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BEFORE THE SURFACE TRANSPORTATION BOARD

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REGULATORY REFORM TASK : Docket No. EP 738

FORCE LISTENING SESSION :

- - - - -X

Washington, DC

Tuesday, July 25, 2017

REPORTED BY:

CARMEN SMITH

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1 P R O C E E D I N G S

2 DIRECTOR CAMPBELL: Good morning,
3 everyone.

4 UNIDENTIFIED SPEAKER: Good morning.

5 DIRECTOR CAMPBELL: Thank you, thanks for
6 that. Energy in the room, I like that. I'm Rachel
7 Campbell, the director of the Office of Proceedings,
8 and more important for today's purposes, the Board's
9 regulatory reform officer.

10 I am here with the Regulatory Reform Task
11 Force, so I will ask them to introduce themselves in
12 just a moment.

13 We are here today for a listening session
14 regarding this initiative.

15 The task force was formed to comply with
16 the spirit of Executive Order 13777. Today we look
17 forward to hearing from all of you, to help us
18 identify and address rules and practices that are
19 burdensome, unnecessary or outdated, or anything
20 else you would like to share with us that is within
21 the spirit of that executive order.

22 Because our regulations have a direct

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1 impact on you, our stakeholders, we are particularly
2 interested in your perspective and what you have to
3 share with us. So we are ready to listen, which
4 means we are not going to be asking a lot of
5 questions. We really are going to be listening. We
6 may just ask you to clarify a thing or two, but
7 don't take our quiet listening posture as
8 disinterest. We are very, very interested in what
9 we're hearing.

10 There will be a transcript prepared today,
11 so you'll all be able to see that. It will be
12 posted to the Web site.

13 As you came in today, you signed in. I
14 have a list of that sign-in sheet. We are going to
15 be having you speak in the order in which you signed
16 in. Given the number of speakers, we ask that you
17 limit your remarks to no more than 10 minutes.
18 We're not going to have our timers running, so don't
19 look -- for those of you familiar with our hearings,
20 don't look for our lights. But I will have my handy
21 dandy iPhone timer running. So I will give you a
22 little sign if you're going to be exceeding your 10

1 minutes and ask you to wrap up.

2 And so procedurally, that's what we've got
3 for you today.

4 And now I'm going to ask the members of
5 the task force to introduce themselves.

6 MS. GOSSELIN: Hi. I'm Danielle Gosselin,
7 I'm an attorney in the Office of Environmental
8 Analysis.

9 DIRECTOR MARVIN: Hi. I'm Lucy Marvin,
10 I'm Director of the Office of Public Assistance,
11 Governmental Affairs, and Compliance.

12 DIRECTOR KEATS: I'm Craig Keats, general
13 counsel.

14 MS. BROWN: I'm Cynthia Brown, Chief of
15 the Section of Administration in the Office of
16 Proceedings.

17 MR. O'CONNOR: Frank O'Connor, Section
18 Chief in the Office of Economics.

19 DIRECTOR CAMPBELL: Okay. So when I call
20 you, if you will just come up to the podium and
21 speak, that will be great.

22 So we'll have our first speaker, Barbara

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1 Cataneo from the Private Railcar Food and Beverage
2 Association.

3 MS. CATANEO: Thank you. Good morning,
4 ladies and gentlemen of the STB Regulatory Reform
5 Task Force. My name is Barbara Cataneo, and I'm the
6 Secretary of the Board for the Private Railcar Food
7 and Beverage Association.

8 The Private Railcar Food and Beverage
9 Association was formed in January of 2016 as a
10 result of a group of frustrated food and beverage
11 rail shippers that felt that their voices as
12 individual companies were not being heard by the
13 North American Railroad Network, nor by the STB.

14 The PRFBA members formed this group with
15 the following objectives in mind, to provide private
16 railcar food and beverage shippers a
17 forum/organization that will allow them to
18 collectively advocate for rail reform regulation,
19 including reciprocal switching, rate competitiveness
20 and performance KPIs.

21 Additionally, the association members
22 share best practices for the management of their

1 private railcar fleets, they share common issues and
2 concerns regarding the underlying rail terms and
3 conditions of service, they explore supply chain
4 efficiencies within the group and work with the
5 railroad providers directly and then collaborate
6 with each other to develop efficient railroad
7 network opportunities such as empty private railcar
8 backhaul programs.

9 Unreliable rail service in the U.S. and
10 the effects of the current outdated deregulation
11 surrounding railroad service directly and greatly
12 impact our membership on a daily basis.

13 The member companies that comprise PRFBA
14 are McCain USA, PepsiCo, which includes Pepsi,
15 Tropicana, Frito-Lay, Quaker and Gatorade, National
16 Frozen Foods, Borden Foods, Land O'Lakes, Bonduelle
17 USA and Canada, Kraft Heinz, Kellogg's, Pinnacle
18 Food Group, Twin City Foods, G3 Enterprises, which
19 is Gallo Wine, Martin-Brower, which is McDonald's,
20 and Cavendish Farms.

21 The board of directors for the PRFBA
22 organization are Charles Penrow III, chairman of the

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1 board for McCain Foods, Brian Watson, board director
2 from National Frozen Foods, Patrice Legare, board of
3 directors, Bonduelle USA and Canada, and Herman
4 Haksteen, board director ex officio, Cryo-Trans.

5 While PRFBA has been very successful in
6 achieving many of our goals and be objectives as set
7 forth above, ultimately the association members are
8 handcuffed by the antiquated regulations that
9 encompass the rail industry today.

10 As we know, the Staggers Rail Act, which
11 was made into law in 1980, deregulated the American
12 rail industry to a significant extent and replaced
13 the regulatory structure that existed since the 1887
14 Interstate Commerce Act.

15 At that time, 37 years ago, the regulatory
16 reform was needed and changes were made in order for
17 railroads to compete with the growing truck and
18 airline transportation services available to
19 shippers, and in an effort to allow the railroads to
20 earn adequate revenue.

21 It is no secret to anyone in this room
22 that railroads have had the home team advantage when

1 it comes to rates and services that are provided to
2 the food and beverage railcar shippers.

3 The current railroad regulations lean
4 heavily on the railroad side. Our members are stuck
5 with whichever railroad services they are shipping
6 or receiving facility and they have absolutely no
7 options for rail competition.

8 Just like in 1980, when Congressman Harley
9 Staggers recognized that the regulations surrounding
10 the rail industry need to be updated from their
11 93-year-old origins, it is now time to revisit the
12 railroad regulations and once again, in order to
13 provide healthier and more productive economy in the
14 United States.

15 All of the PRFBA members are major
16 manufacturers and producers of food and beverage in
17 the United States. The current state of the
18 railroad industry has adversely affected our members
19 as rates have skyrocketed, services left unaccounted
20 for and food processing plants have been shut down
21 because inbound products have not arrived as
22 anticipated.

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1 The current Staggers Rail Act through
2 which the railroads operate today has many policies
3 that are antiquated and do not represent the current
4 trends or market expectations that our PRFBA members
5 are faced with on a daily basis.

6 Each of our member companies provides a
7 food or beverage to consumers in the United States,
8 Mexico and Canada. Without reform regulations that
9 are more balanced between shippers and the
10 railroads, the consumer pays the price.

11 Today's railroad industry is eerily
12 reminiscent of a monopoly. With two railroads on
13 the East Coast and primarily two Class 1 railroads
14 on the West Coast, there is little competition
15 available to the shipper, particularly when a
16 shipper is captive to only one railroad.

17 There are several avenues through which
18 regulatory reform can take place, which provide a
19 fair and level playing field for both the shippers
20 and the railroads. Either through the STB's reforms
21 directly, such as reciprocal switching proposal, or
22 through a modification of the Staggers Act as

1 presented by Senator Tammy Baldwin through the Rail
2 Shipper's Fairness Act in 2017, however the
3 regulatory reform takes place, the PRFBA members
4 support any reform and reregulating certain aspects
5 of the rail industry that provide the shippers with
6 a more competitive rail marketplace and allows the
7 shippers to explore more than one railroad option.

8 Allowing reciprocal switching throughout
9 the U.S. rail network would be a positive and
10 progressive commitment on the part of the STB and
11 would most certainly be in line with President
12 Trump's EO 13777 identifying regulations for repeal,
13 replacement or modification.

14 Implementing and enforcing rail
15 regulations that will allow food and beverage rail
16 shippers of the United States to have multiple
17 railroad options instead of being captive to one
18 railroad ultimately will trickle down to the end
19 consumer. The more options available in the rail
20 industry, the more cost-effective and reliable
21 services will be, and in the end, the consumer will
22 pay less at the store or restaurant for the food and

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1 beverages.

2 In 2013, the Canadian government made a
3 bold move when they started to enforce a law that
4 had been on the books for many years. The Canadian
5 Transportation Act, and in particular
6 interswitching, which is provided for at S127 of the
7 Act, the Canadian government heard the concerns
8 shared by the Canadian rail shippers and they
9 implemented a mandatory switching law which allows
10 either railroad, Canadian Pacific or Canadian
11 National, the opportunity to quote rates and service
12 to the shipper regardless of which railroad owns the
13 track.

14 Interswitching, or in the United States
15 reciprocal switching, in Canada guarantees that a
16 shipper with direct access to only one railroad at
17 the origin or destination of a move can have the
18 shipment transferred to another carrier at a rate
19 prescribed by regulation if the origin or
20 destination is within a certain radius of the exchange
21 point.

22 Interswitching is available

1 unconditionally to all shippers having direct access
2 to one railway.

3 In the U.S., the STB can require terminal
4 facilities owned by one carrier to be used by
5 another carrier, terminal traffic rights, or the
6 railroad owning terminal facilities to transport the
7 traffic on behalf of the other carrier, reciprocal
8 switching, if it finds this to be practical and in
9 the public interest.

10 Since 1985, the meaning of public interest
11 and the context has been greatly narrowed to mean
12 determining whether the incumbent carrier has acted
13 in an anticompetitive manner.

14 The U.S. food and beverage rail shippers
15 need the same opportunity as their Canadian
16 counterparts, unconditional reciprocal switching to
17 all shippers having direct access to one railroad.

18 In the U.S., the policy to allow the
19 maximum extent possible competition and demand for
20 services to establish reasonable rates and to
21 minimize the need for regulation of a rail system.
22 In Canada, it is instead stated the objectives of

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1 the policy are more likely to be achieved when
2 competition and market forces are the prime agents
3 for providing transportation services.

4 Clearly, the focus on U.S. regulations
5 needs to change to be more in line with the Canadian
6 approach, where rates are not even a part of the
7 objective of the policy.

8 The CP and CN railways furnished their
9 2016 annual earnings earlier this year, and it is
10 apparent that the best operating ratio -- that they
11 have the best operating ratio of all Class 1
12 railroads in North America. CP recording an
13 operating ratio of 58.6 percent and CN reporting an
14 operating ratio of 55.9 percent, interswitching or
15 reciprocal switching has clearly not eroded their
16 profitability.

17 Our friends at the American Association of
18 Railroads state that we do not need more regulation
19 and we would agree with that statement. However,
20 there must be reform of the current rules.

21 Today's monopolistic environment created
22 by the railroads requires that reciprocal switching

1 be allowed. Reciprocal switching does not yield
2 more regulation. In fact, it creates more freedom
3 for all parties.

4 In conclusion, the Private Railcar Food
5 and Beverage Association strongly supports
6 regulatory -- railroad regulatory reform and
7 modifying Staggers Act of 1980 with respect to
8 multiple rail acts for shippers, reciprocal
9 switching, advocating for real railroad options for
10 shippers, advocating less of a monopolistic hold on
11 food and beverage rail shippers, and supporting a
12 more balanced approach between shippers and
13 railroads with regard to the current railroad
14 regulations or outdated deregulations.

15 Thank you again for your time today and
16 allowing the Private Railcar Food and Beverage
17 Association this opportunity to share our feedback
18 on the importance of regulatory reform in the rail
19 industry. We appreciate your listening to our
20 concerns, ideas and solutions and we would be
21 agreeable to assist in the Regulatory Reform Task
22 Force, the STB or any other governmental agency or

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1 person that wishes to support the agenda of railroad
2 regulatory reform.

3 Thank you.

4 DIRECTOR CAMPBELL: Thank you.

5 Our next speaker is Gordon MacDougall of
6 Smart TD New York.

7 MR. MAC DOUGALL: Good morning, everyone.
8 I'm Gordon MacDougall. I am appearing on behalf
9 of Samuel Nasca, who is the New York State
10 Legislative Director for Smart Transportation
11 Division.

12 Mr. Nasca has been in many proceedings
13 before this Board, and it rarely takes more than
14 five minutes, and I will not take more than five
15 minutes today, I guarantee you, probably only two
16 minutes. And the reason for that is I submitted an
17 11-page comments filed yesterday, and I think a
18 large number of subjects raised by the AAR in its
19 petition and the five subjects to be finished by the
20 task force makes it kind of unwieldy to use the oral
21 process.

22 Therefore, AAR's 10-page or 11-page

1 comments, and then I filed an 11-page comments.

2 The principal point is I don't think the
3 executive order applies to this agency. I made a
4 check this morning to the FCC, FERC and all the
5 others, independent agencies, and I didn't see
6 anything on the Web site. Our memorandum points out
7 that this agency -- this executive order does not
8 apply to them. And the AAR finally in their filing
9 has also pointed out that it may not apply to you.

10 If it doesn't apply to you, I think you
11 should discontinue the proceeding, and if possible,
12 if you want, take the record of this case and put it
13 in an Ex Parte 712, which Mr. Nasca is a party to
14 that, which is pending. You would have to have a
15 more expanded notice, let people file additional
16 comments in this case and also an Ex Parte 712. But
17 this subject you have here dovetails with that
18 proceeding, where there is a separate response to
19 the President which really doesn't apply to you.
20 Thank you.

21 DIRECTOR CAMPBELL: Thank you.

22 Our next speaker is Ed Hamberger from AAR.

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1 MR. HAMBERGER: Good morning. I'm here
2 representing the Association of American Railroads.
3 On behalf of the AAR and our members, I want to
4 thank the Board for establishing a rail regulatory
5 officer, for impanelling this committee today to
6 hear us, and I take exception with Mr. MacDougall.
7 I believe that your announcement that you are
8 adhering to the spirit of the executive order is
9 exactly, exactly what you should be doing. Thank
10 you for doing it.

11 We believe that reforming the nation's
12 regulatory system is a crucial and timely
13 undertaking that will help unleash the power of the
14 American economy. Indeed, the rail industry is
15 evidence that eliminating unnecessary, burdensome
16 and outdated regulation can be tremendously
17 beneficial to the economy.

18 The single greatest regulatory event in
19 our industry's history occurred at the Staggers Act.
20 By passing Staggers, Congress recognized that
21 America's freight railroads, the vast majority of
22 which are private companies that operate on an

1 infrastructure that they own, build, maintain and
2 pay for themselves, faced intense competition for
3 most of their traffic, but excessive regulation
4 prevented them from competing effectively.

5 To survive, railroads needed a common
6 sense regulatory system that allowed them to act
7 like most other businesses in terms of managing
8 their assets and pricing their services.

9 This agency and its predecessor agency,
10 the ICC, personified a balanced regulatory approach
11 and implementing a deregulatory statute that
12 Congress passed in 1980.

13 Since the act was passed, average rail
14 rates have fallen approximately 45 percent, accident
15 rates are down 78 percent, and the industry has
16 invested more than \$635 billion, that's private
17 sector money, not government money, not taxpayer
18 money, \$635 billion back into our network so that we
19 can give our customers the service they need and
20 demand.

21 These results strongly suggest that
22 balanced regional regulation works for rail

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1 customers, railroads and America at large.

2 And I will emphasize Congress has taken
3 note of that. There are some who say it's time to
4 revisit the Staggers Act. I would draw your
5 attention to the fact that in 2015, Congress did
6 just that. And they rejected calls for further
7 regulation. They rejected calls for forced
8 switching. And they passed the 2015 STB
9 Reauthorization Act.

10 I suggest it is your duty to follow
11 Congress's lead. Congress rejected some of the same
12 things that are being called -- that you are being
13 called upon to do, and I believe it is your job to
14 follow Congress's lead.

15 Let me just skip down here a little bit.
16 There are three categories of regulations that I
17 would like to draw your attention to.

18 First, the Board should withdraw pending
19 proposals that are inconsistent with deregulation.
20 We outlined several of these in the 11 pages that
21 Mr. MacDougall referred to, but let me quickly
22 summarize a couple of them.

1 First, the proposal to regulate certain
2 exempt commodities is a solution in search of a
3 problem. It is troubling because it is a reversal
4 of a spectacularly successful deregulatory
5 initiative and relies almost exclusively on RVC
6 ratios instead of the market.

7 Second, the forced switching proposal runs
8 directly counter to what Congress's direction is to
9 this agency.

10 Third, the concept of revenue adequacy as
11 a rate constraint was first formulated by the ICC in
12 1985. It is not a congressional mandate. In fact,
13 Congress did not establish firm-wide revenue
14 adequacy as a ceiling on revenues that a railroad
15 could earn. Such a constraint would discourage
16 railroad efforts to act capacity, innovate, improve
17 service and improve safety.

18 Fourth, the limit price test for market
19 dominance applied in recent rate cases violates the
20 fundamental tenet of the deregulatory regime created
21 by the Staggers Act that natural competition and
22 demand for service should establish rail

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1 transportation rates. The statute mandates that
2 only where a railroad is market dominant should the
3 government regulate or examine a rate and determine
4 whether it is unreasonable.

5 The use of formula approaches designed to
6 short-cut market dominance determinations erodes the
7 sound economic principles behind the STB stand-alone
8 cost procedure for assessing the reasonableness of
9 rates, and does a disservice to railroads and
10 shippers alike.

11 The second category of regulations that
12 the board should repeal are regulations that impose
13 costs exceeding new benefits. Two examples here are
14 the performance data reporting requirements that
15 were made permanent earlier this year and the
16 continued reporting of agricultural contract
17 summaries.

18 A third category occurs where the Board
19 should repeal regulations that are outdated,
20 unnecessary and ineffective. This task force has
21 already recognized that the Board should finish the
22 work it began in 2011 to review its existing

1 regulations.

2 We identified many ineffective and
3 burdensome regulations in 2011 that have yet to be
4 addressed. One that I would draw your attention to
5 is the maintenance cost benchmark used in
6 abandonment proceedings.

7 The Board recently declined to index this
8 benchmark for inflation and postpone updates to a
9 future proceeding, even though the benchmark has not
10 been updated since 1970.

11 In addition to these three categories of
12 regulations, we believe the Board can become more
13 responsive to stakeholders while furthering
14 deregulatory agenda by modifying its ex parte
15 communication rules, to allow increased dialogue
16 between stakeholders, Board members and staff in the
17 policy reporting and rulemaking context. The
18 Board's efforts to improve its processing and
19 gathering technical information, such as proceedings
20 regarding URCS, demonstrate the limits and drawbacks
21 of formal filings and would be facilitated by a more
22 direct exchange of information.

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1 Indeed, many other agencies, including
2 independent agencies like the Board, regularly
3 accept ex parte communications subject to disclosure
4 rules.

5 Recent Board efforts in this regard,
6 including this meeting this morning, are steps in
7 the right direction, and we encourage you to proceed
8 along that path.

9 Finally, the Board should advance a
10 deregulatory agenda by actively defending its
11 jurisdiction in the public interest and federal
12 preemptive matters. The STB plays a critical role
13 in the federal statutory scheme to promote a safe
14 and efficient national rail system.

15 Congress's decision to deregulate broad
16 aspects of rail transportation to achieve this goal
17 did not create a vacuum for states and localities to
18 fill. Unfortunately, many states and local
19 governments around the country haven't gotten that
20 message, and so railroads and their customers alike
21 have had to seek the aid of the Board in defending
22 the public interest from these unlawful

1 encroachments by state and local regulators with
2 only mixed success.

3 The Board has a crucial role to play to
4 protect the public interest from parochial efforts
5 by states and localities to restrict or in some
6 cases prevent rail transportation.

7 The agency should actively promote and
8 defend the regulatory structure that Congress has
9 devised, a structure aimed at ensuring the national
10 uniformity and regulation that is critical to a
11 sound rail transportation system capable of meeting
12 national needs.

13 We recognize the Board is in a period of
14 transition now, as it awaits the confirmation of two
15 new members. In light of the important issues
16 before the Board, the acting chair's plan to defer
17 major regulatory actions to wait until a full
18 complement of Board members is seated is appropriate
19 and reasonable.

20 However, your task force can complete
21 important work that can guide the Board to action
22 consistent with the administration's direction on

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1 the regulatory reform and Congress's deregulatory
2 mandate.

3 The AAR and our members look forward to
4 working with the Board and you as you complete your
5 important mission.

6 Thank you for the opportunity to be here.

7 DIRECTOR CAMPBELL: Thanks very much.

8 Our next speaker is Jeff Sloan with the
9 ACC.

10 MR. SLOAN: Good morning. I am Jeff
11 Sloan, Senior Director of Regulatory and Technical
12 Affairs from the American Chemistry Council. ACC
13 commends the work and goals of the Regulatory Reform
14 Task Force and appreciates this opportunity to
15 provide our views on the STB's regulatory reform
16 priorities.

17 ACC represents the leading companies in
18 the business of chemistry. The U.S. chemical
19 industry is a nearly \$800 billion enterprise, one of
20 the largest exporting sectors and one of the largest
21 customers of the U.S. freight rail system.

22 Our industry is experiencing tremendous

1 growth with over 260 announced new manufacturing
2 projects representing a total of more than \$180
3 billion in new capital investment.

4 In fact, last year, investments in the
5 chemical manufacturing represented nearly half of
6 total construction spending on manufacturing
7 projects in the U.S. This growth drives further
8 need for efficient and competitive transportation
9 options.

10 Improving STB procedures and reducing
11 unnecessary regulatory burdens will help support our
12 industry's growth as well as the broader American
13 manufacturing renaissance.

14 Well before President Trump issued
15 Executive Order 13777, STB initiated several key
16 initiatives intended to streamline procedures and
17 reduce regulatory burdens. Two initiatives in
18 particular, STB's proposal to revise its reciprocal
19 switching rules and its exploration of alternative
20 rate case methodologies, are critical to the
21 administration's objective of reducing burdensome,
22 unnecessary and outdated rules and practices that

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1 inhibit job creation.

2 The ACC urges the task force to focus on
3 the completion of these initiatives as STB
4 regulatory reform priorities.

5 To the first of these, the Board's
6 proposed changes to reciprocal switching rules would
7 remove regulatory barriers and provide greater
8 market choices to rail customers. Reciprocal
9 switching empowers rail customers to choose a
10 freight rail carrier that provides the most
11 competitive rates and best service. While Congress
12 has expressly authorized switching as a tool to
13 advance competitive markets, the STB's existing
14 rules are so burdensome and unworkable that no
15 shipper has ever successfully gained access to
16 switching.

17 As stated by the Board itself, these rules
18 have effectively operated as a bar rather than as a
19 standard under which switching could be granted.
20 The Board's long-awaited reforms proposed in Ex
21 Parte 711 would remove these regulatory barriers and
22 provide market choices for regulatory customers that

1 currently have no competitive transportation
2 options.

3 I would like to emphasize three points.
4 STB's proposal is deregulatory. It would allow many
5 current and captive shippers to rely on competition
6 rather than regulation to address rate rail -- to
7 address rail rate and service issues. By reducing
8 regulatory barriers to competition, the need to
9 protect and cap some reasonable rates would shrink
10 to just a short distance from a facility to an
11 interchange point, rather than for the entire
12 long-distance move.

13 Second, STB is not creating new
14 regulations here. It's proposing to replace
15 existing regulations with less onerous ones. And
16 workable competitive switching rules would reduce
17 the need for STB rate regulation.

18 And finally, competitive rail service will
19 help promote growth and jobs in a broad range of
20 manufacturing, agriculture and energy-producing
21 industries.

22 Second major area I would like to touch on

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1 is the STB's rate case procedures. The stand-alone
2 cost rate case procedures are really the epitome of
3 unnecessarily burdensome regulation.

4 The STB is charged with resolving disputes
5 between freight rail shippers and railroads, is
6 stymied by its own outdated and overly burdensome
7 rules. And as acting chairman, Ann Begeman
8 perfectly encapsulated these concerns. The STB's
9 rate review process is too costly, too
10 time-consuming and too unpredictable. And the heart
11 of the problem is the Board's arcane stand-alone
12 cost rate standard.

13 To successfully challenge a rate, a
14 shipper must design on paper an entire railway
15 business and prove that this railroad can serve same
16 traffic at a lower cost than the rates charged by
17 the existing railroad. Because of the incredible
18 complexity involved, this act has been characterized
19 as a full employment bill for economists.

20 Recent SAC cases for chemical shippers
21 have taken an average of five years to complete and
22 cost the shipper well over \$5 million. Some claim

1 that these burdens are necessary, calling SAC the
2 gold standard for reviewing rates. However, SAC
3 fails on economic grounds as well.

4 In fact, Professor Gerald Faulhaber, the
5 economist who first defined the SAC concept, has
6 testified at the Board that the use of the
7 stand-alone cost test for STB ratemaking has "no
8 economic validity."

9 ACC supports STB's ongoing efforts to
10 streamline and improve its rate case procedures.
11 The Board's current proposals would provide some
12 incremental improvements. However, in order to
13 truly address burdensome, unnecessary and outdated
14 rules and practices that inhibit job creation, the
15 STB must prioritize efforts to develop alternatives
16 to SAC that are more economically sound and not so
17 inherently complex, costly and time-consuming.

18 Thank you again for holding this session
19 and for this opportunity to provide ACC's views.

20 DIRECTOR CAMPBELL: Thank you.

21 Next, Jennifer Hedrick from NITL.

22 MS. HEDRICK: Good morning. I'm Jennifer

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1 Hedrick, Executive Director of the National
2 Industrial Transportation League. On behalf of the
3 League, I want to thank the Board's Regulatory
4 Reform Task Force for inviting industry stakeholders
5 to share our view on regulatory reforms that would
6 streamline STB processes and eliminate or improve
7 outdated and burdensome regulations.

8 We commend the task force for your efforts
9 and look forward to working with you on this
10 important matter. The league is no stranger to the
11 Board. Our organization and members routinely
12 participate in Board proceedings representing the
13 voice of the shipper community. League members
14 range from some of the largest purchasers of
15 transportation services to smaller companies engaged
16 in the shipment and receipt of goods.

17 The league's rail shippers are from a
18 multitude of industries, including chemicals,
19 petroleum, agricultural and forest products and
20 paper, among others.

21 Railroads are vitally important partners
22 to NITL rail shippers. Our members strongly support

1 a robust and financially sound rail industry that
2 can invest in the national rail network for the
3 benefit of the railroads, their customers and the
4 American economy.

5 However, our members also need a
6 competitive and efficient rail industry that can
7 meet the demands of increasingly complex supply
8 chains and support American manufacturing and
9 business growth.

10 When problems arise between railroads and
11 their customers that require the Board's assistance,
12 our members also need an agency that is readily
13 accessible and a regulatory system that is more user
14 friendly and cost-effective.

15 Thus, we applaud your efforts to improve
16 and streamline the Board's regulations and
17 procedures.

18 A number of the Board's current regulatory
19 initiatives, such as its proposals to repeal and
20 replace its reciprocal switching rules in EP 711, to
21 revoke certain commodity exemptions from EP 704, and
22 to consider alternative rate case procedures in EP

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1 722 are all consistent with the task force mission
2 to "identify rules and practices that are
3 burdensome, unnecessary or outdated," which can be
4 repealed, replaced or modified.

5 Accordingly, within the spirit of
6 President Trump's Executive Order 13777, we urge the
7 Board to take the following actions. First, the
8 Board should move forward expeditiously to repeal
9 and replace its outdated, burdensome and unworkable
10 reciprocal switching rules. The Board's existing
11 reciprocal switching rules were adopted over 30
12 years ago, before the major rail mergers in the
13 1990s that dramatically consolidated the rail
14 industry and reduced competitive rail service for
15 many American businesses.

16 Although Congress envisioned a competitive
17 switching would be available when "practicable or in
18 the public interest or when necessary for
19 competitive rail service" the current rules have
20 never resulted in the establishment of new
21 competitive switching arrangements.

22 In fact, no shipper has even attempted to

1 bring a competitive switching case in many years,
2 despite the strong concerns voiced by captive
3 shippers of their lack of competitive rail service.

4 In its EP 711, subnumber 1, reciprocal
5 switching rulemaking decision issued in July 2016,
6 the Board granted in part a petition filed in July
7 2011 by the league which asked the Board to adopt
8 new switching rules consistent with the governing
9 statute.

10 In that decision, the Board proposed new
11 switching rules based on its findings that the rail
12 market has changed substantially and the current
13 rules impose insufferable regulatory barriers that
14 inhibit competitive switching arrangements.

15 Specifically, the Board determined that
16 applying a single competitive abuse standard in
17 order to obtain a switching remedy "makes less sense
18 in today's regulatory and economic environment." It
19 also found that its current reciprocal rules have
20 "effectively operated as a bar to relieve rather
21 than a standard under which relief could be
22 granted."

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1 The league strongly agrees with these
2 conclusions, which demonstrate that the current
3 reciprocal switching rules are outdated and
4 burdensome and must be modified.

5 The league urges the board to act
6 expeditiously to provide reciprocal switching rules
7 to eliminate the "competitive abuse, regulatory
8 barrier, and allow the competitive marketplace to
9 establish railroad practices."

10 Despite the railroad industry's claims,
11 facilitating reciprocal switching arrangements would
12 be deregulatory and not reregulatory, because it
13 would eliminate STB regulation over the entire
14 origin to destination movement, reducing rate
15 regulation, if any, to the shorter switching
16 movement.

17 Thus, revising the current switching rules
18 would not only be consistent with the President's
19 executive order, it would be consistent with the
20 national transportation policies "to allow to the
21 maximum extent possible competition and demand for
22 services to establish reasonable rates for

1 transportation by rail," and to "minimize the need
2 for federal regulatory control over the rail
3 transportation system."

4 Second, the Board should revoke outdated
5 and unnecessary commodity exemptions as proposed in
6 EP 704, subnumber 1, review of commodity boxcar
7 NTFC/COFC exceptions.

8 In the Ex Parte 704 proceeding, the Board
9 has proposed to revoke a number of commodity
10 exemptions that were determined to be outdated and
11 no longer necessary, and representatives of exempt
12 paper and forest products have asked the Board to
13 revoke these commodity exemptions based on the
14 submitted evidence.

15 Citing its own economic analysis, the
16 Board determined that EP 704 that "the dynamics of
17 the particular transportation markets appear to have
18 changed so significantly since the exemptions were
19 first promulgated as to warrant the application of
20 the Interstate Commerce Act in order to carry out
21 the rail transportation policy."

22 The Board's finding that certain commodity

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1 exemptions were no longer warranted was also
2 supported by "an increased likelihood of railroad
3 market power featuring specific commodity groups."

4 It is important to note that the exempt
5 members are also forced to endure unnecessary
6 regulatory burden and costs since they must first
7 file and litigate petitions to revoke an exemption
8 at the Board before they can access the Board's
9 procedures to address rail pricing and service
10 concerns or unreasonable practices.

11 Certainly, eliminating outdated regulatory
12 exemptions that subject American manufacturers,
13 producers and receivers of goods to railroad market
14 power and unnecessary costs would be consistent with
15 President Trump's executive order.

16 Third, the Board should revise or develop
17 an alternative standard to the burdensome and
18 unworkable stand-alone cost rate case procedures,
19 hereafter referred to as SAC. Large SAC rate cases
20 are widely recognized for being incredibly complex,
21 time-consuming and costly. The league supports the
22 Board's ongoing efforts to improve SAC cases based

1 on its evaluation of court procedures that could
2 expedite such litigations at the Board.

3 However, recent SAC cases have
4 demonstrated that this remedy is unworkable for car
5 load or noncoal traffic and simply expediting SAC
6 cases will not address this problem.

7 The Transportation Research Board recently
8 completed a comprehensive study of the current
9 freight rail regulatory structure modernizing
10 freight rail regulation, in which it was found "that
11 more appropriate, reliable and usable procedures for
12 resolving rate disputes are needed to fulfill the
13 regulatory interests and protecting the shippers in
14 the marketplace, in markets that lack effective
15 competition from unreasonably high rates."

16 The Transportation Research Board
17 suggested that a practical and pro-competitive
18 benchmarking methodology be developed to replace
19 SAC. The league and other shipper organizations
20 supported the development of such an alternative
21 approach and the Board's pending EP 722, subnumber 2
22 revenue adequacy proceeding.

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1 Accordingly, the league encourages the
2 Board to not only look for ways to improve the
3 working of its large rate case proceedings but to
4 develop a more workable, effective and less
5 burdensome alternative to the SAC standard itself.

6 Finally, I would like to note that the
7 league submitted additional regulatory reform
8 recommendations in the Board's ex parte number 712,
9 improving regulation and regulatory review
10 proceeding established in 2011, and continues to
11 support those comments to the extent not already
12 addressed by the Board or Congress.

13 I would also ask that my statement today
14 be included in the Ex Parte 738 docket, and we will
15 submit a copy to the Board today.

16 Again, the league greatly appreciates the
17 efforts of the Board's Regulatory Reform Task Force.
18 Thank you for the opportunity.

19 DIRECTOR CAMPBELL: Thank you.

20 Our next speaker is Eddie Johnston from
21 the Chemours Company.

22 MR. JOHNSTON: Good morning. My name is

1 Eddie Johnston, and as was stated, I work for the
2 Chemours Company. We're headquartered in
3 Wilmington, Delaware, a 2015 spinoff from The DuPont
4 Company.

5 It's a pleasure to speak to you today.
6 This is not my first time before the Board, but I do
7 count it an honor to be here.

8 I'd like to begin my comments by thanking
9 the STB for holding this listening session and
10 commend the Board for taking the first steps on a
11 path toward long overdue regulatory reforms.

12 Chemours relies heavily on rail
13 transportation for receipt of raw materials and
14 shipment of products to customers. 96 percent of
15 Chemours's loaded shipments are captive, with no
16 access to competitive rail service.

17 The United States needs, and thankfully
18 has, a strong, financially secure rail system in
19 2017. There's never been a better time to be a
20 railroader. Just read their reports to
21 shareholders.

22 It is not a good time to be a captive rail

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1 customer. The freight railroads enjoy unprecedented
2 market power over captive shippers like Chemours.
3 The simple fact that rail service continues to
4 decline while rates continue to increase should tell
5 you everything you need to know about the state of
6 competition, or lack thereof, in the rail industry.

7 And my experience is not unique. It's
8 typical of other captive shippers.

9 Recognizing that your decisions regulate
10 not just the railroads but rail customers too, what
11 should your regulatory reform agenda be? Let me
12 suggest a threefold approach.

13 First, regulatory reform should encourage
14 greater competition between railroads, where
15 possible. I'm talking about real competition where
16 railroads fight for business, something that does
17 not exist today, for captive shippers.

18 The Board's proposed rule to expand
19 reciprocal switching is a modest but positive step
20 in encouraging competition between railroads where
21 structural competition is nonexistent.

22 The Board has our ideas on how the

1 proposal can be improved. I encourage the Board to
2 proceed with rulemaking on reciprocal switching, and
3 also to examine other policies that encourage
4 greater competition.

5 The electric utility industry and
6 telecommunications industries faced similar
7 structural barriers, yet developed models for
8 increasing competition. These models might be
9 instructive and might have parallels for railroads.

10 Secondly, shippers must have recourse when
11 railroads exert their monopoly power in setting the
12 rates. Because of the structure of the rail
13 network, you must anticipate that measures put in
14 place to encourage competition will be inadequate in
15 many cases.

16 The Board must have a rate complaint
17 process that reflects sound economic principles and
18 recognizes the realities of the 21st century U.S.
19 rail network.

20 The Board has commented in numerous
21 decisions in recent years, including the DuPont
22 case, later assigned to Chemours, that the

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1 stand-alone cost methodology does not, indeed
2 cannot, offer a viable way for captive car load
3 shippers to challenge unreasonable rates. The rate
4 complaint process must change.

5 Last year, a panel of economists provided
6 economically sound alternatives to SAC. I urge you
7 to actively take this back up, make it a priority
8 for action, and bring forward a complaint process
9 that will give shippers hope that justice and equity
10 can be found here.

11 A fair method that results in fair rates
12 will not bankrupt freight railroads. You need not
13 fear that.

14 The current process for computing revenue
15 adequacy should be abandoned and replaced by the
16 financial reports railroads make to their
17 shareholders. Investors make decisions every day
18 based on these reports. There's no reason the Board
19 cannot rely on them too, saving the Board and the
20 railroads countless time and effort and costs in
21 preparing a fictitious metric.

22 Third and finally, the Board must be more

1 proactive when it comes to addressing service
2 failures, and act decisively when carriers fail to
3 correct problems they create for their customers.

4 There are chronic failures occurring
5 across the eastern United States, as we speak.
6 Chemours has had to take extraordinary steps at
7 increased risk and cost to keep our customers' U.S.
8 manufacturing plants supplied and operating, simply
9 because CSX has repeatedly failed to pick up and
10 deliver cars. One of our own plants came within
11 hours of shutting down because the railroad is not
12 delivering raw materials.

13 Service failures began in late May when
14 sweeping, unannounced changes were made to operating
15 plants. Despite our repeated complaints, service
16 has only worsened.

17 Dealing with CSX has become impossible, as
18 person after person we work with one day are gone
19 without replacement the next. Problems are now
20 being communicated directly to a CSX vice president.
21 Still, I have a plant located on the CSX mainline
22 that got no rail service for two consecutive days

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1 late last week. This is a plant that runs 24/7. No
2 rail service for two days.

3 This behavior is inexcusable, period.
4 Last week, after announcing record profits, CSX told
5 financial analysts that customers might have to
6 endure a little pain and suffering to get over a
7 bump in the road. They told the analysts this, not
8 us, their customer. We had to read about it in the
9 newspaper.

10 The remarks lack any genuine concern for
11 customers, underscoring the operation's centric
12 obsession of a railroad.

13 Why would a supplier ever treat a customer
14 like this? There is only one answer. Because they
15 can.

16 You will need to understand service
17 failures from the customers' point of view.
18 Railroad operational metrics matter, but so does
19 communicating openly about changes before they
20 happen, being responsive when problems arise, and
21 working aggressively to correct those problems, and
22 being easy to communicate with and do business with.

1 The irony is these are nonnegotiables for
2 businesses like Chemours who must compete, who face
3 the real prospect of losing the next order if they
4 fail to deliver the expected service.

5 Poor to mediocre service, high rates and
6 other indifference from rail suppliers we depend
7 upon, that's what it is like to be a captive rail
8 shipper in 2017.

9 I told you earlier that 96 percent of my
10 company's loaded shipments are captive. Sadly, the
11 railroads have no fear of losing my business. The
12 antidote is for the Board to encourage competition
13 between railroads, where possible, to finish the
14 work of reforming the rate complaint process, and to
15 make the Board's oversight of rail service more
16 robust.

17 I've given you an ambitious but sensible
18 threefold assignment, but I've also asked Congress
19 to give the Board the resources needed to do it. A
20 strong STB, one that is fully funded and fully
21 staffed to deliver on these priorities is in the
22 public interest and necessary to fulfill the Board's

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1 statutory mandate.

2 It is essential if America's farmers and
3 manufacturers are to prosper and grow.

4 Thank you again for holding this session
5 and for the opportunity to discuss these important
6 issues with you today. The STB has wisely
7 challenged outdated regulations that are hurting
8 many large and small businesses across America. I
9 encourage you to keep moving forward on reform.

10 Thank you.

11 DIRECTOR CAMPBELL: Thank you.

12 Next speaker is Adam Weiskittel from BNSF
13 Railway.

14 MR. WEISKITTEL: Good morning. Good
15 morning, my name is Adam Weiskittel, I'm Senior
16 General Attorney at BNSF in Fort Worth, Texas. On
17 behalf of BNSF, I want to thank the Board for
18 creating this task force and for giving stakeholders
19 like us the chance to invite comments today.

20 Let me start by saying BNSF supports the
21 initial list of potential proposals that the task
22 force identified in its May 25th memo to acting

1 Chairman Begeman, in particular we support efforts
2 to modernize and digitize the Board's filing
3 processes, which we believe can only lead to more
4 efficient, environmentally-friendly administration
5 Board proceedings.

6 In addition to work being done by this
7 task force, BNSF supports the other efforts that
8 have been made by the Board recently to reexamine
9 and streamline its procedures, including the review
10 of the rate case procedures in Ex Parte 733 and
11 review of Board regulations in Ex Parte 712.

12 While it may not appear on its face to be
13 directly related to those streamlining efforts, I
14 did also want to mention the benefits BNSF has seen
15 from the work done by the Board's rail customer
16 public system group in recent years. BNSF has found
17 that the RPCA is usually informed of the U.S. issue
18 customers that might otherwise have unnecessarily
19 consumed Board resources through more formal
20 avenues.

21 We support and join in the comprehensive
22 comments we heard from Mr. Hamberger from AAR

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1 earlier. I'm here because BNSF wants to emphasize
2 two issues we think the task force should focus on
3 and continue to support.

4 The first is the Board's pending
5 exemptions proceeding Ex Parte 704 sub-1, and second
6 is the Board's approach to ex parte communications
7 with stakeholders.

8 Regarding exemptions, Executive Order
9 13777 directs agencies to identify regulations that
10 create a serious inconsistency or otherwise
11 interfere with regulatory reform initiatives and
12 policies. This, of course, in addition to our
13 national rail transportation policy to minimize the
14 need for federal regulatory control over the rail
15 industry and to allow competitive market forces to
16 establish rail rates to the maximum extent possible.

17 From BNSF's perspective, the one thing
18 this task force can do that would most clearly
19 resonate with the administration's deregulation
20 policy and this task force would be to recommend to
21 the Board that the exemptions proceeding be
22 abandoned.

1 In that proceeding, the Board proposes to
2 reregulate five categories of commodities that have
3 been transported by rail carriers on a exempt basis
4 for more than 20 years. As we described in our
5 filing, in that time, BNSF has offered innovative
6 and competitive service options that enable us to
7 successfully compete in those markets. We built
8 upon that success by joining with our customers to
9 make significant investments in our network that
10 will allow us to compete and grow together into the
11 future.

12 But contrary to that deregulatory success
13 story, the Board theorized the dynamics of those
14 transportation markets have changed so significantly
15 that reregulation is now necessary to protect
16 shippers from abuse of market power by railroads.

17 The Board's conclusion was built on a
18 record that essentially consisted of a review of
19 changes to industry average revenue variable cost
20 ratios for those commodities over time. As BNSF
21 pointed out in its comments, RVC ratios are not
22 reliable indicators of what's happening in complex

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1 markets where BNSF participates.

2 To the contrary, changes in RVC ratios can
3 often falsely signal that a railroad is exercising
4 increased market power by charging higher rates
5 when, in reality, that railroad is actually lowering
6 rates in response to competitive pressures.

7 Justifying regulatory intervention with
8 RVC base metrics also has the perverse effect to be
9 less cost efficient and to refrain from making
10 capital investments in places where market forces
11 would otherwise suggest they should be made.

12 We believe that the Board's exemptions
13 proposal would be an unnecessary intervention and in
14 fully functioning markets where there's no evidence
15 that reregulation is needed. At a time when the
16 administration has tasked agencies with identifying
17 and eliminating unnecessary regulations, the Board's
18 proposal would instead represent perhaps the largest
19 expansion of the Board's regulatory reach. We urge
20 the task force to take on that inconsistency in
21 formulating its recommendations to the Board.

22 Turning to the issue of the Board's

1 approach to ex parte communications, BNSF
2 understands and agrees that the Board must follow
3 processes and rulemakings in other nonadjudicatory
4 proceedings that guard the Board's independence and
5 ensure the credibility of the Board's actions and
6 satisfy the Board's obligations under the
7 Administrative Procedure Act. But it can also be
8 tremendously valuable for Board members and Board
9 staff to have the benefit of experience and
10 technical knowledge of all relevant stakeholders
11 when formulating its rules and decisions. We think
12 the Board's current approach to ex parte
13 communications is overly restrictive and
14 unnecessarily hinders that beneficial flow of
15 information.

16 Enabling the Board to have access to more
17 information can only further its understanding of
18 complicated issues and should produce decisions that
19 take a more streamlined approach to achieving the
20 Board's policy goals.

21 In short, the Board should not view
22 maximizing the flow of information with its

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1 stakeholders, all of its stakeholders, as something
2 that is in conflict with its ethical or legal
3 obligations.

4 We saw benefits of a more reasonable
5 approach to ex parte communications in the Board's
6 2015 service reporting proceeding. In that
7 proceeding, written filings revealed to the Board
8 that railway data collection practices were
9 technically complicated and varied across the
10 industry.

11 The Board rightly recognized a chance to
12 talk to stakeholders in person would help Board
13 staff develop a better understanding of the issues
14 than could otherwise have been achieved only through
15 filings. By waiving its normal ex parte rules for
16 that proceeding, the Board was able to craft service
17 reporting regulations that more closely tracked the
18 realities of railroad operations and thus achieved
19 the Board's policy goals in a more efficient and
20 less burdensome manner.

21 Even though the Board has occasionally
22 taken a less restrictive approach to ex parte

1 communications over the years, we think it can and
2 should do more. Specifically, BNSF recommends that
3 this task force investigate possible revisions to
4 the Board's default ex parte prohibition found in
5 its ethics, to instead create a standardized process
6 allowing for increased ex parte communications in
7 weighing in on nonadjudicatory issues. We think
8 revised process should allow for increased
9 stakeholders communications not also with just the
10 Board staff but also with Board members itself.

11 The approach taken in the Ex Parte 711
12 reciprocal switching proceeding is a good starting
13 point, allowing stakeholders to meet with the Board
14 on an ex parte basis and then having high level
15 summaries of those discussions filed in the record
16 nicely balances the Board's ability to continue
17 important dialogue with stakeholders with its
18 obligations under the APA.

19 In closing, BNSF is encouraged by the
20 Board's decision to create this task force and we
21 thank you for the opportunity to provide these
22 comments.

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1 DIRECTOR CAMPBELL: Thank you.

2 Our next speaker is Lawrence Spiwak from
3 The Phoenix Center.

4 MR. SPIWAK: Good morning. My name is
5 Lawrence Spiwak. I am the president of Phoenix
6 Center For Advanced Legal and Economic Public Policy
7 Studies. By way of quick background, in case you
8 may not have heard of us, we are a small but
9 influential think tank, we're a 501(c)(3) and we
10 study broad policy issues with a particular emphasis
11 in providing academic level work on law in economics
12 of regulated industries. All of our work is freely
13 available on our Web site, www.phoenix-center.org or
14 on the research network.

15 Given our interest in economic regulation,
16 I would like to commend the STB for holding this
17 listening session. It is always welcome to see an
18 administrative agency proactively asking the public
19 both how it can improve its regulatory procedures,
20 as well as to help identify regulations, in the
21 STB's own words, for "repeal, replacement and
22 modification."

1 So while there are many topics that I am
2 sure that we can discuss, and many have come up,
3 given our interest in economic regulation, I think a
4 good place to start and where I would like to focus
5 on is the potential return of the increased price
6 regulation on the freight rail industry in
7 reciprocal switching.

8 Under its statutory mandate, the STB faces
9 significant hurdles in regulating the prices of rail
10 service. Despite noticeable tensions, it is widely
11 acknowledged that the regulatory powers held and
12 actions taken by the Interstate Commerce Committee
13 and the predecessor to the STB nearly destroyed the
14 rail industry in this country. In response we had
15 the Staggers Act, a legislative action aimed at
16 revitalizing the rail industry by substantially
17 curtailing regulatory influence. In fact, I would
18 submit that the law charged the ANC with assisting
19 railroads achieving adequacy, essentially requiring
20 the regulatory agency to monitor carefully the
21 financial implications of its actions on railroads.

22 The STB over the years has established

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1 stringent costs and competition-based requirements
2 for rate regulation and consequently rate remedies
3 have been few and far between.

4 Fortunately, as the heavy hand of
5 regulation of the rail industry subsided following
6 the Staggers Act, the financial condition of the
7 industry has improved. Still with vigorous
8 competition from alternative transportation
9 modalities, it's hard to make money in the rail
10 business.

11 So even as the rail industry is beginning
12 to recover, we are starting to show signs of
13 financial health, nonetheless this factor of
14 aggressive price regulation looms large on the
15 horizon with the STB's notice of proposed rulemaking
16 on reciprocal switching, which came out last year.

17 For over 30 years, the federal government
18 posed reciprocal switching only if determined that
19 it was, and it's "necessary to remedy or prevent an
20 act that is contrary to competition policies of the
21 Staggers Act or is otherwise anticompetitive."

22 That is reciprocal switching was never

1 intended to function as direct price regulation, but
2 rather as an attempt to remedy anticompetitive
3 actions by rail companies.

4 So consistent with the deregulatory
5 intention of the Staggers Act, the bar for
6 regulatory intervention for reciprocal switching was
7 appropriately set high, and for good reason. While
8 railroads involved in such rates have an opportunity
9 to arrive at a negotiated rate, reciprocal
10 switching, failure to come to terms bring in the STB
11 to regulate prices. And since the federal
12 government first promulgated the standard in 1985,
13 only a few requests for switching were filed and
14 none were granted.

15 However, although the NPRN concedes the
16 Staggers Act provisions were "not designed to
17 provide shippers with full and open access routing,"
18 the NPRN nonetheless proposes to abandon the STB's
19 30-year-old standard in favor of a more permissive
20 standard which, in the STB's view, would "encourage
21 the availability of reciprocal switching where
22 appropriate."

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1 Now, although it is well established that
2 an administrative agency can change its policy so
3 long as it provides a reasoned explanation for doing
4 so, I believe there are several important
5 shortcomings with the STB's logic for abandoning its
6 long-standing anticompetitive test.

7 First, the NPRN asserts that the dearth of
8 reciprocal switching brought over the last 30 years
9 and automatically follows that requiring a finding
10 of anticompetitive harm is "effectively operated as
11 a bar to relief rather than a standard under which
12 relief could be granted."

13 So we are understanding the logic of the
14 NPRN correctly, the STB does not have to demonstrate
15 a market failure before it can intervene in the
16 market.

17 However, if there is no market failure to
18 remedy, then what is the point of government
19 regulation?

20 Second, the NPRN argues that it's
21 important to weaken the anticompetitive standard due
22 to the increased concentration of the industry.

1 Well, I find this argument a bit puzzling in light
2 of the fact that no rail merger can be approved
3 unless the STB approves it first.

4 More importantly, as the NPRN observes,
5 the Board approves such consolidation in order to
6 remedy "decades of inefficiency and serial
7 bankruptcies." So apparently, we seem to be at the
8 appropriate equilibrium, as approved by the
9 government.

10 Which brings me to the NPRN's third
11 argument. Now that the rail industry has returned
12 some modicum of financial health, again made
13 possible by reduced regulation by the government of
14 consolidation, lowering the reciprocal switching
15 standard will allow the STB to, and again I quote,
16 "avoid obsolescence of the Board's regulatory
17 policies."

18 Okay. The obsolescence of regulation is
19 good policy, right. That's what we want. It
20 indicates that market forces are now adequate to
21 ensure acceptable performance of the industry.

22 So given the three points I just made, I

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1 think it begs some interesting policy questions.

2 Why use such complex schemes such as
3 reciprocal switching in the first instance. Why
4 don't you just redirect price regulation supposedly
5 if the price is too high.

6 I think unfortunately the answer is
7 straightforward. Because the STB's own rate
8 regulation standards rooted in valid economic and
9 financial concepts represent a hurdle and a
10 legitimate one to direct price regulation, using
11 reciprocal switching alternatively grants the
12 flexibility for the STB to craft new, less rigorous
13 and less economically justified approach to price
14 regulation. However, as the courts have constantly
15 recognized, price regulation is an inexact science,
16 I'm not sure having a softer standard really serves
17 the public interest.

18 So in sum, the STB is proposing to expand
19 reciprocal switching vastly, even though it concedes
20 that there's no market failure and the regulations
21 are obsolete. However, if the STB is truly
22 interested in using this listening session to

1 identify and ultimately eliminate, again using STB's
2 own words, "burdensome, outdated or cumbersome
3 regulations," it would seem dropping reciprocal
4 switching is an excellent place to start. With
5 that, I thank you for your time.

6 DIRECTOR CAMPBELL: Thank you.

7 Next we have Lou Anne Rinn from Union
8 Pacific.

9 MS. RINN: Good morning, Director Campbell
10 and the other respected members of this task force.
11 I'm Lou Anne Rinn of the Union Pacific Railroad.

12 Union Pacific really appreciates both the
13 efforts and the initiative of this task team, as
14 well as this listening session. I personally have
15 gained a greater appreciation of the importance and
16 the art of listening by attending a CLE program
17 called Better Lawyering Through Better Listening,
18 cosponsored by the International Listening
19 Association. Who knew.

20 Listening well can be a really valuable
21 foundation for your reform efforts, and we
22 appreciate the fact that you're holding this session

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1 today.

2 I'm going to start by looking back at how
3 changes that the STB has made have enhanced
4 listening that therefore improved its process and
5 its results, and how those that impede or limit
6 communication have not. Then looking forward, I
7 will conclude with some specific recommendations
8 that Union Pacific believes would be beneficial for
9 this body to pursue.

10 Looking back, when the STB has increased
11 opportunities for listening, there have been very
12 positive results. Mediation in rate cases and
13 complaint proceedings has facilitated several early
14 settlements and laid the groundwork for later
15 settlements.

16 Referring discovery disputes to FERC ALJs,
17 those discovery hearings allow clarification and
18 narrowing of discovery disputes. Consequently,
19 parties have been able to compromise many of those
20 disputes and the relatively few remaining ones are
21 then promptly decided by the ALJ.

22 Adding face-to-face meetings with

1 shareholders in rulemakings, these provide
2 interactive, informal opportunities for
3 stakeholders, besides lawyers, to discuss concerns
4 with the Board and its staff. They are a particular
5 virtue to allow questions and answers, to clarify
6 facts and to build understanding of the issues are,
7 I think, intangible but very real benefits.

8 I believe that such sessions ultimately
9 improve the final result in Ex Parte 724 as
10 described by counsel for BNSF.

11 And the creation, the stakeholders and the
12 Board have opportunities to learn more about complex
13 topics and its changes. When the STB increases the
14 opportunities for its stakeholders to listen to each
15 other, as in mediation, discovery hearings and
16 advisory committees, the possibility of resolving or
17 avoiding disputes is increased.

18 When the STB enhances the channels of
19 communication between the stakeholders and its board
20 members and staff, its greater understanding of the
21 issues and consequences improve the likelihood of
22 the decision to be correct.

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1 As Chief Justice Marshall observed, to
2 listen well is as powerful a means of communication
3 and influence as to talk well.

4 But when the STB has made decisions that
5 shut off or unduly limit communication on important
6 topics for procedural simplicity, the unfortunate
7 result has been too often to expand regulation where
8 there has been no showing of market failure,
9 contrary to its congressional mandate.

10 For example, the decision to bar any
11 evidence of products of geographic competition and
12 market dominance determination. Followed by the
13 summary rejection of an AAR petition to consider
14 natural gas competition for coal without even a
15 rulemaking, built a wall in front of a locked door.

16 But can there be any doubt that natural
17 gas is placing profound pressure on rail coal rates?
18 The adoption of a quantitative limit price test to
19 drive decisions on qualitative market dominance on
20 competition effectively covers the STB's fears to
21 economic evidence widely accepted by other agencies
22 and in favors focusing its eyes on an arbitrary and

1 irrelevant ratio.

2 The justification for not limiting -- or
3 not listening to relevant market evidence has been
4 to simplify a rate case process, not to improve the
5 economic validity of the decisions. But the
6 undoubted substantive effect of those procedural
7 changes is at the core of the Staggers Act reform.

8 Combined with other proposals pending
9 before the Board whose primary virtue, according to
10 proponents, would be to expand STB regulation over
11 rates or the surface, this failure to listen to
12 economic evidence of competition can become even
13 more serious.

14 So to sum up, if you look back on the
15 experience, it leads to this general recommendation.
16 Pursue reform proposals that enhance communication
17 between and among the Board and its stakeholders.
18 And please avoid procedural improvements that
19 restrict or eliminate communication about market
20 forces or rail operation or service that will inform
21 the Board's decisions.

22 Looking forward, Union Pacific does have

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1 some specific recommendations for regulatory reform.
2 And while these will be informed by comments that
3 have been made by prior rail speakers, I'm not going
4 to repeat that or go into pending proceedings, but
5 we do have these suggestions for specific things
6 that this task force could pursue.

7 Expand and use face-to-face meetings
8 between stakeholders and Board members or Board
9 staff to allow the exchange of information and
10 interactive discussion on a more regular basis,
11 subject of course to appropriate disclosure rules,
12 so that there is a fair and transparent process.

13 You should also explore incorporating
14 technical conferences and proceedings, especially
15 when dealing with technical subjects such as URCS or
16 stand-alone costs.

17 Rely on E filing and drop the requirement
18 for parties to provide paper copies for written
19 submissions. This will save time and money for all
20 of your stakeholders and possibly the Board itself,
21 without limiting substantive communication. And
22 it's good for the environment.

1 Please discontinue limited price test and
2 adopt guidelines for the presentation of qualitative
3 market evidence including types of objective
4 information such as price comparisons, market share,
5 negotiation and communications that other agencies
6 have found useful in assessing competition, so that
7 you can balance coming up with an appropriate record
8 with an expeditious and efficient procedure.

9 Open declaratory board proceedings in
10 states or localities block or delay rail
11 construction for rail line projects or otherwise try
12 to impose operating restrictions. Railroads and our
13 customers are encountering increasing hostility to
14 certain commodities, chemicals and fossil fuels lead
15 the list. This hostility is increasingly expressed
16 in efforts to impose preconstruction clearance
17 requirements or restrictions on how trains are to be
18 operated.

19 While we try to work with communities we
20 serve to address their concerns, environmental
21 activists have increasingly adopted tactics that
22 effectively deprive us of an opportunity to present

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1 the preemption argument to have a court heard or to
2 rule on, and deprive us of a hearing on the
3 preemption, while expecting us to comply with
4 clearly unlawful permitting procedures.

5 If the Board were to be more proactive or
6 develop a record, they would be able to deliver a
7 stronger message to those agencies that such
8 regulation is not permitted.

9 Thank you for this opportunity to be heard
10 in this effort. Thank you.

11 DIRECTOR CAMPBELL: Thank you.

12 Our next speaker is John Scheib, Norfolk
13 Southern.

14 MR. SCHEIB: Good morning to you all.
15 It's a pleasure to be with you. I'm John Scheib,
16 Vice President Law, Norfolk Southern Corporation.

17 Let me start by thanking Chairwoman
18 Begeman for her leadership in implementing a process
19 to follow the spirit of Executive Order 13777, and
20 thanks to you all for serving on this task force.

21 It's important that the task force make
22 recommendations to set an agenda for the agency that

1 is consistent with both the deregulatory message of
2 the executive order and the deregulatory direction
3 of your governing statute.

4 During our time this morning, I'd like to
5 focus on three main points. First, Executive Order
6 13777 is very different and affirmatively
7 deregulatory, as compared to other executive orders.

8 Which means this task force is asked to do
9 more than simply repeat some of the unfinished work
10 of Ex Parte 712, although I would note that most of
11 the unfinished work in 712 were the railroad's
12 proposals.

13 Second, because Executive Order 13777
14 directs that "applicable law" should guide and
15 sometimes stay the Agency's hand in choosing those
16 regulations that ought to be repealed, replaced or
17 modified, the task force should take time to remind
18 itself that the governing statutes for the STB are
19 themselves deregulatory.

20 And third, the STB should use this task
21 force to correct its course back to the directives
22 of the Staggers Act and the Interstate Commerce

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1 Commission Determination Act.

2 First, this shouldn't be a repeat of Ex
3 Parte 712. The Board conducted a retrospective
4 analysis of its regulations several years ago in Ex
5 Parte 712, which was initiated in response to the
6 2011 Executive Order 13563 issued by President
7 Obama. That executive order directed agencies to
8 modify, streamline, expand or repeal those
9 regulations that were outmoded, ineffective,
10 insufficient or excessively burdensome.

11 13777 goes much further. It creates a
12 Regulatory Reform Task Force which is charged with
13 two things, to recommend ways to improve upon the
14 implementation of regulatory reform policies,
15 including the Obama executive order, and two, to
16 recommend regulations that ought to be repealed,
17 replaced or modified "consistent with applicable
18 law." And applicable law as I have emphasized twice
19 is an important phrase and we'll come back to that.

20 If I were to summarize the difference
21 between the Obama era executive order and the one
22 we're discussing today, it's this. The purpose of

1 Executive Order 13563 was to achieve regulatory
2 objectives more efficiently. While the purpose of
3 Executive Order 13777 is to deregulate. Don't take
4 it from me. It's right in the preamble.

5 "To lower regulatory burdens on the
6 American people by implementing and enforcing
7 regulatory reform." Which makes some of the
8 comments this morning ironic, given that they seek
9 more regulation.

10 So Executive Order 13777 should result in
11 a much broader, more sweeping deregulatory action
12 than was contemplated in Ex Parte 712. In short,
13 this task force's efforts should not merely be 712
14 reduction.

15 Second, the applicable law for the Surface
16 Transportation Board is deregulatory. The
17 deregulatory focus of Executive Order 13777 should
18 be taken especially seriously by an agency that
19 carries the deregulatory mandate from Congress.

20 Of course the applicable law that is the
21 load star of this agency is one of the most
22 extraordinary examples of deregulation in the

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1 country's history. The Staggers Rail Act of 1980,
2 which is widely regarded as one of the greatest
3 public policy achievements of the 20th Century. The
4 task force should search for ways to reorient the
5 STB back towards its deregulatory load star.

6 While good government and achieving
7 regulatory efficiency are always laudable goals and
8 we should never stop striving for them, I would
9 encourage the members of this task force to think
10 bigger, to reverse the Agency's back sliding since
11 Staggers and return to the deregulatory vision laid
12 out by Congress nearly four decades ago.

13 Third, course correction is necessary to
14 get back to the deregulatory aims of the STB's
15 governing statutes. It's important to give back to
16 those deregulatory principles enacted by Congress.

17 By the 1970s, excessive regulations had
18 taken their toll and the freight railroads were in
19 financial crisis. As the Department of
20 Transportation said at that time, railroading had
21 fallen on difficult times, in large part because
22 regulators could not keep up with the changes that

1 were occurring in the marketplace with the
2 development of the interstate highway system and
3 trucking competition about which we've not heard
4 much this morning.

5 There was insufficient capital to support
6 service and safety. It was the decade of the 1970s
7 closed, the regulatory scheme had taken its toll and
8 we know railroads were going bankrupt.

9 The root cause of the problem was an
10 economic system -- regulatory system that was
11 smothering the industry and could not keep up with
12 the marketplace.

13 Congress responded, as we know, and
14 Mr. Hamberger went through the great successes of
15 the Staggers Act. Productivity and volume increased
16 while rail rates declined. In a recent study by
17 Jerry Ellig and Patrick McLaughlin showed that
18 safety improvements were driven solely by the
19 Staggers Act and not by safety regulation.

20 Seeing these results, Congress has doubled
21 down on deregulation with the Interstate Commerce
22 Commission Termination Act, in which it further

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1 expanded the STB's ability to exempt railroads from
2 regulation.

3 The genius of Congress in enacting the
4 Staggers Act is in recognizing that government
5 regulation was not nimble enough to keep up with the
6 changing market dynamics and competitive pressure
7 facing the railroad industry. That principle is as
8 valid today as it was in the 1980s. Only a
9 deregulated railroad industry can react in time to
10 changing events, whether the creation of interstate
11 highway system in the rise of truck competition
12 following World War II, the recent developments of
13 new technologies and natural gas production that
14 affect coal pricing, or other forms of competition
15 that are constantly changing that we are dealing
16 with in the marketplace.

17 This task force needs to help the STB to
18 stop succumbing to the temptation to regulate. For
19 example, the Agency's proposed rule that Congress
20 has repeatedly considered and rejected, forced
21 access. Congress has been clear and consistent on
22 this point. The Board should intervene in the

1 private marketplace only to remedy abuses.

2 But the Board has proposed a rule that
3 would depart from the law and forced one railroad to
4 switch to competitors traffic even in the absence of
5 anticompetitive conduct. If adopted, this rule
6 would undermine the financial health of the
7 industry, reduce investment and erode hard-gained
8 operational efficiencies.

9 To be called a deregulatory action,
10 as we've heard this morning, is a joke.
11 If regulators went in and told Coke that
12 they had to use their facilities to produce for
13 Pepsi, it would never be called a deregulatory action.
14 The task force should recommend that the STB
15 withdraw this proposal immediately and others like
16 it that threaten to return to a failed, active
17 regulatory philosophy.

18 But you shouldn't stop there. There are
19 other opportunities, and one of them is to look at
20 existing regulations that are antiquated or
21 outdated. That examination must begin with revenue
22 adequacy.

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1 Profit regulation like revenue adequacy
2 restraint creates a cloud of uncertainty over the
3 regulated entity. That uncertainty has the
4 potential to stifle innovation, productivity and
5 competition while hampering investment.

6 Accordingly, regulatory history has proven
7 that that type of regulation is ill-advised as
8 Professor Sappington explained to the Board at the
9 hearing on the proceeding on revenue adequacy.

10 This task force should recommend that the
11 STB modify its proposed rule immediately by
12 withdrawing the revenue adequacy -- modify its
13 regulations immediately by eliminating the revenue
14 adequacy constraint.

15 There are plenty of other areas that are
16 ripe for exploration by the task force. Reporting
17 regulations such as contract summaries that serve no
18 regulatory purpose should be repealed.

19 Environmental regulations should be modified or
20 streamlined. You should jettison the limited price
21 test, which shippers and railroads alike have
22 expressed concern with and objected to.

1 It may even be time to examine whether
2 railroads should be exempt from filing anything more
3 than a notice in an abandonment proceeding, and if
4 not, you certainly should update the costs
5 associated -- the cost inputs into the abandonment
6 proceeding as maintenance costs and those
7 proceedings haven't been updated since the '70s.

8 The Board should take Norfolk Southern's
9 request in the exemptions proceeding and look to
10 find more traffic that should be exempted from
11 regulation, not trying to reimpose regulation.

12 In short, this task force should be
13 exploring bold actions to further use 49 USC 10-502
14 in light of the extreme competition in the economy
15 from all sources that have made regulation not
16 necessary to carry out the transportation policy of
17 the United States, and where regulation is not
18 needed to protect shippers from an abuse.

19 In conclusion, the task force is charged
20 with conducting a wide-ranging examination of the
21 Board's regulations, much broader than what occurred
22 in 712.

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1 All the points that I have made are
2 highlighted not just by me but by articles and
3 academics, and we have put together a primer that we
4 will leave with Ms. Graab of supporting articles
5 that demonstrate all the points that I have made
6 this morning.

7 In short, I hope you as a task force can
8 seize this opportunity you've been given and stay
9 true to the deregulatory focus of the executive
10 order and the deregulatory focus of your governing
11 statute. Thank you.

12 DIRECTOR CAMPBELL: Thank you.

13 Our next speaker is Raymond Atkins from
14 Sidley.

15 MR. ATKINS: Good morning. My name is Ray
16 Atkins and I'm a partner with the law firm of Sidley
17 Austin. I am here today speaking on my own behalf
18 as a practitioner and a former STB staffer, although
19 I do represent several railroad parties in ongoing
20 regulatory matters before the STB.

21 This task force has a tremendous
22 opportunity to help guide the STB on a path towards

1 further deregulation of the freight rail industry.
2 And it's a bit of deja vu. The impressive steps
3 that Congress took with the Staggers Act were
4 sparked by federal staffers who wrote detailed
5 reports that were encouraging old deregulatory
6 action. It took staffers who were steeped in the
7 regulatory history, who understood the industry and
8 were willing to reexamine their own roles.

9 Fast-forward four decades, and you're in
10 their shoes. You are being called upon to develop
11 new and bold ideas for further deregulation.

12 And the STB has the tools it needs to
13 effect huge change. As you know, Congress gifted
14 the STB with virtually unlimited power to
15 deregulate. The section is Provision 105-02, and
16 with the exception of labor protection, it empowers
17 the STB to exempt virtually anyone from anything in
18 the statute.

19 The STB can remove any federal regulation
20 that is no longer needed to promote the national
21 transportation policy or to protect shippers from
22 the abuse of market power. And Congress instructed

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1 the agency to deregulate aggressively, to the
2 maximum extent possible, while providing a safety
3 valve where the STB could revoke an exemption where
4 needed for special circumstances.

5 But having sat in your seats, I can
6 appreciate that I offer you little help by shouting
7 carpe diem without offering you framework for
8 further deregulation or any specific ideas.

9 And in my view, the framework is the easy
10 part. Almost every economist on the planet will
11 agree that federal regulation is only justified
12 where there is a clear market failure, where you've
13 got a well-functioning marketplace there is simply
14 no justification for federal intervention.

15 This concept is not only a bedrock of
16 modern regulatory theory, but it has been compelled
17 by Congress for this industry. The primary policy
18 of the United States government when it comes to the
19 freight rail industry is to minimize the need for
20 federal control and to allow the marketplace to
21 govern.

22 Well, if the framework is the easy part,

1 the specifics are clearly harder. But if you follow
2 this framework, then I think this task force should
3 explore at least four ideas that in combination
4 would trim away a lot of the unnecessary and
5 antiquated federal regulations and focus the STB on
6 its core mission.

7 First, as the paramount goal should be to
8 intervene only where there's a market failure, then
9 it's obviously terribly important that the Agency
10 have a sound way to decide whether there is or is
11 not effective competition.

12 If the STB does not perform that gate
13 keeping function appropriately, then it's doomed to
14 interject itself where it doesn't belong.

15 And as someone who must bear some
16 responsibility for the current state of affairs, I
17 will have to say that the Agency dominance inquiry
18 is in disarray. First, you've excluded product
19 and geographic competition. What that means is as
20 a result today the Board would ignore the formidable
21 effect that natural gas prices is having on the
22 transportation of coal.

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1 Then you've got the DMIR decision, where
2 even competition from other railroads is ignored if
3 it doesn't match the interchange point and the
4 origin of the challenged rate.

5 And then enters the limit price test,
6 whose opponents are legion and fans are few.

7 Time has revealed that that test placed
8 its integrity on a benchmark that has no correlation
9 to whether there is or is not effective competition.

10 And I have taken to heart the words of the
11 great Justice Frankfurter who said "wisdom too often
12 never comes," so it ought not be rejected merely
13 because it comes late.

14 The cumulative effects of this erosion of
15 the Agency's market dominance analysis leaves little
16 left of this important gate keeping function but the
17 statutory threshold.

18 Second, where there is a marketplace
19 failure, the Agency must follow sound regulatory
20 principles when it intervenes in the marketplace.
21 And on this second point, the revenue adequacy
22 constraint described in the coal rate guidelines is

1 the clearest example of an antiquated and
2 discredited form of rate regulation that should be
3 on the very top of your list to be discarded.

4 Finally, all of the remaining STB
5 regulations should be viewed through the lens of
6 whether any of them is needed to address a market
7 failure. And I'll offer you two final thoughts for
8 how the STB could use its broad regulatory --
9 deregulatory powers to exempt railroads from federal
10 regulations whose time has run its course.

11 First, there is no remaining justification
12 for any regulatory approval for an abandonment other
13 than perhaps to oversee the OFA process.

14 This is a leftover from when the ICC would
15 force a railroad to operate an unprofitable line to
16 in effect cross-subsidize rural regions or to leave
17 a shipper with leverage that it can use against
18 trucking companies. That idea is long since dead.

19 There is clearly no market failure that
20 would justify putting a railroad through any hoop
21 and hurdle before it decides to cease operation and
22 abandon a line.

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1 The railroad itself is far better situated
2 and has the proper incentives to make informed
3 business judgment about whether a line is or is not
4 profitable.

5 And exempting railroads from having to
6 obtain regulatory approval for abandonment would
7 avoid future situations like what we're witnessing
8 with the Harsimus case. I'm not casting any blame
9 on the STB, but that's a proceeding to abandon a
10 line that's been ongoing for eight years, where the
11 line in question has not seen any traffic in over 30
12 years.

13 Second, the Board should consider
14 exempting all traffic with rates that fall below 180
15 percent of variable costs. As Congress has declared
16 that this traffic has effective competition, there's
17 no market failure that can justify any federal
18 regulation. Might there be some rare exceptions,
19 some circumstance where federal regulation was
20 needed to protect a shipper from the abuse of the
21 market power, notwithstanding the fact that his rate
22 fell below 180 percent? Perhaps.

1 But Congress contemplated that possibility
2 when it created the safety valve whereby such a
3 uniquely situated shipper could seek to have a
4 revocation revoked if federal intervention were
5 needed to address the market failure.

6 Let me wind up by commending this idea of
7 having a public listening session. You have a rare
8 opportunity to put the Board on a better path, one
9 that conserves your own scarce resources and further
10 minimizes the degree of federal regulatory control.

11 You can seize this opportunity by
12 forgetting about how long the Agency has regulated a
13 certain activity, but ask yourself instead whether
14 federal control remains necessary to address a
15 market failure today.

16 Congress cut away a lot of regulatory fat
17 with Staggers and ICTA, but there's a lot more that
18 you can propose for the members to do today. And
19 just to recap, that list should include revisiting
20 and reforming your market dominance guidelines,
21 abandoning the antiquated and discredited revenue
22 adequacy constraints, exempting carriers from the

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1 need to obtain agency approval for abandonment and
2 exempting all traffic from federal regulation where
3 the rates in question demonstrate there is effective
4 competition.

5 Thank you for this opportunity, and I look
6 forward to reading your final report to the members.

7 DIRECTOR CAMPBELL: Thank you.

8 Our next speaker is Charlie Delacruz from
9 NGFA.

10 MR. DELACRUZ: Good morning, Director
11 Campbell and members of the task force. I am
12 Charlie Delacruz, Senior Vice President and General
13 Counsel of the National Grain and Feed Association.
14 We commend the Board for establishing this task
15 force and for the work this task force has already
16 done. We especially commend the task force for
17 conducting this listening session this morning, in
18 which we are proud and honored to participate. I
19 will do my best to provide a quick snapshot of the
20 written comments that we intend to follow up on
21 today.

22 NGFA consists have more than a thousand

1 grain feed processing exporting and other
2 grain-related companies that operate more than 7000
3 facilities and handle more than 70 percent of all
4 U.S. grain and oil seeds. NGFA also has 34
5 affiliated state and regional agribusiness
6 associations and strategic alliances with a number
7 of groups, including the North American Export Grain
8 Association and the Pet Food Institute.

9 We urge the task force to reject any
10 attempt by other stakeholders to rescind or weaken
11 the few remaining statutory protections afforded to
12 rail users under the Staggers Rail Act and other
13 federal statutes.

14 There are numerous references in Staggers
15 Act rail transportation policy that call upon the
16 Board to foster effective competition in the freight
17 rail sector.

18 Several of these statutory protections are
19 the subject of ongoing active proceedings at the
20 Board. The statutory obligation of the Board to
21 foster competition and prevent abuse of market power
22 is needed more strongly now than ever.

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1 U.S. agricultural shippers and receivers
2 in 2016 depended on just four Class 1 carriers to
3 transport 84 percent of grain and oil seed rail
4 traffic. That's compared to only 53 percent when
5 the Staggers Act was enacted in 1980.

6 The executive orders made clear, each
7 Regulatory Reform Task Force shall evaluate the
8 existing regulations and make recommendations to the
9 Agency head regarding their repeal, replacement or
10 modification, consistent with applicable law.

11 Thus, we urge the task force to reject
12 recommendations that are inconsistent or contradict
13 the governing federal statutes.

14 NGFA supports several proposals contained
15 in the May 25 status report prepared by the task
16 force for acting Board Chairman Begeman, namely
17 those addressing outdated environmental rules,
18 antiquated procedural and filing rules and
19 regulations that may be outmoded, ineffective,
20 insufficient or excessively burdensome that were the
21 subject of Ex Parte 712.

22 Unfortunately, the Ex Parte 712 proceeding

1 resulted only in a February 2016 decision that made
2 nonsubstantive, inconsequential changes. NGFA
3 concurs with then-Commissioner Begeman's assessment
4 in that 2016 decision that more substantive changes
5 to the Board's rules should have been considered
6 during the four-year time span of that proceeding.
7 And NGFA supports this task force's decision to
8 review the comments received in that proceeding.

9 Many of the suggestions of rail shipper
10 stakeholders in that proceeding follow the Board's
11 rules and procedures governing rate reasonableness,
12 revenue adequacy, reciprocal switching, market
13 dominance and other rules and procedures continue to
14 be relevant and apply today.

15 NGFA also respectfully requests the task
16 force consider including the following
17 recommendations in its report to the Board.

18 First, the Board should be redirected to
19 redouble its efforts to revamp rate reasonableness
20 rules to create a cost-effective, workable
21 methodology for agricultural shippers to challenge
22 unreasonable freight rail rates. The record is

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1 clear, the Board's three existing rate challenge
2 methodologies are too complex, too cumbersome and
3 too costly, particularly for agricultural shippers.

4 The concerns of agricultural shippers
5 about unreasonably high rail rates were borne out
6 most recently in a June 15, 2017 report by the U.S.
7 Department of Agriculture. It found "grain rates
8 have consistently risen over the past half decade,
9 even accounting for inflation, with a few brief
10 exceptions, particularly for wheat, USDA's analysis
11 found the changes in rates and rate spreads are
12 significant and puzzling, relative to the price
13 received for wheat at its destination, which has
14 declined over the same time period."

15 As an example, USDA cited average rail
16 rates for wheat, for shuttle service between the
17 same origin and destination pairs of Wichita, Kansas
18 and Houston, Texas, which are more than \$1000 per
19 car greater than the rate charged for corn.

20 USDA concluded that during a time when
21 wheat and other grain shippers have been struggling
22 against falling grain prices and rising rail rates,

1 wheat shippers in particular have found it difficult
2 to compete in export narcotics, as they face higher
3 rail rates than other grain shippers over similar
4 corridors and rates that have not declined in
5 response to changes in world wheat markets. And
6 that's again a quote from the USDA report.

7 Since the Board should revise outdated
8 rules governing reciprocal switching, that's my
9 second recommendation, the Board's existing rules
10 and precedent are the epitome of outdated
11 regulations since no party has attempted to use them
12 for nearly 30 years.

13 NGFA and other agricultural interests have
14 joined with other shipper interests in urging the
15 Board to replace its current, unworkable Class 1
16 competitive switching rules, to provide a fairer,
17 more reasonable way for shippers to access the lines
18 of competing carriers to reach customer markets.

19 Action by the Board would at the end of
20 the day merely replace a wrongly decided Agency
21 precedent and an outdated and ineffective
22 regulation.

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1 Updating and reforming the Board's
2 competitive switching rules are more important than
3 ever in today's consolidated rail marketplace.

4 Next, we strongly urge the task force to
5 not tamper with the Board's existing regulations
6 that require Class 1 railroads to import service
7 performance metrics and to file summaries of
8 agricultural transportation contracts.

9 We already are witnessing service declines
10 by at least one significant Class 1 carrier this
11 year, and both the reporting of service metrics and
12 agricultural contract summaries are beneficial to
13 agricultural shippers and to the Board itself.

14 In addition, NGFA notes that comments
15 submitted as part of the Board's Ex Parte 712
16 proceeding in 2011 regarding potential changes to
17 the Agency's rules for determining railroad revenue
18 adequacy and application of the railroad -- of the
19 revenue adequacy constraint in rate reasonableness
20 cases continue to be relevant. Since the Board
21 still has not addressed its rules and policies
22 related to revenue adequacy in a substantive manner.

1 NGFA believes rail shippers and shipper
2 organizations have provided considerable evidence
3 demonstrating a Class 1 railroads have reached or
4 exceeded revenue adequacy.

5 NGFA encourages the task force and the
6 Board to continue the efforts begun in Ex Parte 712
7 and Ex Parte 722 to develop policies and regulations
8 to comply railroads found to be revenue adequate.

9 Finally, there is one recommendation in
10 this proceeding in which the NGFA and the AAR are
11 aligned, and that regards the need for the Board to
12 reform its rules regarding ex parte communications,
13 to allow increased dialogue and information exchange
14 between the stakeholders and Board members and
15 staff.

16 Recent efforts by the Board to begin to
17 reform and modernize its ex parte rules have been
18 beneficial and appreciated.

19 We believe the task force should recommend
20 that they be continued and expanded.

21 In conclusion, NGFA again appreciates the
22 opportunity to highlight these recommendations, as

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1 well as the task force's consideration of our more
2 detailed written statement to follow, and of course,
3 we remain willing and happy to assist the task force
4 in its project at any point in any manner. Thank
5 you.

6 DIRECTOR CAMPBELL: Thank you.

7 Our next speaker is Justin Sutton from the
8 Hydrogen Super Highway.

9 MR. SUTTON: Good morning, everyone. I
10 admire the work that you do. We definitely have a
11 huge burden to manage all these problems so
12 articulated today. And I also greet everyone who
13 has attended.

14 I represent the Interstate Traveler
15 Company, which is the builder of what is called the
16 Hydrogen Super Highway. If you haven't heard of it,
17 don't be surprised. We were told by very
18 influential people back in 2004 that such a
19 revolution in transportation technology was not for
20 our time.

21 However, I can explain to you today that I
22 spent the last 10 years as subject matter expert in

1 the United States Air Force, I just spent the last
2 two days with the United States Navy, who are very,
3 very concerned about not just transportation safety
4 and security but energy security, of which the
5 Hydrogen Super Highway, for all to see, provides a
6 very adequate and exciting industrial revolution
7 that affects all of us one way or another.

8 So I would like to just read the opening
9 paragraph here. So what is the Hydrogen Super
10 Highway? It is a collection of vital municipal
11 utilities bundled into a conduit cluster providing
12 its first of its kind full integration of
13 solar-powered hydrogen production and distribution
14 system technology that provides the energy to
15 operate at high speed magnetic levitation on demand
16 public transportation network, along with any
17 permissible -- or along any permissible
18 right-of-way, private, public or such as highways,
19 local roads, power corridors, the U.S. interstate
20 highway system and, of course, our many, many
21 railroad rights of way that are currently used.

22 This gives the United States economy an

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1 opportunity to create an industrial revolution that
2 will greatly exceed the current automotive and
3 aerospace industries. It will require many millions
4 of tons of steel over the course of 10 years to
5 build the interstate highway. There's about 800
6 million tons of steel that would go into the rail
7 alone.

8 There are about 11,000 highway
9 interchanges on the U.S. interstate highway system.
10 At each location, we plan to build a pair of
11 buildings, so that people can access the system,
12 anywhere the interstate highway happens to be.

13 By using this as a public transportation
14 medium, it resolves the issues which everyone in
15 every state and every county that we've communicated
16 with, they all face, how do you build a public
17 transportation system on a rail network that's
18 already either overburdened or is really in
19 disrepair?

20 So this provides an entirely new
21 right-of-way that the public has access to, that the
22 railroad companies can take advantage of, that the

1 shippers will also be able to take advantage of.

2 As a public access railroad network, you
3 will be able to have vehicles of any type, scale,
4 size, purpose, that would operate on this brand-new
5 rail system, which was originally designed as an
6 upgrade to the interstate highway network, hence the
7 name of the company, the interstate traffic company.

8 Now, I have with me a set of booklets to
9 provide to you, along with the formal testimony
10 provided to the Federal Railroad Administration a
11 number of years ago, which gives an adequate
12 technical summary of how the system will work.

13 But for your visual reference, if you see
14 here, there is an elevated rail system that's
15 covered in solar panel material. It is not really
16 for us to decide what type of solar panels are used.
17 It is our job to create the new manufacturing
18 standard. That is a standard that would be launched
19 in the United States and will be very quickly
20 adopted globally, as our largest export of
21 industrial products in the history of the United
22 States.

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1 It is a very important transition that
2 will be taking place in the future. Not just for
3 transportation but also for communications,
4 pipelines for data, for chemicals, for fuels, for
5 any commodity liquid, vapor or gas, quite frankly,
6 that would operate within the conduit cluster that
7 you see inside of the rail.

8 It may look small, but it's actually quite
9 large. The rail gauge is 12 feet, it's three times
10 wider than the standard rail gauge.

11 The United States obviously made the
12 decision quite a long time ago to go with the
13 standard rail gauge. However, other places in the
14 world have a broad gauge, which can take much larger
15 vehicles, which adds to the serviceability of the
16 rail line and of course the comfort of the
17 passengers that might be riding it.

18 We provide the ability to support vehicles
19 that are as wide as 16 feet and as long as 60 feet
20 and as much as 24 feet tall. So you can literally
21 have a tri-level structure that can be used as a
22 mobile hospital, a mobile office, a mobile

1 residence, or really a mobile hospital one is the
2 most important to me.

3 As a statistic, the interstate highway
4 system is one of the deadliest places in the United
5 States. About 35,000 people a year enter the
6 interstate highway and either leave in an ambulance
7 or don't leave at all. And out of those 35,000
8 people that perish because of a car accident, about
9 half of them die on the way to the hospital.

10 We provide an opportunity for this rail
11 system to be down the sides of the interstate
12 highway where we can bring the critical care
13 surgical team to the scene of the accident, and
14 statistically we expect to be able to save at least
15 10,000 lives a year. If I can save one life, it's
16 worth doing, which is a part of my motivation
17 standing here before you today.

18 With that note, there is quite a bit of
19 information we can talk about. I understand you're
20 not asking questions today. But I will be in
21 Washington, D.C. for the rest of the week. We'll be
22 up on the Hill for the next couple of days.

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1 I have these to provide to you, and if you
2 have any further questions, please don't hesitate to
3 contact us. And we will certainly be -- Andre
4 Sauvageot, who you saw a moment ago, our director
5 for Washington, D.C., he has had several political
6 appointments, very influential having to do with
7 international commerce and specifically the
8 revolution of the Vietnamese economy when the trade
9 embargo was reduced. He brought in General Electric
10 and a couple of other very large American companies.

11 We are a private limited liability company
12 from the state of Michigan. We are made up of about
13 400 members, and our trade missions include about
14 the top 50 countries in the world. So our
15 international clients are waiting to see American
16 leadership, and hopefully we will see that here soon
17 in the United States with the system to be built in
18 the state of Indiana, which was permitted last year.

19 So with that, I thank you very much for
20 your time. Thank you, Justin. Thank you, all.

21 DIRECTOR CAMPBELL: Thank you.

22 Our next speaker is Pete Shudtz, CSX.

1 MR. SHUDTZ: Well, I would not be
2 addressing 711 today. I may be the only speaker who
3 isn't.

4 Good morning. I am Pete Schudtz, and I am
5 here today on behalf of CSX. CSX thanks the Board
6 for convening this listening session which promotes
7 the further improvement of the Board stakeholder
8 relations. We have submitted written comments today
9 for your consideration. Those comments lay out
10 several proposals that we will briefly summarize
11 this morning.

12 CSX also supports and adopts the AAR
13 comments delivered today by Mr. Ed Hamberger. CSX's
14 proposals are all based on our belief that the
15 Board's regulations work best when they are focused
16 on the Board's core mission, and most importantly,
17 directed at those areas that promote Congress's goal
18 for a financially healthy rail industry.

19 This teaches us that eliminating
20 unnecessary regulation is often the best way to
21 serve the interest of all stakeholders. It creates
22 a stable, naturally healthy rail system that

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1 provides rail service to shippers at reasonable
2 rates.

3 We are all familiar with the great success
4 story of deregulation resulting from Staggers. That
5 Act, the rail industry's efforts and the Board's
6 implementing regulations all led to increased
7 productivity and volumes, more investment, safer
8 operations and lower rates for shippers.
9 Mr. Hamberger's statement both demonstrates that
10 success story today.

11 But there's more that the rail industry
12 and Board can do. The Board's regulations still
13 impose unnecessary burdens that restrict
14 efficiencies, create needless transaction costs and
15 discourage investments, all of which are contrary to
16 the Staggers goals and those of the Board and the
17 rail industry.

18 Our written comments focus on three areas
19 which we believe will improve the Board's
20 regulations, the elimination of the revenue adequacy
21 constraint and improvements to the Board's
22 abandonment and environmental rules.

1 This morning I will briefly address these
2 three topics.

3 First, as Mr. Hamberger and Mr. Scheib
4 also recommend, the Board should remove revenue
5 adequacy constraint. That constraint is an outdated
6 and unnecessary form of regulation. It discourages
7 investment and innovation and most importantly, the
8 Board has other, better methodologies than SAC that
9 are economically sound. We submit that this
10 constraint is exactly the type of antiquated
11 regulation that the Board should eliminate.

12 Another area that the Board should examine
13 are its regulations governing applications for
14 abandonments in discontinuation of service. The
15 Board's 27 pages of application requirements wreak
16 substantial and unnecessary regulatory hurdles that
17 discourage abandonment of like lines even when these
18 lines satisfy the Board's standards for abandonment.
19 The Board has long recognized that it's contrary to
20 the public interest to force railroads to operate
21 unprofitable lines and for shippers to
22 cross-subsidize those lines.

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1 This policy is already encouraged by the
2 Board's efficient, timely exemption process. By
3 contrast, the Board's regulations for applications
4 were so arduous as to discourage almost any
5 abandonment that cannot be accomplished through an
6 exemption. The Board's docket clearly reflects the
7 wide use of exemptions and the absence of
8 applications.

9 The 1920 abandonment law goes back to the
10 steam era, the beginnings of truck transportation.
11 The Board's application requirements today remain at
12 essentially pre-Staggers construct. Although the
13 Board has updated many of its regulations over the
14 years, the application requirements still set forth
15 arduous processes that take several years to
16 adjudicate and/or coupled with uncertain results and
17 lengthy post-decision conditions.

18 The Agency should reform its regulations,
19 specifically the Board should consider a new cost
20 exemption allowing railroads to abandon or
21 discontinue service of all unprofitable lines by
22 notice of class exemption. The new class exemption

1 could be modeled on the Board's very successful out
2 of service class exemption.

3 Like that exemption, you protect the
4 interest of any shippers on the line by providing
5 opportunities for offers of financial assistance to
6 continue rail service, thereby placing the burden of
7 unprofitable operations on the beneficiary of those
8 services.

9 At the same time, this suspended exemption
10 process will allow the Board to focus on the
11 financial assistance requirements of the Act and the
12 other public uses for unprofitable lines which the
13 Board encourages so well.

14 Finally, the Board's ongoing efforts to
15 update its environmental rules should employ new
16 thresholds for determining whether or not it would
17 result in significant changes to carrier operations.
18 Specifically, the Board should reconsider its eight
19 trains a day and three trains a day thresholds for
20 traffic increases on lines served. These are
21 thresholds that most commonly trigger environmental
22 review.

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1 In the first place, the Board should
2 consider whether it makes any sense to have the
3 lower three trains a day threshold for environmental
4 review in nonattainment areas. It is well
5 recognized that shifting traffic from trucks to
6 rail, has environmental benefits, both because of
7 decreased emissions and decreased highway traffic.

8 In light of these benefits, it's
9 counterproductive to have lower threshold for
10 competing rail operations in nonattainment areas.

11 Moreover, the Board should change the
12 thresholds that automatically deem any increase of
13 three or eight trains per day to be significant
14 traffic increases. On a daily basis, those
15 operational changes are completely unrelated to any
16 transaction the Board makes.

17 Our written comments further outline these
18 two options for changing the Board's metrics that
19 would better focus the Board's environmental review
20 on treating significant changes resulting from the
21 transaction.

22 Lastly, the Board should consider whether

1 certain categories of Board decisions, like exempt
2 abandonments, administrative acts -- do not require
3 environmental review.

4 In conclusion, CSX thanks the Board and
5 its staff for instituting this proceeding, and for
6 considering ways it can eliminate unnecessary
7 regulations. CSX appreciates the opportunity to
8 submit its written comments on these important
9 issues and looks forward to the Board's continued
10 deregulation efforts.

11 That concludes my comments, and kindly let
12 me know if I may provide any additional information
13 to the group or to the Board.

14 And I would also lastly like to just
15 comment on some of the earlier commenters on service
16 issues. I must note that we always try to be
17 responsive to our customers, and we appreciate very
18 much Ms. Marvin's office to help assist us in our
19 communications with our shippers on an informal
20 basis. Thank you again.

21 DIRECTOR CAMPBELL: Thank you.

22 According to my list, we are through all

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1 the speakers for today. But is there anyone who had
2 intended to speak who somehow didn't make it on the
3 list? I just want to make sure everyone had an
4 opportunity before we close.

5 Okay. As I said, the transcript of this
6 will be available and will be placed in the docket,
7 the EP738 docket. Also, the status reports of the
8 task force are on the Board's Web site under a
9 landing page for the Regulatory Reform Task Force.
10 Right now there's just one up there that I know a
11 number of you referred to, so I know you found it.
12 But as we have more status reports, those will be
13 posted there as well, so you can keep an eye out for
14 that.

15 Thank you so much for coming here today,
16 providing your comments. I'm sure they are going to
17 be tremendously helpful to us, and we're all looking
18 forward to getting into a conference and sorting it
19 all. So thank you very much. We appreciate it.

20 (Whereupon, at 11:59 a.m., the hearing was
21 concluded.)

22

CERTIFICATE OF NOTARY PUBLIC & REPORTER

I, CARMEN SMITH, the officer before whom the foregoing hearing was taken, do hereby certify that the witness whose testimony appears in the foregoing hearing was duly sworn; that the testimony of said witness was taken in shorthand and thereafter reduced to typewriting by me or under my direction; that said hearing is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Notary Public in and for the
District of Columbia

Commission Expires: MARCH 31, 2018

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