which an alternative combination of railroads will

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Competition in the Railroad Industry, at 70, 96 (June 22, 2011) ³ (testimony of Scott Stone on behalf of the Interested Parties ⁴)	be so much more efficient that the potentially competing railroad will say you know what, I really can offer a much lower rate here.” “I think what you’re going to see is not a draconian change, but as I said, assuming there are clear guidelines that people can look at and know what to expect, people are not going to be flocking into proceedings. They’re simply going to be sitting down to the negotiating table, aware of the changed regulatory environment, and they will work out policies. You may hear very little from your end.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 71-72, 72, 73 (June 22, 2011) (testimony of Chairman Elliott, Jeffrey Moreno on behalf of the Interested Parties, and Curt Warfel on behalf of the National Industrial Transportation League)	<u>Elliott</u>: “Let me follow up on that. With that in mind, as Mr. Moreno said, if he gave a party and nobody came, what would be your preference, if we proceeded down that path of trying to make access and competition more available, with the risk that we would result in giving a party and nobody coming, versus taking a look at the regulatory policy that’s in place now with respect to making the rate cases more effective?” <u>Moreno</u>: “I think undoubtedly most of the shippers in this room would probably prefer to have competition. The very fact that they have to expend resources on pursuing a regulatory remedy means that that’s resources investment they’re not making in this country and in other facilities and job growing opportunities.” <u>Warfel</u>: “Most shippers are going to be very reluctant to file any type of a rate case. I mean it’s going to be a definite last resort, one where you feel that you have closed off pretty much all other avenues. As counsel here has noted, it’s expensive, it’s time-consuming and it certainly wouldn’t do anything to improve your relationship with the carriers that serve you.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 77 (June 22, 2011) (testimony of Vice Chairman	<u>Begeman</u>: “And by ‘not competing,’ do you mean they’re not offering you a competitive lower rate than the guy down the street?” <u>McBride</u>: “Sometimes they don’t even offer a rate, and when they do offer a rate, it’s so unreasonable, there’s no point in continuing the conversation. That’s a product of the last several

³ Transcript is available at

[https://www.stb.gov/transandstatements.nsf/8740c718e33d774e85256dd500572ae5/e163ad72a36c38028525793c000ce7e8/\\$FILE/0622STB.pdf](https://www.stb.gov/transandstatements.nsf/8740c718e33d774e85256dd500572ae5/e163ad72a36c38028525793c000ce7e8/$FILE/0622STB.pdf).

⁴ The Interested Parties comprise 26 different associations representing all types of shippers, including shippers of agricultural products, forest and paper products, coal, chemical fertilizer and mineral products and a wide range of other products.

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Begeman and Michael McBride on behalf of the Interested Parties)	years.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 226-228 (June 22, 2011) (testimony of Terry Whiteside on behalf of the Alliance for Rail Competition et al.)	“Action has been delayed far too long by the STB and the ICC before it, and the vast majority of the nation’s captive shippers have been waiting really since 1980 for a methodology that will implement for their freight the command of Congress that rail rates on captive traffic must be reasonable. . . . What captive shippers desperately need is a recourse to effective regulatory remedies that force market dominant railroads to moderate their rate gouging, by ensuring that the rates on captured shippers are reasonable. Board members, what’s needed here is the guiding hands of this Board, to provide surrogates for rail competition, for those shippers that do not have rail competition afforded them.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 251-252, 252, 253, 254 (June 22, 2011) (testimony of Chairman Elliott, Kendell Keith on behalf of the National Grain and Feed Association, and Terry Whiteside on behalf of the Alliance for Rail Competition et al.)	<u>Elliott</u>: “Would you rather have more access, or would you rather have more aggressive rate proceedings that maybe gave you a better avenue to come to the Board?” <u>Hurst</u>: “From our perspective, you know, it’s ultimately just I think better rates, frankly. That’s the bottom line. You know, right now, I think most of us are being served fairly well by the railroads and they’re efficient and they’re our partners. But we’re paying for it, and there are forces, like I say, at work that are driving high rates and maximizing profits, and we need somebody that we can access fairly quickly and inexpensively and effectively, to say ‘that’s enough.’” <u>Whiteside</u>: “But the real reality is the more avenues, the more methodologies we have, gives us the ability to compete, and to negotiate. . . . [W]e can negotiate if we have strong access.” <u>Keith</u>: “I’d say on that we believe we need a reasonable small rate case standard process. I don’t think that people are going to use it too much in our industry, even if it was very advantageous. So I think the access probably is more important to us.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 265, 265-266 (June	<u>Mulvey</u>: “I was wondering if that was any of your experiences, that the problem today is more service than it is rates, at least today.” <u>Whiteside</u>: “Commissioner, no. I think it’s rates, more than service issues. . . . So I think in

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22, 2011) (testimony of Commissioner Mulvey and Terry Whiteside on behalf of the Alliance for Rail Competition et al.)	general in the west, we're seeing issues -- the conversations I have with most of the wheat commissions and most of the farm producers are about rates and basis points right now."
Public Hearing in the Matter of Competition in the Railroad Industry, at 458, 460-461 (June 22, 2011) (testimony of Sharon Piciacchio on behalf of The Chlorine Institute)	"[I]f you say that we're only going to focus on open access, and you really don't get the competition that you're looking for in open access, then you need your second tool, which is your ability to bring rate cases." "But if you look at the rates, the rates are the heart of the issue for us, if you look at it separately for -- I know for many of the Chlorine Institute members and for PPG, it's the escalating rate structure, and feeling that you have no ability to really do anything about it, because you run into a lot of obstacles when you look at trying to bring forward a rate case. So the rates are a serious issue for us."
Public Hearing in the Matter of Competition in the Railroad Industry, at 153-154 (June 23, 2011) ⁵ (testimony of Michael McGarry on behalf of PPG Industries, Inc.)	"For a large rate case, we've estimated that the litigation costs and tariff premiums that we would have to pay would be upwards of \$20 million, which prevents many companies from filing a rate case. In addition, the artificially high tariff rates published by the railroads don't offer a lot of benefit even for small and medium rate cases, so the effect of the relief would be minimal. And thus, PPG supports a regulatory system that would allow it access competitive rail service, for our transportation rates to be established by working in a competitive market environment."
Public Hearing in the Matter of Competition in the Railroad Industry, at 264, 266-267, 269-271 (June 23, 2011) (testimony of Fred Fournier on behalf of M&G Polymers USA, LLC)	"Although we are challenging our existing rail rates at the Board, we cannot defer our investment, that decision, for two to three years while waiting for an uncertain outcome, nor could we have challenged CSX rates on movements several years into the future to locations to be yet determined." "Some other evidence that competition is lacking includes the following: rail rates have steadily and significantly increased, even through the recent severe recession, while other supposedly

⁵ Transcript is available at [https://www.stb.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/157786e14799361a8525793c000d9bf6/\\$FILE/0623stb-exh.pdf](https://www.stb.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/157786e14799361a8525793c000d9bf6/$FILE/0623stb-exh.pdf).

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	competiti[ve] modes decreased rates. The second one is, despite the potential for significant additional traffic from Apple Grove expansion, CSX was unwilling to offer rates and a contract term that would provide reasonable rates for a sufficient length of time to justify the expansion at West Virginia.” “When it comes to the changes to enhance rail competition, although we are availing ourselves of the regulatory remedies for unreasonable rates, even as we speak, its costs are enormous. . . . So if the Board cannot streamline its rate case process, it needs to find ways to enhance competition where it does not exist, and to allow competition to work more effectively where it does exist. M&G would much prefer to allow a competitive market for rail service to determine reasonableness of its rail rates. The Board can and should modify its existing policies to facilitate such competition through the requested reciprocal switching and bottleneck rates that you’ve been hearing about for the last two days.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 306 (June 23, 2011) (testimony of Chairman Elliott and Fred Fournier on behalf of M&G Polymers USA, LLC)	<u>Elliott</u>: “[I]f we went one way or another, would you rather us work on improving the regulatory process through rate cases, or would you rather us look more towards open access?” <u>Fournier</u>: “If we could do open access and it resulted in competition, or if you did the other and it resulted in competition, I’d be happy with either.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 113-115, 111 (June 23, 2011) (testimony of Jeff Baker on behalf of The Dow Chemical Co.)	“As to the adequacy of existing STP regulatory procedures, as has been pointed out, it’s extremely expensive and complicated to file a rate case, especially large rate cases. . . . On top of these rate case costs, there’s enormous penalty that a company pays for simply bringing a rate case, starting with contract rates that a shipper finds unreasonable. The alternative, then, is to pay significantly higher tariff rates during the rate case. . . . Dow has experienced dramatic reduction in US rail competition. This has resulted in significant rate increases, cost shifting, and rail franchise protectionism. Dow, American companies, and American workers need better access to rail competition.” “You heard -- you have heard it said that it’s not about competition, it’s about rates. But is competition precisely about rates, safety and service? Dow has experienced dramatic increase in

<u>Shipper(s)</u>	<u>Comment</u>
	our rates for our captive facilities.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 124-125 (June 23, 2011) (testimony of Keith Smith on behalf of E.I. du Pont de Nemours and Co.)	“Today’s rail rates are less competitive than they were upon the passage of the Staggers Act. DuPont strongly believes that the reduction in rail competition over the last decade warrants changes in the Board’s policy toward enhanced rail competition. The Board has the tools to enhance rail competition, and we humbly believe that now is the time to act. One of these tools is reciprocal switching. DuPont asks the Board to make reciprocal switching more widely available at reasonable rate levels in order to create competition for captive shippers located in terminal areas that are served by two or more railroads.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 58-59, 59, 59-60 (June 23, 2011) (testimony of Vice Chairman Begeman and Thomas Wilcox on behalf of Omaha Public Power District)	<u>Wilcox</u>: “However, if you need to have some avenue to try to challenge a rate, or if you believe that it's unreasonable because you’re not getting the level of competition you need, but I think the Board, you know, the coal rate guidelines were initially designed to provide a kind of a cookbook of a way to -- where someone could calculate what a maximum rate would be to encourage contractual -- you know, solutions, and so I think by having a way you can help competitive shippers, until competition resumes. And I agree with what was stated yesterday that it's going to take time, it probably will take time, to create a clear set of rules for competitive shippers that would provide that guideline or backstop to have the parties come to the table rather than just file a rate case, because the preferred way is for people to --” <u>Begeman</u>: “Sort of a threat?” <u>Wilcox</u>: “Well, it’s like what was said yesterday. It’s not re-regulation if you establish the rules so people understand them, and then so if you have a reciprocal switching rule everybody understands, then the parties can use those rules to come to an agreement on the outside of the Board. So -- and that’s the same with rate rules. If you can supply the parties with the guidelines, then now they know, you know, if you go to the Board, here’s the answer, and so let’s work around that.”
Public Hearing in the Matter of Competition in the Railroad Industry, at 139 (June 23, 2011) (testimony of John McIntosh on	“For a captive shipper, there is no competition in the rail industry. Because of that, for a captive shipper, we are faced every day and at every renewal of contract or discussion with the railroads with rates that exceed what would be reasonable for the railroads to earn a reasonable profit.”

<u>Shipper(s)</u>	<u>Comment</u>
behalf of Olin Corp.)	