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January 13, 2017

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: STB Docket No. EP 711 (Sub-No. 1)
Reciprocal Switching

Dear Ms. Brown:

In accordance with the decisions served July 27, 2016 and September 1, 2016 in the above-referenced proceeding, enclosed are the "Reply Comments Of The Kansas City Southern Railway Company" to be submitted as part of the record in this proceeding. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET NO. EP 711 (SUB-NO. 1)

RECIPROCAL SWITCHING

**REPLY COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

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Railway Company**

Dated: January 13, 2017

TABLE OF CONTENTS

SUMMARY OF ARGUMENT	1
ARGUMENT.....	3
I. SHIPPERS' COMMENTS MAKE IT CLEAR THAT THEIR INTENT IS TO SEEK A BACK-DOOR MEANS OF OBTAINING RATE RELIEF WITHOUT HAVING TO FILE A RATE COMPLAINT AS REQUIRED BY STATUTE	3
A. The Comments Are Directed At Concerns Over Rates, Not Anticompetitive Actions Or Market Abuses	3
B. The Board Has No Legal Authority To Regulate Rates Through Section 11102 ...	5
C. The Rail Transportation Policy ("RTP") Does Not Provide A Sufficient Legal Basis To Artificially Manufacture Competition So As To Reduce Rates	7
II. SHIPPERS IGNORE OR SEEK TO EXACERBATE THE OPERATIONAL HARMS OF FORCED SWITCHING.....	11
III. THE OPENING COMMENTS DO NOT SUPPORT APPLYING THE PROPOSAL TO CLASS II OR III CARRIERS OR TO KCS	16
IV. SEVERAL SUGGESTED CHANGES AND PROPOSALS SHOULD BE REJECTED AS BEING INCONSISTENT WITH THE STATUTE AND PRECEDENT	19
A. The Term "Reasonable Distance" Must Be Limited In Scope	19
B. The Board Cannot Compel A Carrier To Build, Create, Or Require A Working Interchange	25
C. Parties Have No Legal Authority To Challenge A Compensation Fee That The Carriers Have Agreed Upon	28
D. The Burden Of Proof Cannot Be Shifted To The Railroads.....	30
CONCLUSION.....	32

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**REPLY COMMENTS OF
THE KANSAS CITY SOUTHERN RAILWAY COMPANY**

SUMMARY OF ARGUMENT

The Board should not adopt the forced switching rules contained in its Notice of Proposed Rulemaking (“NPR”).¹ The opening comments by the shippers clearly establish that their goal for the proposal is to lower rates. There would be no requirement for a shipper to show that an incumbent carrier has abused its market power or that there has otherwise been a failure in the marketplace. Rather, shippers would merely need to show through two different potential tests, that the “public interest” justifies government-mandated competition and that the switching would not substantially impair railroad operations. The Board has neither the statutory authority nor Congressional direction to regulate rates through forced switching. When there has been no market abuse by an incumbent carrier or failure of the marketplace so as to justify government interference, there is no public interest or competitive need justifying the Board’s proposed remedy.

If the proposal is adopted, there could be significant unintended consequences to the rail network. These consequences include, but are not limited to, significant operational interference and congestion, inefficient switching and routes, reductions in revenues available for investment,

¹ Reciprocal Switching, EP 711 (Sub-No. 1) (STB served July 27, 2016).

stranded infrastructure, and distortions in when, how, and why to invest in additional infrastructure. The Board's proposal either ignores these consequences or kicks the can down the road by simply saying that it will deal with such issues on a case-by-case basis. Such an approach only creates further uncertainty and further increases the possibility of potential disparate treatment among and between carriers and shippers alike.

While claiming that it will deal with such impacts on a case-by-case basis in cases involving Class I's, with respect to Class II's and III's, the Board takes a different approach. There, the Board recognizes that the consequences of its proposal on the revenues and operations of Class II's and III's could be significant. Rather than dealing with those circumstances on a case-by-case basis, the Board instead proposes different regulatory treatments between the Class I carriers and the Class II and III carriers.² While KCS supports this different treatment, the Board ignores that there is little principled difference to support differentiating Class II and III carriers from smaller Class I's. Moreover, smaller Class I's, like KCS, share many of the characteristics that the American Short Line and Regional Railroad Association ("ASLRRA") advocated in EP 711 as justification for exempting Class II's and III's from the rules. Accordingly, if the rules are adopted, which they should not be, reasoned decision-making requires the Board to treat KCS similar to Class II and III carriers.

For the reasons set forth in these comments, the Board should not adopt the rules as proposed. Instead, it should discontinue this proceeding.³ Rather than promulgate a new,

² "The Board is proposing in this decision to limit the availability of reciprocal switching prescriptions to... Class I rail carriers due to the lack of specific information on this matter and the concerns raised by ALSRRA." NPR, slip op. at 20-21.

³ If it does not, however, the Board, at a minimum, should adopt the clarifications and limitations set forth in KCS's Opening Comments. As discussed in those Opening Comments, the Board also needs to adopt a compensation methodology that would ensure that KCS is able to maintain

potentially ineffective end run around its existing rate complaint processes, which would result in significant unintended consequences to the entire rail network, the Board should focus on addressing the efficacy of the rate complaint process. The solution to the complexity of rate complaints is not a pervasive new switching regime, but rather, to focus on improving the methodologies and processes that already exist in the statute by which a shipper can challenge its rate as unreasonable.

ARGUMENT

I. SHIPPERS' COMMENTS MAKE IT CLEAR THAT THEIR INTENT IS TO SEEK A BACK-DOOR MEANS OF OBTAINING RATE RELIEF WITHOUT HAVING TO FILE A RATE COMPLAINT AS REQUIRED BY STATUTE

A. The Comments Are Directed At Concerns Over Rates, Not Anticompetitive Actions Or Market Abuses

In its Opening Comments, KCS argued that shippers viewed the Board's proposed rules as an alternative method of rate relief. Unsurprisingly, the majority of the opening comments filed by shippers overwhelmingly confirms KCS's argument.⁴ In addition to encouraging the Board to provide an alternative form of rate relief via forced switching, shippers suggest rules to broaden the availability of such relief and to secure rate reduction through forced access. There is no legal basis for the Board to adopt the proposed rules and the shippers' suggested revisions.

sufficient revenues so as to continue to invest in its network and compete against the larger carriers. The various shipper-proposed compensation approaches fail that test.

⁴ See, e.g., Opening Comments of Alliance for Rail Competition ("ARC") et al. at 4; Opening Comments of Diversified CPC International, Inc. at 6, 11 (forced switching would resolve the problem of competitive rail rates and control costs); Opening Comments of Shell Chemical LP ("Shell") at 1 (forced switching would improve incentives to "maintain a competitive price"); Opening Comments of The Chemours Company ("Chemours") at 1 (suggesting forced switching would reduce rail rates at "captive locations."); and Opening Comments of INEOS USA LLC ("INEOS"), at 3 (stating that it would rather have access to a second carrier than file a rate complaint).

Doing so would violate public policy and be unlawful because the Board has no authority to provide rate relief without requiring shippers to file a rate complaint.⁵

The shippers' opening comments clearly demonstrate a strong desire to use forced switching as a way to obtain lower rates without having to file a rate complaint. One need only examine the various opening comments that discuss the access price methodology to realize that this is the shippers' primary concern. In opposing any efforts by the railroads to obtain some form of lost contribution, the shippers specifically argue that the Board should reject such requests because adopting the railroad's access price methodology would not allow the shippers to retain the rate-reducing benefits of forced switching.⁶ Shippers are united in their opposition to allowing the incumbent carrier to recover lost contribution because they believe that would limit the rate reduction they hope to achieve through forced switching.

Clearly – the sole goal of the proponent shippers is to find a means by which they can obtain lower rates. Almost all shippers asserted that the main reason for doing away with the agency's existing standard set out in Midtec⁷ was to force artificial competition to lower rates. Their primary rationale for doing away with Midtec was that no party had successfully obtained a reciprocal switching order pursuant to that standard. Yet, simply pointing out that no party has ever won a case under Midtec does not, *ipso facto*, justify doing away with that standard.

Indeed, as KCS pointed out in its Opening Comments, the ICC and the STB denied all of the

⁵ KCS joins in support of the AAR's reply comments.

⁶ See Opening Comments of Cargill, Incorporated ("Cargill") at 7-8; Opening Comments of Sandy Creek Energy Associates, Brazos Sandy Creek Electric, Cooperative, And Lower Colorado River Authority ("The Sandy Creek Co-Owners") at 13, 15; Opening Comments of Dow Chemical Company ("Dow") at 11; Opening Comments of INEOS at 12, 14; Opening Comments of National Grain and Feed Association ("NGFA") at 16-17; and Opening Comments of The Shipper Coalition for Railroad Competition ("Shipper Coalition") at 5, 53-54.

⁷ Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171, 181 (1986), aff'd sub nom. Midtec Paper Corp. v. U.S., 857 F.2d 1487 (D.C. Cir. 1988)) ("Midtec").

previous cases brought by shippers under Midtec precisely because those attempts really involved complaints about rates, not about a failure of the marketplace or railroads abusing their market power. See Opening Comments of KCS at 6-7.⁸

B. The Board Has No Legal Authority To Regulate Rates Through Section 11102

The Board has consistently found that it has no authority to use Section 11102 to accomplish rate relief and that the proper course of action would be for shippers to file a rate complaint case. As the Board has said, the competitive access provisions of Section 11102 were intended to remedy a situation where the incumbent carrier has used its market power “to extract unreasonable terms on through movements, or ... because of its monopoly position, has shown a disregard for the shipper’s needs by rendering inadequate service.” See Bottleneck I, 1 S.T.B. 1059, 1066 (1996).⁹ Section 11102 is not meant to provide an alternative form of rate relief. See Midtec, 857 F.2d at 1503-1508. Indeed, Section 11102 contains no authority or language to indicate that it is to be used to remedy concerns over rates. The subject of rates, including the reasonableness of rates, the limitations on Board authority over rates and the standards that govern rate regulation, is addressed exclusively in Chapter 107 of Title 49 U.S.C.

Chapter 107 provides the sole means by which to obtain rate relief. Under those provisions, the railroads have the right to establish any rate they choose in the first instance, and the authority of the Board to determine the reasonableness of a railroad-established rate cannot

⁸ Additionally, the Board has made it clear that it has the authority pursuant to Section 11102 to correct anticompetitive abuses but it does not have the authority to use its “power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.” Midtec, 3 I.C.C.2d at 173-74 (1986).

⁹ Central Power & Light Co. v. S. Pac. Transp. Co., 1 S.T.B. 1059 (1996)(“Bottleneck I”), clarified, Central Power & Light Co. v. S. Pac. Transp. Co., 2 S.T.B. 235 (1997)(“Bottleneck II”), aff’d sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

be invoked unless a complaining shipper makes a threshold showing of market dominance.¹⁰ If that showing is made, the Board can then determine if the rate is unreasonable and needs to be reduced.

The Board, over the past twenty years, has worked hard to implement, revise, modify, and simplify the process by which rates can be challenged as being unreasonable. It has adopted several methodologies and processes available to both large and small shippers.¹¹ While these changes have been welcomed by the shipper community, many shipper organizations continue to contend that the rate complaint process is unworkable. The Board is continuing to examine ways to improve that rate complaint process.¹² However, simply because the rate complaint process is not working in the way shippers' desire does not provide legal authority for attempting to do an end-run around Chapter 107. In short, Chapter 107 establishes the standards and limitations that

¹⁰ Some shippers suggest that the Board should remove the requirement that the shipper show market dominance by the incumbent carrier from the proposed forced switching rules. See Opening Comments of Western Coal Traffic League and Minnesota Power ("WCTL/MP") at 4, 18, and 19; Opening Comments of NGFA at 9-12; Opening Comments of ARC at 10-11; Opening Comments of G3 Enterprises, Inc. ("G3") at 5, 7; Opening Comments of Highroad Consulting at 6-10; and Opening Comments of Diversified CPC at 8-9. To the extent that the shippers use forced switching as a way to challenge rate levels, this suggestion violates the statute. 49 U.S.C. 10701(d)(1).

¹¹ See, e.g., Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987); Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1)(served Oct. 30, 2006), aff'd sub nom. BNSF Railway v. STB, 526 F.3d 770 (D.C. Cir. 2008); Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (served Sept. 5, 2007), aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir.), vacated in part on reh'g, 584 F.3d 1076 (D.C. Cir. 2009); and Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc., No. 42121 (served Sept. 14, 2016).

¹² Rail Transportation of Grain, Rate Regulation Review, EP 665 (Sub-No. 1) (STB served Aug. 31, 2016)(Board sought comment on procedures that could comprise a new rate reasonableness methodology for use in very small rate disputes, which would be available to shippers of agricultural and other commodities); and Expanding Access to Rate Relief, EP 665 (Sub No. 2) (STB served Aug. 31, 2016)(the Board sought comments to develop a new rate review process that would be more affordable and accessible to shippers of all commodities with small disputes).

must be applied for shippers to obtain reduced rail rates. Section 11102 was designed to remedy anticompetitive conduct. The Board and the shippers are trying to eliminate those Congressional distinctions through regulatory fiat.¹³ This they cannot do.

C. The Rail Transportation Policy ("RTP") Does Not Provide A Sufficient Legal Basis To Artificially Manufacture Competition So As To Reduce Rates

Shippers singularly focus on only one goal of the RTP to support circumventing Chapter 107 and using Section 11102 as a means of reducing rates. A significant number of shippers claim that the RTP provision that instructs the Board "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail," 49 U.S.C. 10101(1) (emphasis added) ("RTP-1"), justifies the Board's proposed changes to its reciprocal switching rules.

They are wrong. The phrase "to allow, to the maximum extent possible" directs the Board to restrain itself from interfering with the naturally occurring forces of supply and demand for rail transportation. Those competitive forces in the marketplace should set the rail rates. The policy does not authorize the Board to artificially manufacture competition that imposes artificial downward pressure on rail rates. To "allow competition" does not mean to "manufacture competition" as the Board's proposal attempts to do.

Moreover, the Board is not free to act in service of only one goal of the RTP to the exclusion of all others. Indeed, the Board has the obligation to weigh and balance all fifteen

¹³ Shippers attempt to achieve rate relief on all traffic moving to a facility by limiting the consideration of market dominance under the proposed forced switching rules to the bottleneck portion of a particular route. This is contrary to the Board's existing rate reasonableness precedent that requires a shipper to challenge the reasonableness of a rate for an entire route. See Louisville & Northern Railroad Company v. Sloss-Sheffield Steel Iron Co., 269 U.S. 217, 231-34 (1925); Great Northern Railway Company v. Sullivan, 294 U.S. 458, 463 (1935) (finding that the shipper's only interest is that the through rate should be reasonable as a whole); Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 400-10 (1989).

policy goals that establish the framework for regulatory oversight in the rail industry. Market Dominance Determinations – Product and Geographic Competition, EP 627, slip. op 6-7 (STB served April 6, 2001). By catering solely to shippers' desire to obtain lower rates, the Board inappropriately gives short shrift to several other policy goals of the RTP. See Intramodal Rail Competition – Proportional Rates, 1990 WL 287993 (ICC 1990) at *2 (“Intramodal Rail Competition”) (“The contention that the policy favoring promotion of rail-to-rail competition is independent or preeminent of revenue need ignores the statute’s clear requirement that [the Board] maintain standards and procedures for adequate revenue levels and ignores the principle that the various policies of the Act, some of which conflict, must be balanced.”).

For example, the second goal of the RTP directs the Board “to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.” 49 U.S.C. 10101(2) (“RTP-2”). The proposed rules have the opposite effect, allowing wholesale regulatory intervention to manipulate the marketplace to create artificial downward pressure on rates. Additionally, the Board’s failure to provide any kind of guidance about what might constitute a sufficient showing for relief leaves parties with much uncertainty. As parties have pointed out, uncertainty is more likely to lead to extended litigation, rather than an efficient resolution of a dispute.¹⁴ This is inconsistent with RTP-2.

Perhaps realizing the complexity and uncertainty of the proposal, the shippers attempt to address this issue by creating a prima facie case, where burdens of proof for certain elements of the Board’s open-ended public interest analysis would be shifted to rail carriers in an effort to

¹⁴ See Opening Comments of INEOS at 7, 10-11; Opening Comments of The Freight Rail Customer Alliance (“FRCA”) at 3; Opening Comments of The Sandy Creek Co-Owners at 6, 8, 11-12.

streamline and limit the evidentiary findings.¹⁵ Such proposals serve only shippers' desire for a faster and cheaper way to lower rates, in keeping with their one dimensional policy approach to avoid having to file a rate complaint, show market abuse, or meet its burden of proof to show that there has been some failure in the marketplace.

The third goal of the RTP encourages the Board "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board." 49 U.S.C. 10101(3) ("RTP-3").¹⁶ The agency has long acknowledged the importance of differential pricing to a railroad's ability to recover its high fixed costs. See, e.g., Intramodal Rail Competition; Coal Rate Guidelines, Nationwide, 2 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. ICC, 812 F.2d 1444 (3d Cir. 1987). However, the Board's proposed rules and shippers' proposed changes to the Board's proposal directly hinder rail carriers' ability to engage in differential pricing by artificially manipulating a shipper's demand elasticity.

FRCA asserts that railroads can make up revenues lost as a result of a forced switching order by increasing rates for traffic with transportation alternatives, i.e., competitive traffic. See Opening Comments of FRCA at 3. That assertion makes no sense at all. A carrier will not be able to increase rates on traffic with transportation alternatives, i.e., competitive traffic because it is already subject to market constraints. Thus, a carrier will likely not be able to make up contribution lost to forced switching through rate increases and instead could see a significant reduction in its ability to recover its fixed costs, which will negatively affect the rail carrier's

¹⁵ KCS addresses the unlawfulness of shippers' burden-shifting proposals in Section IV(D), infra.

¹⁶ One shipper asserts that the revenue impact of the Board's proposed rules on rail carriers should be irrelevant. See G3 at 6, 9. Another shipper states that "revenue adequacy should not be a factor" in the Board's adoption of its forced switching rules. See also INEOS at 9. Both assertions are contrary to the goals expressed in the RTP.

ability to attain revenue adequacy and reinvest in its system. This, in turn, could cause carriers to shed marginally profitable lines through abandonments or further shrinkage of the Class I systems. This would have significant effects on shippers.¹⁷ Eventually, the cumulative effects of such case-by-case hindrances will impact other goals of the RTP, see, e.g., RTP-3; 49 U.S.C. 10101(4) (charging the Board “to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense.”).

Finally, the RTP sets forth the Board’s goal of maintaining “reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital.” 49 U.S.C. 10101(6) (“RTP-6”). Shippers and rail carriers disagree as to what rate levels constitute “reasonable rates” and whether “effective competition” exists. However, shipper opinions about rate levels or the access to rate relief, without actual evidence that rail carriers are doing anything wrong or that there is some failure in the marketplace for which government needs to intervene, do not justify Board action. That the Board has proposed to revise its competitive access rules in response to shipper complaints about rate levels, instead of in response to evidence of carrier wrong doing or market failure, transforms forced switching into more of a right than a remedy. This constitutes an impermissible and unlawful end-run around the existing rate relief process.

Shippers’ opening comments predominantly reflect a desire for an easier path to rate relief. The Board’s proposed rules might serve that end. However, in its haste to address

¹⁷ Labor interests note that the Board’s proposed forced switching proposal would negatively affect railroad employment as well. See Opening Comments of Samuel J. Nasca, /for and on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY) at 6. See also RTP-11 (“to encourage fair wages and safe and suitable working conditions in the railroad industry”).

shippers' desire to circumvent statutory protections Congress required for challenging rate levels, the Board is shirking its statutory directive to balance multiple policy goals of the RTP. While the Board's current actions may benefit short run shipper interests, the Board cannot ignore the impact of the proposed rules on rail carriers and other constituencies.

II. SHIPPERS IGNORE OR SEEK TO EXACERBATE THE OPERATIONAL HARMS OF FORCED SWITCHING

In their opening comments, as in the original EP 711 proceeding, the railroads show how the Board's proposal would disrupt rail network operations through added switching and reduced investment. Most shipper commenters give little attention to the issue of disruption of rail service due to the Board's proposal. Indeed, many shippers would make that disruption worse by stretching forced switching dozens or hundreds of miles, or asking the Board to give away a railroad's private property to shippers or to the railroad's competitors. However a few rail users that aren't looking to capitalize on the Board's proposed giveaway of rail assets, sound a loud warning note that major disruption of the rail network could result from the Board's proposal. It is these, more credible voices – United Parcel Service ("UPS"), Hub Group Inc. ("Hub"), National Railroad Passenger Corporation ("Amtrak") and ports – to which the Board should pay heed.

In comments submitted in the original EP 711 proceeding, railroads, the AAR and ASLRRRA submitted extensive evidence of the operational harm that the NITL proposal would cause. These included excessive switching movements, loss of efficiency and overburdening existing interchange facilities. See, e.g., Verified Statement of Gregory Walling in support of KCS Reply Comments in EP 711 (included in Exhibit B to KCS's opening comments here), and Opening and Reply Verified Statements of William J. Rennie in support of AAR's Opening and Reply Comments in EP 711 (included in Appendix to AAR Opening Comments here). The

Board chose not to deal with this evidence in the EP 711 proceeding, and instead closed the EP 711 proceeding without a substantive decision on the railroads' operational impact evidence.¹⁸

As in the original EP 711 proceeding, the railroads' opening comments in this proceeding show clearly the disruptive effects of the Board's proposal on operations and investment. See, e.g., Verified Statement of Thomas C. Haley in support of UP's opening comments; Verified Statement of Jeffrey H. Sliger in support of NS's opening comments. Similarly, the ASLRRA stated, "ASLRRA vigorously opposes the imposition of a rule mandating reciprocal switching as it would be extremely injurious to the national rail system." Opening Comments of ASLRRA at 3. Patriot Rail Company, LLC ("Patriot"), a shortline holding company, said "The primary factor in terminal efficiency is the number of switch events (including interchange events) required to handle each carload. The proposed Rule would result in additional switch and interchange events that in turn create inefficiencies at terminals, leading to a decline of network performance on a national scale." Opening Comments of Patriot at 2. Altogether, the opening comments reiterate and amplify the evidence of direct, immediate damage to railroad operations that forced switching would cause.

The railroads' evidence shows not only direct operational harm from the Board's proposal, but also substantial harms to network investment and future capacity. As shown in the Verified Statement of Jeffrey M. Songer ("Songer VS") supporting KCS's opening comments,

¹⁸ KCS, CSX Transportation, Inc. ("CSX") and many of the other carriers have resubmitted all or parts of their testimony from the original EP 711 proceeding so that the Board will consider and make findings on the operational issues raised there, issues which remain directly pertinent here despite the Board's deletion of NITL's conclusive presumptions in favor of the Board's current vaguely described, case-by-case proposal. KCS also notes the Shipper Coalition, on January 9, 2017, requested that the record in EP 711 be consolidated with the record in this proceeding, also requiring the Board to evaluate and discuss the operational impact evidence previously submitted.

the Board's proposal jeopardizes new investment to support shipper needs, particularly investment in yard capacity. Opening Comments of KCS, Songer VS at 6-8. Testimony by other carriers' witnesses is similar. See, e.g., Verified Statement of Thomas C. Haley in support of Union Pacific opening comments, at 11-12; Verified Statement of John H. Friedmann in support of NS opening comments, at 6-10. Together, this evidence shows that not only will the Board's proposal result in inefficiency and added operational complexity now, it will also eliminate investment incentives to fix those problems for the future.

Being focused on the potential of obtaining revenue enhancement at the railroads' expense, few shippers comment on the operational impacts of the Board's proposal. Those that purport to address operational issues draw general conclusions based on inapposite facts. For example, Chemours states that where its plants are open to reciprocal switching, it does not experience operational problems. Opening Comments of Chemours at 1. This type of analysis, of course, does not acknowledge the fact that such switching is voluntary and supported by adequate facilities, something that the railroads' evidence shows is not true at most locations. As another example, FRCA discounts the negative effect of the proposed rules on rail operations because "Canadian Pacific Railway Company (CP) unilaterally and voluntarily proposed to extend terminal trackage rights and reciprocal switching, and other bottleneck relief to its United States operations as part of its recently proposed combination with NS." Opening Comments of FRCA at 3. CP's vague and non-specific proposal made in connection with a transaction that was ultimately withdrawn in the face of broad opposition does not support the notion that the effect on rail operations of the Board's very specific proposal on forced switching would be negligible.

A number of shippers' comments would make the operational harm from the Board's proposal far worse than the Board's own proposal. For example, NGFA asserts that "switching" should normally be allowed for 100 miles, and further in individual cases. Opening Comments of NGFA at 7. The National Mining Association ("NMA") says allowing "switching" to cover a distance of 140 miles is "critical." Opening Comments of NMA at 2. WCTL and Northern Indiana Public Service Company ("NIPSCO") go even further, suggesting that a "reasonable distance" for "switching" should mean 10% of the total linehaul distance. Opening Comments WCTL/MP comment at 4; Opening Comments of NIPSCO at 5. These suggestions make a mockery of shippers' references to reciprocal switching being a "less intrusive form of competitive access." Suggesting that "switching" should be carried on for these distances obliterates the concept of what switching is, and would lead to even greater operational inefficiencies at the whim of a shipper or for the benefit of one's competitor.

Remarkably enough, some shippers go even further toward increasing government control and regulations, suggesting that the government should mandate that they (or their serving carrier's competitor) be allowed to appropriate the property of the incumbent serving carrier for their own use. Shippers such as Cargill, Dow, Runyon Industries and Shell all suggest that even if facilities necessary for switching don't exist, they should be allowed to build them.¹⁹ Not only would such facilities be installed where the railroad has no operating plan for switching, they also would appropriate use of the railroad's property to a particular shipper or its competitor, limiting the future ability of the railroad to make more productive use of its own

¹⁹ See Opening Comments of Cargill at 10; Opening Comments of Dow at 11; Opening Comments of Runyon Industries at 1; Opening Comments of Shell at 2.

property. These shippers' suggestions evidence that much of the shipper community sees the Board's proposal as a proposed giveaway of railroad assets to shippers.

However, several unbiased users of the rail network – UPS, Hub, Amtrak, port authorities and others – strongly echo the railroads' concerns about disruption to network fluidity and service capacity. These entities count on the fluidity of the rail network to meet their and their customers' needs. None would be in a position to cash in on the Board's proposal, as the shippers described above hope to be. Rather, each sounds a note of concern about the huge potential for disruption of the rail network due to the Board's proposal:

UPS's experience in other contexts leads us to conclude that implementation of a new reciprocal switching scheme will lead to decreased network velocity, diminished capital investments into the freight rail network, and deteriorating rail intermodal service levels....Ultimately, if rail intermodal service levels fall below UPS time-in-transit obligation standards, we would have no business option but to move these containers and trailers back onto the highway..."

Opening Comments of UPS at 1-2.

I write this letter to strongly oppose the forced access proposal. Hub Group's customers depend on consistent intermodal service in order to best manage their inventory and operations. Less rail switching results in better railroad operations, better transit times and expanded market reach for railroads. In addition, railroads have invested in their intermodal facilities, streamlined operations and limited car handlings. As a consequence, rail service has greatly improved and, in doing so, presented customers with a competitive service alternative to over-the-road service...By implementing forced access, the additional handling of railcars will inevitably cause rail operations and service to worsen. Further, as forced access spreads, it will eventually affect customers across the network as slower rail operations result in slower turn times for rail cars, resulting in increased equipment shortages, fuel use, congestion and network delays.

Opening Comments of Hub at 1.

Amtrak has a unique perspective on the effects of the STB's new policy. We are the only railroad that operates from coast to coast, and throughout the national rail network....Amtrak is concerned that the new reciprocal switching policy may adversely impact the performance of our national network trains, particularly in congested terminal areas such as Chicago....Our greatest concern is that additional freight train and switching operations under the new policy could

adversely affect the on-time performance of our long distance and state-supported routes...Implementation of reciprocal switching likely will require additional freight operations to move trains and freight cars to different and additional interchanges. Additional switching operations needed to interchange freight traffic may increase rail network congestion that could adversely affect Amtrak trains....Reciprocal switching would likely obligate the six Class I railroads that serve Chicago to increase the number of freight cars they interchange with each other there. Needless to say, that could make a very bad situation worse.

Opening Comments of Amtrak at 1-2.

Similar concerns were expressed by other impartial parties, such as the Florida Department of Transportation, the Port of Greater Cincinnati, the Harrisburg Regional Chamber and Capital Region Economic Development Corporation, the Port of Tampa Bay and other entities concerned with rail network operations and fluidity, not with seeking a handout under the Board's proposal.

The Board should pay careful heed to the voices of these rail network users who aren't seeking to capitalize on the Board's proposed giveaway of railroad assets. These unbiased voices confirm the concerns with the Board's proposal that the railroads' evidence in both EP 711 and in this proceeding have clearly established. The record irrefutably shows that the Board's proposal will cause substantial network disruption. Moreover, the proposal will undercut investment incentives necessary to build network capacity for future growth.

III. THE OPENING COMMENTS DO NOT SUPPORT APPLYING THE PROPOSAL TO CLASS II OR III CARRIERS OR TO KCS

KCS's Opening Comments supported the Board's decision to exclude Class II and III carriers from the proposed rule. KCS also pointed out, however, that the Board had made no principled distinction between Class II/III carriers and smaller Class I carriers such as KCS. While opening comments by some shippers seek to pull Class II and III carriers into the Board's proposal – either as recipients but not providers of forced switching, or as both recipients and

providers – evidence by small railroad interests continues to demonstrate significant hardship to smaller carriers from being made part of the forced switching regime. In addition, testimony by CSX reinforces that the Board's proposal would have disparate impacts among Class I carriers. Overall, the record supports excluding KCS from the scope of the Board's proposal, along with Class II and III carriers.

Testimony on behalf of smaller carriers continues to demonstrate that they could be significantly damaged by being included in the Board's proposal. ASLRRA testified that applying forced switching to smaller carriers will disproportionately hurt small railroads because small railroads' operations are heavily focused on short-haul and switching operations. Opening Comments of ASLRRA at 8. Other factors cited by ASLRRA for excluding small carriers included–

- Limited number of customers and the significant harm to a carrier's finances if revenue from serving a customer were lost
- Smaller carriers are generally already subject to substantial intermodal competition
- Shorthaul, interline nature of many shortlines' operations
- Smaller carriers operate at a limited number of locations, and while potentially providing switching to a larger carrier, don't have the ability to compensate for traffic and revenue losses by seeking switching from that carrier elsewhere
- Being forced to cost-based pricing would damage the small carrier's financial soundness

Opening Comments of ASLRRA at 8 – 10.

Other shortline interests similarly offered good reasons why sweeping Class II and III carriers into the Board's proposal would damage them and others like them, and, in turn, the entire rail network which often depends on them to originate or terminate shipments handled mostly by larger carriers. Patriot reinforced ASLRRA's evidence that many shortlines have a limited customer base, and loss of a customer could create significant financial hardship. Patriot also focused on the potential of a larger carrier to cherry-pick high value customers, while

leaving the shortline with the common carrier obligation to provide all remaining, less remunerative service.

Railroads – of all Classes – have a common carrier requirement to serve all customers. Forced access that permits a foreign carrier to ‘cherry-pick’ the most profitable customers is in direct conflict with our common carrier obligation to serve all customers. Forced access creates an asymmetric relationship in which one carrier can select which customers to serve while the incumbent carrier must serve the remaining customers (unless/until the line is abandoned).

Opening Comments of Patriot at 2. Overall, Patriot’s comments stress the harm to the national rail system that the Board’s proposal would cause, both to large carriers and to smaller ones.

Big Spring Rail System, Inc. (“BSR”), a Class III carrier, voices concerns for itself and other small carriers that also echoes the concerns of the Class I’s. “An unintended consequence of extending reciprocal switching to Class II and certainly Class III carriers might be eviscerating the ability of small roads to ferret out and customize rail solutions for shippers, BSR wrote in its July 30 opening comments. Voicing concerns similar to those of larger carriers, BSR went on to state –

If a Class I could force entry into a Class III’s customer at some arbitrary fee, it could take away the Class III’s entrepreneurial prerogative to negotiate either a lower truck-competitive factor or a higher factor that amortizes the cost the building necessary rail infrastructure.

Opening Comments of BSR at 1. In short, BSR was concerned with how it could provide good service and support its infrastructure if its traffic could be cherry-picked at a fee at an arbitrary fee.

Even CSX, one of the four largest carriers in the U.S., shows that not all Class I’s are the same when it comes to the impacts they would suffer from the Board’s proposal. CSX notes that some geographic areas have a higher density of interchanges than others, which means the proposal would have a disproportionate impact in those areas vis-à-vis other areas where there

are few interchanges among the large carriers. CSX also points out that carriers differ in their success in achieving revenue adequacy and that the proposal could exacerbate those differences.²⁰ The Board, CSX notes, has failed to consider any of these distinguishing factors.

KCS has the same concerns expressed by Patriot, BSR and CSX. KCS's system is built and configured to serve all of its shippers in as efficient and profitable manner as possible. If KCS traffic can be siphoned off by a competitor at multiple interchanges without compensating KCS for its infrastructure investment via some form of Efficient Component Pricing methodology ("ECP"), how can KCS support its system and meet its common carrier obligation serving only less remunerative traffic? The Board neither considers nor answers this question.

Excluding Class II and III carriers for the reach of the Board's rule is clearly justified. Excluding KCS from the rule is equally justified for many of the same reasons. The Board has given no consideration to and no reason for treating KCS like the largest Class I's, despite its smaller size, frequent interchanges and predominantly interline traffic which, if accessible to larger competitors through the Board's rule, may be lost to KCS entirely, without a reciprocal ability to gain traffic elsewhere.

IV. SEVERAL SUGGESTED CHANGES AND PROPOSALS SHOULD BE REJECTED AS BEING INCONSISTENT WITH THE STATUTE AND PRECEDENT

A. The Term "Reasonable Distance" Must Be Limited In Scope

Under both prongs of the Board's proposed rules, a shipper, if it makes the requisite showings and the Board grants its switching request, can require the incumbent serving carrier to provide a switch move to a working interchange to another Class I rail carrier as long as that working interchange is "within a reasonable distance of the facilities of the party seeking

²⁰ CSX, like KCS, has not been found revenue adequate in decades.

switching.” The term “reasonable distance” is not defined. Nor did the Board describe the factors it would consider to determine what constitutes a “reasonable distance” for a forced switch. Instead, the Board asked for comments on the “reasonable distance” requirement in the proposed rules so that the Board could consider providing “guidelines to parties that may seek switching under the proposed regulations.” NPR at 21.

Several shippers commented on the proposed “reasonable distance” requirement. Almost all requested the Board to adopt an expansive definition of what constitutes a reasonable distance. Grain shippers suggested that the Board could order forced switching to a working interchange that could be as much as 100 miles away.²¹ NMA suggested that the “reasonable distance” should be the distance to the nearest interchange with another railroad no matter how far away the nearest working interchange was.²² Coal shippers suggested measuring the distance as a percentage of the line-haul move; asking the Board to establish a presumption that 10% of the distance of a line-haul unit coal train movement would be a reasonable distance.²³ The Shipper Coalition said that if there is no working interchange nearby, the switching carrier should be required to interchange the traffic at any rail yard or terminal area where the traffic could be switched to another carrier, regardless of how far away that rail yard or terminal was from the origin or termination.²⁴ The Shipper Coalition’s witnesses Crowley and Fapp proposed that 100 miles should be considered to be a reasonable distance.²⁵

²¹ See Opening Comments of NGFA at 6-7.

²² See Opening Comments of NMA at 2 (e.g., a reasonable distance in Kentucky for association members would be 145 miles based on distance to nearest interchange for some mines).

²³ Id.; see also Opening Comments of NIPSCO at 4-5.

²⁴ See Opening Comments of Shipper Coalition at 38-40.

²⁵ Id. at Crowley/Fapp VS at 31-32.

All of these shipper proposals attempt to conflate the two separate provisions of Section 11102 and ignore the limitations of the Board's authority to grant reciprocal switching pursuant to Section 11102(c). Subsection (c) does not authorize forced switching by reference to a "reasonable distance" between the origin or destination of the movement and an interchange point with another railroad. The reasonable distance language governs awards of terminal trackage rights pursuant to Section 11102(a). Subsection (c) contains no language relating to reasonable distance. Yet, it is Section 11102(c) that the Board is relying upon as its statutory basis to order a forced switch pursuant to its EP 711 (Sub-No. 1) proposal. So the proper legal analysis is to determine what Subsection (c) means by the use of the phrase "reciprocal switching" and how far the Board can order a carrier to provide such a "reciprocal switch."

Legislative history and precedent indicates that the Board can only order an incumbent carrier to provide a switch to another carrier if the interchange with the other carrier is within an established switching district or terminal. The Board has no legal authority to order a switch to a "working interchange" if that interchange is outside of an established switching district or terminal.

In adopting the precursor to today's Section 11102(c), Congress explained that the provision empowered the ICC to "order the more limited action of reciprocal switching," when compared to the ICC's established, and more expansive authority to "order joint use of terminal facilities."²⁶ Congress rejected calls to expand the scope of Section 11102(c) to allow the agency to order reciprocal switching in "all standard metropolitan areas,"²⁷ instead permitting the agency

²⁶ S. Res. 15319, 96th Congress, Congressional Record, Pub.L. No 448, 94 Stat. 1895 (1980).

²⁷ Id. In contrast, the proposal and shipper comments would go far beyond the distances involved in standard metropolitan areas. Certainly if Congress did not expand the scope of switching to cover all metropolitan areas, Congress did not intend for switching to cover any

to engage in a fact-based evaluation of whether the requested relief was sought in a terminal. The rejection of the application of Section 11102(c) to all metropolitan areas, combined with Congress' position that ordering reciprocal switching is a "more limited action" than ordering terminal access or terminal trackage rights, clearly shows that Congress intended for the reciprocal switching provision to be less far-reaching in scope than the terminal trackage rights provision.

The long-standing agency definition of the term "reciprocal switching" - the phrase that appears in the statute - confirms that Section 11102(c) was only to apply in terminal areas and/or "switching districts." Long-standing precedent defines reciprocal switching as an activity occurring within a terminal or switching district.

Before the advent of Staggers, the ICC described reciprocal switching thusly:

In practice [reciprocal switching] means that one line-haul carrier operating within a terminal area will act only as a switching carrier in placing cars at industries on its own trackage . . . as an incident of the line-haul movement of those cars over another carrier whose trackage does not extend to the serviced industry.²⁸

The ICC continued to embrace the Switching Charges description of reciprocal switching in post-Staggers decisions. For example, in 1982, the ICC described reciprocal switching as follows:

It has long been a common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching. In practice this means that one line-haul carrier operating within the terminal area

place there is a working interchange no matter the distance to that interchange and regardless of whether it is located within metropolitan area or switching district.

²⁸ Switching Charges and Absorption Thereof at Shreveport, La., 339 I.C.C. 65, 70 (1971) ("Switching Charges"). The U.S. Supreme Court shortly thereafter took judicial notice of the ICC's Switching Charges definition of reciprocal switching in Port of Portland v. United States, 408 U.S. 811, 820 n. 8 (U.S. 1972); See also Railroad and Warehouse Commission of Minnesota v. Chicago Great Western Railway, 262 I.C.C. 437, 437-38 (1945) (noting that reciprocal switching takes place within a terminal, not outside of it.)

will act only as a switching carrier in placing cars at industries on its own trackage for loading or unloading, as an incident of the line-haul movement of those cars over another carrier whose trackage in that terminal area does not extend to the serviced industry. The carriers reciprocate in their roles as switching and line-haul carriers at this terminal in accordance with the flow of traffic to and from industries on their respective trackage.²⁹

And again, in 1985, the ICC reaffirmed that reciprocal switching pertains to activities within a terminal area as follows:

Reciprocal switching involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at commonly served terminal areas in an arrangement under which one of the carriers acts as the switching carrier, placing cars at customer locations on its lines for loading and unloading which it will deliver to or has received from the other carrier for the line-haul movement. In the simplest reciprocal arrangement, . . . [t]he carriers, in effect, mutually exchange their switching services³⁰ so that each can extend its lines to the industries served by the other, even on traffic for which they may be directly competitive as line-haul carriers.³¹

The agency's actions have consistently reflected the understanding that reciprocal switching occurs exclusively within terminal areas, where reciprocal switching is common or customary, and therefore is or could be practicable under the statutory standard to order carriers to engage in forced reciprocal switching within that terminal district if it was in the public interest. Leading among these cases is Central States Enterprises, Inc. v. Seaboard Coast Line Railroad, FD 38891 (ICC served May 17, 1984) ("Central States"), *aff'd sub nom. Central States Enterprises, Inc. v. ICC*, 780 F.2d 664 (7th Cir. 1985) ("Central States Appeal"). In Central

²⁹ Delaware and Hudson Railway Company v. Consolidated Rail Corporation – Reciprocal Switching Agreement, 366 I.C.C. 845, 846 (1982) ("Delaware and Hudson").

³⁰ Notably, the Board's current proposal also abandons the reciprocity concept of the agency's historic definition of reciprocal switching, to the particular detriment of smaller carriers. See Opening Comments of ASLRRRA at 10; Opening Comments of KCS at 28-30.

³¹ Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution Rules and Practices, 1 I.C.C. 2d 700 (citing Switching Charges and Absorption, 339 I.C.C. 65, 90 (1971)).

States, the ICC denied a request for forced reciprocal switching in part because the shipper seeking the remedy was not within a nearby switching district, even though the shipper was located at a station just outside of an established switching district. As the ICC explained, because the shipper was not located in a common station or within a jointly-served terminal, “this was not a reciprocal switching situation” appropriate for the requested relief.³²

The ICC clearly believed it had no legal authority to expand reciprocal switching to a “reasonable distance outside of a terminal” (in that case, only 1.4 miles beyond the established bounds of the terminal area) and nothing in the statute or case law has changed since that time. Certainly if the statute prohibited extending forced switching 1.4 miles outside of the terminal area, that same statute cannot now be used to extend forced switching to some arbitrary “working interchange” outside of a terminal area – even if that working interchange is within a “reasonable distance of the facilities of the party seeking switching.”³³ If that working interchange is outside of the terminal/switching district, the Board cannot order a forced switch to that location.

Other post-Staggers decisions are consistent with Central States. For example, in Vista Chemical³⁴ the parties acknowledged that the reciprocal switching request was appropriate for adjudication on the merits, inasmuch as there was “no controversy between the parties as to whether the [requested reciprocal switching arrangement] would be performed wholly within the

³² Central States Appeal at 670.

³³ In contrast, the Board’s proposal would have “reciprocal switching” re-defined as the open-ended provision of intermediate transportation to and from any “working interchange” within a “reasonable distance” of the shipper facility. Under the Board’s proposal, the facility need not be in, or even near, a terminal area to obtain forced reciprocal switching. There is no legal support in the statute or case history for such an expansive reading of the scope of Section 11102(c).

³⁴ Vista Chemical Co. v. Atchison T. & S.F. Ry., 5 I.C.C.2d 331 (1989) (“Vista Chemical”).

limits of [an established] switching district.”³⁵ This is true also of Midtec where the ICC’s discussion of reciprocal switching consistently depicts the remedy as one necessarily tied to a rail terminal. Finally, the aforementioned Delaware and Hudson decision clearly embraces the understanding that reciprocal switching is “terminal-centric.”³⁶

The above analysis establishes clearly that the term “reciprocal switching” has a very specific meaning within the railroad industry and at the agency. In particular, while reciprocal switching may not universally be truly “reciprocal,”³⁷ it is always conducted within areas that are recognizable as terminals or switching districts. There is no authority in Section 11102(c)(which provides for reciprocal switching), and none in agency precedent, giving the Board the statutory authority to compel reciprocal switching outside of the bounds of a terminal.³⁸

B. The Board Cannot Compel A Carrier To Build, Create, Or Require A Working Interchange

The Board’s proposed rules state that forced switching will be ordered (assuming all other factors are met) to the nearest interchange location where there “is or can be a working interchange” between the incumbent and another Class I rail carrier. A “working interchange” is one in which the rail carriers involved currently engage in switching operations. If there are no current switching operations at the proposed interchange point, the Board nonetheless still

³⁵ Vista Chemical at 337.

³⁶ Delaware & Hudson, at 846 (observing that it is “common practice among the railroads to participate at commonly served terminal areas in what is called reciprocal switching”).

³⁷ See, e.g., Id. at 847 (“Although traditionally service was assumed to be in balance between carriers in the terminal under a reciprocal switching agreement, in practice that is not a prerequisite to an agreement”).

³⁸ Any attempt to order forced switching beyond such a defined area would, in effect, be a prescription of a through route. As such, such an order would have to comply with the requirements of section 10705 before an interchange outside of a terminal area could be prescribed.

claims authority to compel switching to that location if there “can be” a working interchange because “the infrastructure currently exists to support switching.” NPR at 21. Whether the infrastructure currently exists so that there “can be” a working interchange is left to a case by case analysis.

Several shipper commenters disagreed with the requirement that the infrastructure necessary to support switching operations must already exist. These shippers want the ability to either force the railroads to build added infrastructure or to have the ability to build it themselves. For example, WCTL argued that railroads can and should be required to make infrastructure investments necessary to support forced switching if such investments are “in the public interest.”³⁹ The Shipper Coalition did not advocate the railroad’s being required to pay for such new infrastructure. Instead, they argued that an incumbent railroad should be forced to make the infrastructure investments (or allow them to be made on the incumbent’s property) if the shipper or alternative railroad paid for that infrastructure.⁴⁰ Still others argued that if the shipper or alternative railroad agrees to pay for facilities necessary to support the switching operation that should be enough to meet the “can be” interchange requirement.⁴¹

The shippers cite no legal authority that would grant the Board the authority to compel the construction of an interchange, let alone to require the railroad to pay for it. Indeed, compelling a carrier to allow an interchange to be built on its property is no less than an exercise of eminent domain inconsistent with the statute and the U.S. Constitution. The STB has no such extraordinary takings powers, except perhaps in the sole context of a forced sale under the

³⁹ See Opening Comments of WCTL at 14.

⁴⁰ See Opening Comments of the Shipper Coalition at 41.

⁴¹ See, e.g., Opening Comments of the NGFA at 8; Opening Comments of NIPSCO at 6; Shell, at 2; Opening Comments of Cargill at 10.

provisions of 49 U.S.C. § 10904 (OFA provision) or § 10907 (feeder line provision). As previously noted, the legislative history and historic definition of the phrase “reciprocal switching” in the context of Section 11102(c) was premised on the notion that the carriers were located within a terminal or switching district where such switching activities already took place or could take place because the infrastructure already existed. There is not a single instance – either in the context of Section 11102(c) or in the context of a Board-imposed merger condition that imposed switching – where the Board required parties to build infrastructure so as to accommodate that switching requirement, let alone compel a carrier to allow an interchange to be built on its property.

Even if it were legal, the shippers’ proposal should not be adopted because it represents bad policy and distorts the investment decisions made by both railroads and existing shippers. Existing infrastructure investment and existing switching and interchange locations have been made in reliance on rules that have been in place for more than 30 years. Mandating forced switching, coupled with the requirement to build new interchange infrastructure to accommodate that forced switching, completely distorts the marketplace, leaving some investments completely stranded and unable to recoup the expected returns and leads to significant uncertainty about when, where, and how to make future investments.

As explained by KCS witness Jeffrey M. Songer, when making decisions on where to invest scarce capital dollars, the rate of return on that investment, and how that return will be obtained, is a principal concern. Investment decisions to install new infrastructure, build yards, or improve interchange with other carriers are not made unless there is reasonable likelihood that those investments will pay off in terms of efficiency savings or capital returns. The shippers’ ideas to force the building of infrastructure to accommodate forced switching substitutes

government mandates for those private decisions, creates uncertainty, distorts the marketplace, and risks redirecting scarce investment dollars away from needed projects. Such results are contrary to the Rail Transportation Policy⁴² and should be rejected.

The Board should not adopt any mandatory switching proposal, but if it does, it absolutely should not adopt any of the shipper proposals aimed at forcing, through government mandate, the construction of additional interchange infrastructure to accommodate such forced switching. There is no legal or policy justification for adopting such proposals. At best, the Board can only order mandated switching within the context of an existing terminal or switching district where such interchange infrastructure already exists and is, or can be, used to accommodate the mandated switch.

C. Parties Have No Legal Authority To Challenge A Compensation Fee That The Carriers Have Agreed Upon

Unsurprisingly, shippers and rail parties disagree on the methodology to be used in setting compensation for forced switching. Although there is widespread disagreement among the shipper parties as to the appropriate methodology, almost all rail parties, including KCS, argue for some form of ECP. What is surprising, however, is that several shipper interests claimed that they should have the right to challenge an agreed-upon switch fee.⁴³

The idea that a third party, even if that party is the intended beneficiary of a forced switch, should be allowed to challenge a compensation arrangement agreed to by the carriers should be rejected. There is no support in the statute for such a proposition.

⁴² See 49 U.S.C. §10101(2)(minimize federal regulatory control); 3(allow carriers to earn adequate revenues); 5(promote sound economic conditions); and 9(encourage honest and efficient management).

⁴³ See Opening Comments of Cargill at 8; Opening Comments of Dow at 12; Opening Comments of Shell at 2; Opening Comments of Shipper Coalition at 53; and Opening Comments of American Truck & Rail Audits, Inc. at 1.

The statute is clear: if two carriers are required to enter into a reciprocal switching arrangement, the “rail carriers entering into such an arrangement shall establish the conditions and compensation applicable to such an arrangement, but if the rail carriers cannot agree ... the Board may establish such conditions and compensation.” Section 11102(c). The operative phrase invoking the Board’s jurisdiction or ability to set the compensation is “if the rail carriers cannot agree.” If the carriers agree, the Board has no authority to establish the “conditions and compensation.”

The shippers would rewrite the statute to say that even if the carriers agree, the Board nonetheless has the right to change that agreement and impose its own view of the appropriate methodology. There is no support in precedent for such a rewrite nor would such an interpretation be consistent with principles of statutory construction. In construing a statute, both the agency and the courts are to look to the language of the statute itself and if the language of the statute is plain and unambiguous, it must be applied according to its terms.⁴⁴ There is no ambiguity as to plain meaning of the applicable compensation sentence in Section 11102(c).

Accordingly, if the Board adopts a mandated switching regime, it should make it clear that any compensation principles or methodology that it imposes can only be applied if the two involved carriers cannot on the terms of compensation. If the carriers agree on the conditions and compensation, that is the end of the Board’s involvement. If the shipper believes that the

⁴⁴ Consumer Product Safety Commission et al. v. GTE Sylvania, Inc. et al., 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”); and Connecticut Nat’l Bank v. Germain, 503 U.S. 249, 254 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says [and that] when the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”)(internal citations omitted).

resulting rate presented to it by non-incumbent carrier (which rate would presumably consist of the agreed upon switch rate plus the non-incumbent carrier's rate from the point of switch to origin or destination) is too high, then the shipper has the choice to stay with the incumbent carrier or to file a rate complaint pursuant to its rights and remedies contained in Chapter 107 of Title 49 U.S.C.

D. The Burden Of Proof Cannot Be Shifted To The Railroads

The Board's proposed rules did not initially address procedural issues or respective burdens of proofs and the Board did not request comments on these issues. Nevertheless, some shipper commenters directed comments at establishing rules that would govern the parties' respective burdens of proof.⁴⁵ For example, Cargill argued that the STB should clearly allocate the burden of proving the various factors that will be evaluated in a reciprocal switching case to the party asserting that factor in favor or against switching and requiring the incumbent rail carrier to shoulder the burden of proving that that the proposed switching is not feasible, is unsafe, or will unduly hamper the incumbent's ability to serve other shippers.⁴⁶ Dow made a similar suggestion.⁴⁷ G3 wants the Board to adopt a simple *prima facie* test that a shipper would have to meet, and if met, the burden would then shift to the railroad to disprove those factors.⁴⁸ The Sandy Creek Co-Owners made a similar suggestion.⁴⁹ Even the U.S. Department of Agriculture ("USDA") argues that the burden of proof should be placed on the party that is most

⁴⁵ See, e.g., Opening Comments of G3 at 6; Opening Comments of The Sandy Creek Co-Owners at 12, note 32; and Opening Comments of Shipper Coalition at 23-31.

⁴⁶ Opening Comments of Cargill at 6.

⁴⁷ Opening Comments of Dow at 4-5.

⁴⁸ Opening Comments of G3 at 6.

⁴⁹ Opening Comments of The Sandy Creek Co-Owners at 9, 12, note 32, 14.

capable of providing the evidence and that if a shipper sets forth its best case based upon publicly available information, then it should up to the railroad to refute the request and explain to the STB why competitive switching should not be allowed – in essence, the railroad should be required to prove a negative.⁵⁰

These requests to shift various burdens to the incumbent railroad – or respondent – should be rejected. Such a shifting of the burden of proof would be a clear violation of the Administrative Procedure Act.⁵¹ The Administrative Procedure Act provides that “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). The Board has consistently upheld this principle. See Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad, STB F.D. 34337, slip op. at 2 (Jan. 31, 2007)(except as specified by statute, a proponent/complainant has the burden of showing it is entitled to relief); CSX Transportation, Inc. – Abandonment Exemption – Fayette and Nicholas Counties, WV; In the Matter of a Request to Set Terms and Conditions, STB Docket No. AB-55 (Sub-No. 250X) (STB served January 4, 1989)(noting that the burden in most cases before the Board is upon the proponent of the requested relief); Wisconsin Central Ltd. – Abandonment – In Ozaukee, Sheboygan and Manitowoc Counties, WI., STB Docket No. AB-303 (Sub-No. 27) (STB served Oct. 18, 2004)(holding in an abandonment case that the burden of proof was on the community to establish the viability of the alternate service proposal); and Chicago and North Western Railway Company – Construction and Operation Exemption – City of Superior,

⁵⁰ Opening Comments of the USDA at 6.

⁵¹ This is especially the case with respect to Prong 1 where the shippers improperly seek to shift the burden of proof onto the railroads by proposing that the incumbent railroad respondent be required to prove in an individual case that forced switching is not justified.

Douglas County, WI – Petition for Issuance of An Order Pursuant to 49 U.S.C. 10901(d), STB Docket No. 32433 (Sub-No. 1), slip. op. at 3 (July 31, 1995)(noting that in a forced crossing case the burden of proof lies with the rail carrier seeking to cross the lines of another carrier, i.e., the proponent that is seeking the requested relief).

A shipper seeking forced switching under Prong 1 of the proposed rules must bear the burden of proving that the forced switch is in the public interest since a showing that forced switching is in the public interest is an express requirement of the statute. The burden cannot be placed on the incumbent serving railroad to show that forced switching is not in the public interest.

CONCLUSION

The Board should not adopt its proposed rules. The proposal is simply an attempt to regulate rates outside of the rate reasonableness process by artificially creating rail-to-rail competition. The Board does not have the statutory authority or the Congressional directive to grant such a remedy. The solution to the complaints that rates are too high and the rate complaint process too complex, lengthy, and expensive is not to adopt a pervasive new switching regime that would be contrary to the statute and result in significant unintended consequences to the entire rail network, but rather, to focus on improving the methodologies and processes that already exist in the statute by which a shipper can establish that its rate is unreasonable.

If the Board does adopt any form of forced switching, which it should not, such a proposal must account for the fact that smaller Class I's share certain characteristics of the Class II's and III's, but nonetheless are treated the same under the NPR as the largest Class I carriers. Instead, smaller Class I's should be treated similar to Class II and III carriers. The rules also must fit within the existing regulatory framework. For example, the rule should only apply in

established switching districts and on a movement-specific basis. It should not apply to movements of exempt commodities or movements where the rate or divisions are below the 180% revenue/variable cost jurisdictional threshold. Neither should a facility be eligible for forced switching if intramodal competition is already present at the facility. Additionally, any final rules should provide some certainty to the railroad industry with respect to investment decisions by exempting railroad-owned facilities and facilities in which a carrier has invested significant capital investments, as well as limiting the duration of any remedy granted.

Finally and critically, any final rules should adopt an access pricing methodology that promotes the RTP. The two methodologies proposed by the Board do not adequately consider a railroad's ability to attain revenue adequacy. Therefore, the Board should incorporate ECP into its access price methodology. Failure to do so will drive carriers further away from revenue adequacy and is likely unconstitutional.

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