

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

234341

STB Ex Parte No. 711

ENTERED
Office of Proceeding
May 30, 2013
Part of Public
Record

**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

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May 30, 2013

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CSX Transportation, Inc. (“CSXT”) respectfully submits these Reply Comments in response to the Board’s July 25, 2012 order requesting comments on the National Industrial Transportation League’s (“NITL’s”) Petition for a rulemaking to consider changes to the Board’s rules for considering reciprocal switching requests (“NITL Petition”).

SUMMARY OF COMMENTS

The Opening Comments filed by other parties confirm what CSXT demonstrated in its Opening Comments: the NITL Proposal is a misguided effort to remake the regulatory system to benefit a favored subset of shippers at the expense of the vast majority of rail users. Adoption of the NITL Proposal would both create significant operational problems and set off an avalanche of new regulatory litigation. Even the comments submitted by supporters of forced switching make clear that the Proposal is slanted heavily in favor of a few shippers of relatively-higher rated traffic who have the resources to pursue a complex new type of regulatory litigation. This small group of intended beneficiaries—predominantly chemicals shippers—has proposed a plan transparently designed to serve their desire to obtain lower rail rates without having to prove that those rates are unreasonable. Those shippers would do so at the cost of significantly damaging the fluidity of the rail network and service for other shippers. The Board should reject this misguided and shortsighted proposal.

The NITL Proposal is designed to have the Board pick winners and losers. The “winners” are the limited number of shippers who could take advantage of forced switching to pressure railroads to lower their rates (without having to prove that those rates are unreasonable). The losers include shippers who could not or do not want to use forced switching but who would nevertheless share in the costs of such switching, including lower network efficiency, degraded service, and longer delays and dwell times. The losers include rail employees who would be subject to more furloughs, disruptions, and uncertainty as a result of the unpredictable traffic

flows that the NITL Proposal would create. The losers include all parties who depend on timely and efficient decisions from the Board, for the NITL Proposal would spur complex and substantial regulatory litigation that could grind the agency's processes to a halt. And the losers would include the public as a whole, which would have to deal with the cascading effects of a less efficient rail system that would be less competitive with trucks, including more highway congestion, more pollution, and higher prices for consumers. Even if the NITL Proposal were truly in the best interests of some subset of "winners"—and it is not at all clear that it is—the NITL Proposal is plainly not in the *public* interest.

Section I of these comments summarizes the clear and unmistakable evidence that the NITL Proposal is designed to benefit a few chemicals shippers at the expense of rail users as a whole. While quantitative assessments of how many forced access users might "benefit" from reduced rail rates are deeply speculative, assessments agree that the NITL Proposal and its "conclusive presumptions" are designed to ensure that any such rate reductions disproportionately benefit a limited group of chemicals shippers. Indeed, shippers' comments confirm the point. While chemicals shippers are full-throated supporters of the NITL Proposal, other shippers are lukewarm at best to the NITL Proposal as written. Moreover, chemical shippers already have ample access to remedies for allegedly unreasonable rates, and those existing remedies allow the Board to provide any warranted rate relief for hazardous and toxic-by-inhalation ("TIH") shipments without encroaching on security and routing decisions that are within the expertise of the railroads and of other agencies.

Section II demonstrates that advocates of the NITL Proposal have failed to demonstrate that the proposal would be in the public interest, as opposed to what they believe is their own narrow private interest. The Board is charged with advancing the public interest in its

implementation of the Interstate Commerce Act. The evidence in this proceeding overwhelmingly shows that it is in the public interest to maintain the existing, successful regulatory regime, and that it is not in the broader public interest to experiment with a forced switching regime that indisputably would increase car handlings and switches, decrease network fluidity, and adversely affect rail service.

Section III addresses the adverse effects that the NITL Proposal would have on rail operations, a topic that CSXT and other railroad commenters addressed at length on Opening. In contrast, NITL and other proponents of forced switching have not addressed the significant operational inefficiencies and degraded service that would result from allowing a select group of shippers to use forced switching to disrupt regular traffic flows. Section III summarizes the overwhelming evidence that forced switching would undermine the modern operating practices that enable railroads to deliver efficient and reliable rail service. CSXT Reply Exhibit 1 is a video exhibit that illustrates these facts by depicting three real-world scenarios on the CSXT network where a forced switching order could adversely affect operations and service for many CSXT customers. Section III also rebuts NITL's claim that the adverse effects of widespread forced switching could effectively be addressed on a case-by-case basis, and it shows that the entirely different history of Canadian railroading does not in any way suggest that the NITL Proposal would be operationally feasible in the United States.

Section IV demonstrates that the NITL Proposal would increase regulation, not reduce it. Indeed, NITL and its supporters have disavowed any desire to replace existing rate regulation with forced switching regulation, and instead made clear that NITL intends forced switching to be an additional remedy that shippers can use as a "Plan B" if they do not want to bring a rate case (or believe that they cannot prevail in such a case). Moreover, the Opening Comments

confirm what CSXT showed in Opening: forced switching cases would be complex, contentious, and would present many difficult issues that the NITL Proposal fails to acknowledge.

Section V demonstrates that the analysis submitted by NITL in support of its proposal is unreliable and unpersuasive. This is primarily so because the analysis NITL presents fails to assess the actual NITL Proposal, and instead makes a series of unwarranted presumptions designed to artificially underestimate the number of shippers who would be eligible for forced switching under the NITL Proposal as written. Section V also demonstrates that the comments submitted by NITL and its allies on access pricing should be rejected. The prices adopted by a Canadian regulatory agency for interswitching are not a reasonable or an accurate proxy for a compensatory access price, and even if they were, NITL's application of this cost-based fee approach is flawed and internally inconsistent.

Section VI concludes by reiterating the basic legal principle that CSXT explained on Opening: even if a wholesale revision to the Board's reciprocal switching policies were justified (and it is not), the Board does not have the authority to revise deregulatory policies that were specifically approved and ratified by Congress in ICCTA. The exact same arguments NITL and its allies make in this proceeding were made to the Congress that enacted ICCTA. Congress rejected those arguments then, and the Board is not a forum for parties to appeal congressional decisions with which they do not agree. And even if the Board had legal authority to adopt the NITL Proposal (which it does not), it would be imprudent and unwise for the Board to make wholesale revisions to the regulatory system when Congress has not directed it to do so—and indeed when the vast majority of legislators who participated in the Ex Parte 705 proceeding urged the Board to not disturb current regulatory policy.

I. THE NITL PROPOSAL IS DESIGNED TO BENEFIT THE FEW AT THE EXPENSE OF THE MANY.

While NITL and its supporters attempt to characterize its proposal as a benefit for so-called “captive shippers” that is being challenged by “railroads,” in fact its proposal would benefit a select subset of shippers at the expense of other shippers, consumers, railroads, and all who depend on an efficient and effective rail network. Above all else, the NITL Proposal is designed to provide forced access for a small number of chemicals shippers, many of whom transport TIH or other hazardous materials and object to the rates charged to transport these dangerous commodities. Indeed, the Opening Comments show that shippers of other commodities are unenthusiastic at best about NITL’s Proposal. Some want the Board to expand the NITL Proposal into a full open access regime with switching available to all or nearly all shippers;¹ some are primarily concerned that the proposal not impact existing rate remedies.² But virtually no parties other than NITL and chemicals interests are satisfied with the NITL formulation. This fact alone strongly suggests that the NITL Proposal is designed to serve the narrow interests of a subset of shippers—not the broader public interest. And the analyses that have been submitted with Opening Comments confirm that any potential rate reductions from the proposal—speculative as they are—disproportionately would benefit a limited group of chemicals shippers, while the costs of the proposal would be borne by other users of the rail network.

¹ See, e.g., Opening Comments of Nat’l Grain and Feed Ass’n at 7, 23-24.

² See, e.g., Opening Comments of Entergy Arkansas, Inc., Kansas City Power & Light Co., Seminole Electric Cooperative, Inc. & Wisconsin Electric Power Co. at 11-14.

A. The NITL Proposal Primarily Benefits Chemicals Shippers At The Expense Of Other Groups.

While the ambiguities in the NITL Proposal make it impossible to assess its impact precisely,³ the various analyses submitted on Opening agree that shippers of chemicals traffic would constitute a disproportionate share of those eligible for forced switching under the NITL Proposal. Parties have submitted significantly different estimates of how many shippers would be eligible for forced switching and the impact that the proposal would have on rail rates for eligible and ineligible shippers. The most reliable analysis—and indeed the only one that attempts to model the impact of the actual rules that NITL has proposed—is the one submitted by the Association of American Railroads. As detailed below in Section VI, many of the shipper-submitted analyses ignore significant elements of the NITL Proposal, primarily by assuming that the only eligible shipments would be those with R/VC ratios over 240%.

All parties agree on one thing, however: any benefits of the NITL Proposal would be concentrated among shippers of chemicals traffic. While chemicals shipments constitute a relatively small portion of overall rail traffic—approximately eight percent of overall carloads and 14% of overall rail revenues⁴—chemicals shippers constitute a remarkably disproportionate share of shippers eligible for forced switching under the NITL Proposal.

For example, the U.S. Department of Transportation’s (“USDOT’s”) analysis showed that chemicals traffic would make up approximately half of shippers eligible for forced switching. USDOT focused its analysis on the major commodities of coal, chemicals, and farm products, and identified 360,142 carloads of potentially eligible traffic that was both (1) within

³ See Opening Comments of CSXT at 3; Opening Comments of AAR at 14 (explaining that “data limitations and ambiguities in the NITL proposal make it impossible to generate a precise impact estimate” and that “AAR is not able to estimate rate reductions or identify with any certainty the traffic that would receive rate reductions”).

⁴ ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS at 24, 29 (2011 ed.).

30 rail route miles of an interchange; and (2) at an R/VC of over 240%.⁵ Opening Comments of USDOT at 2-3, 11. Over half of those carloads—nearly 183,000—were chemicals shipments. *Id.* at 10. Moreover, USDOT found that those chemical shipments accounted for over 71% of the revenue at stake for the eligible shipments. *See id.* at 11.

The NITL’s analysis—deeply flawed as it is—likewise shows a disproportionate benefit for chemicals shippers. A full 42% of NITL’s claimed “reduced revenue” from its proposal would inure to chemicals shippers. *See* Opening Comments of NITL, V.S. Roman, App. D Table E. Indeed, chemicals shippers admit that they would be the primary beneficiaries of the NITL Proposal. The American Chemistry Council asserts that “[c]hemical shipments have the largest potential savings of any commodity group” under the NITL Proposal and estimates that chemicals shipments would constitute one-third of all carloads that might be eligible for automatic switching under NITL’s 240% R/VC presumption. Opening Comments of ACC at 5. And AAR’s analysis indicates that over a quarter of all lanes eligible for forced switching under the NITL Proposal would be chemical shipments. *See* Opening Comments of AAR, V.S. Baranowski, at 10 (showing 21,366 eligible lanes, of which 5,667 are chemicals lanes).

Under any analysis, therefore, chemicals shippers would have more access to forced switching and potential rate reductions than any other group of shippers. But as detailed further below, the costs of the NITL Proposal would be distributed among the entire community of rail users. And while the benefits of any hypothetical rate reductions are speculative, the costs of increasing switching, decreasing network fluidity, and creating a complex new regulatory regime are certain to occur. The Board should not reshape the regulatory landscape by imposing

⁵ USDOT’s analysis thus does not model the full proposal—which permits shippers to demonstrate eligibility for forced switching either by shipping 75% of their product by rail for a 12-month period or by submitting other evidence that they lack effective competitive options.

regulations with widespread costs and speculative, concentrated benefits in order to satisfy the demands of one narrow interest group, no matter how vocal it might be.

B. The NITL Proposal Is Primarily Supported By Chemicals Shippers.

The Opening Comments themselves provide the best evidence of the NITL Proposal's disproportionate impact. For while NITL claims to represent all shippers, in fact its proposal is primarily supported by the limited set of chemicals shippers who believe they would benefit from it. NITL effectively conceded this point in its Petition, which provided a list of "a number of individual companies" whose Ex Parte 705 comments supported expanding forced switching. That list exclusively consisted of chemicals shippers.⁶ While it is true that other shipper groups have expressed support for expanded switching, chemicals shippers constitute a lopsided share of the advocates for the NITL approach.⁷ Indeed, many of the most vocal advocates of the NITL Proposal are not just chemicals shippers, but shippers of hazardous or toxic by inhalation chemicals. The Chlorine Institute strongly supports the NITL Proposal. So does the American Chemistry Council and individual shippers of hazardous materials.⁸ The fact that so many TIH

⁶ NITL Petition at 27-28 & nn. 90-96 (citing Ex Parte 705 comments of E.I. du Pont de Nemours & Co., Olin Corp., Westlake Chemical Corp., Total Petrochemicals USA, Inc., PPG Industries, and Dow Chemicals as examples of support from "individual companies").

⁷ Nine of the 22 replies submitted to the Board in support of the NITL's initial petition were filed by chemicals shippers. *See* Reply of AksoNobel, Ex Parte 711 (filed July 22, 2011); Reply of Interstate Asphalt Corp., Ex Parte 711 (filed July 22, 2011); Reply of Olin Corp., Ex Parte 711 (filed July 22, 2011); Reply of Dow Chemical Co., Ex Parte 711 (filed July 26, 2011); Reply of American Chemistry Council, Ex Parte 711 (filed July 27, 2011); Reply of Bayer Material Science, Ex Parte 711 (filed July 27, 2011); Reply of Chlorine Institute, Ex Parte 711 (filed July 27, 2011); Reply of Fertilizer Institute, Ex Parte 711 (filed July 27, 2011); Reply of PPG Industries, Inc., Ex Parte 711 (filed July 27, 2011).

⁸ For example, Diversified CPC International, Inc. manufactures and supplies multiple chemicals that PHMSA classifies as flammable gases and flammable liquids. Diversified manufactures propane, isobutene, butane, propylene, and difluoroethane, all of which are assigned hazardous material classification 2.1 (flammable gas), and it also manufactures Class 3 flammable liquids like pentane, isopentane, and dichloroethylene. *See* 49 C.F.R. § 172.101; Diversified CPC International, "Products Overview," available at www.diversifiedcpc.com/html/products.htm.

shippers have chosen to participate in this proceeding to support the NITL Proposal—even though TIH materials account for only 0.25% of all U.S. rail carloads⁹—is a strong indication that the NITL Proposal primarily favors chemical shippers, particularly those who ship TIH commodities.

Non-chemicals shippers are either indifferent to the NITL Proposal or primarily concerned with revising it into a full “open access” regime. For example, coal shippers primarily want assurance that rate remedies (and particularly shippers’ ability to prove market dominance) would not be adversely affected by a forced switching regime. A group of four coal-burning electric power utilities—three of which are former rate case complainants—submitted comments urging the Board not to make any change that would limit shippers’ ability to challenge the reasonableness of their rates. *See* Opening Comments of Entergy Arkansas, Inc., Kansas City Power & Light Co., Seminole Electric Cooperative, Inc. & Wisconsin Electric Power Co. (“Joint Coal Shippers”). The Joint Coal Shippers took no position as to the advisability of adopting the NITL Proposal. Instead, they urged the Board not to make changes that could make it harder for shippers to demonstrate the lack of effective competition that complainants must prove to establish that the STB has jurisdiction over complaints about the reasonableness of their rates. *See id.* at 11-14. The coal shippers argued that a regulatory change that would limit a solely-served shipper’s right to seek rate relief would constitute “a significantly adverse impact” on shippers. *Id.* at 11.

⁹ *See* Association of American Railroads, Hazmat Transportation by Rail: An Unfair Liability, available at <http://www.aar.org/~/media/aar/Background-Papers/Haznat-by-Rail.ashx> [sic]. *Cf.* CSXT Ex Parte 705 Supplemental Comments at 24 (noting that “out of the twenty-one witnesses from shippers or shipper organizations who testified at the [Ex Parte 705] hearing in support of changing the current regulatory regime 43% represent TIH shippers (9 of 21)”).

Agricultural shippers are unenthusiastic about the NITL Proposal for other reasons. While many agricultural shippers support the concept of forced switching in general, they recognize that the NITL Proposal is not designed to benefit them. A coalition of agricultural shippers submitted an analysis finding that, because “less than 6%” of agricultural shipments would qualify for forced switching under the NITL Proposal, “the estimated economic benefits accruing to shippers of [agricultural commodities] as a group from the Proposal as written would not be significant.” Opening Comments of Nat’l Grain and Feed Ass’n *et al.* at 5-6. Indeed, those shippers argued that the NITL Proposal would be “a net negative” to them because few could take advantage of forced switching and many would be subject to increased rates to “offset” rate decreases to shippers who qualified for forced switching. *See id.* at 22 & V.S. Fauth at 20. As a result, these shippers asked the Board to adopt a “significantly modified” rule that would make any shipment with a rate above a 180% R/VC ratio eligible for forced switching and that would allow shippers to argue for forced switching access to interchanges more than 30 miles away. *Id.* at 7, 23-24. In other words, the agricultural shippers argued that the NITL Proposal would be of little benefit to them, and they urge the Board instead to adopt rules that approach a full “open access” regime.

Other commenters similarly recognized that the NITL Proposal would confer limited benefits on agricultural shippers and urged the Board to take more extreme “open access” measures. The U.S. Department of Agriculture argued that the NITL Proposal “would benefit too few grain and oilseed shippers” and urged the Board to adopt a blanket presumption of forced switching eligibility for any shipment with a rate above 180% R/VC located within 30 track miles of a switching point. Opening Comments of USDA at 6-7. And the joint comments of the Alliance for Rail Competition (“ARC”) and grain shippers admit that “many shippers . . .

have little or no hope of taking advantage of competitive switching,” in part because many “shippers of agricultural commodities” are located where it would not be possible to obtain switching from a second carrier. Opening Comments of ARC at 13.¹⁰

Lastly, it should not be forgotten that a significant number of shippers strongly oppose changes to existing regulations like the NITL Proposal that could degrade rail service. The record in Ex Parte 705 contains multiple examples of shippers that urged the Board to reject calls for reregulatory actions like forced switching and to continue its successful regulatory policies. David Yeager of the Hub Group urged the Board at the Ex Parte 705 hearing to not damage service for the majority of rail customers at the behest of a vocal minority:

I know that a few railroad customers in specific rail markets who ship specific kinds of freight believe that expanding rail regulation will benefit their own self-interests. However, such a shift will do harm to many more companies and individuals in the long run. Taking actions that could reduce railroad efficiency will harm the interests of intermodal customers, as well as the public at large, who benefit from the railroads.

Shippers and the public at large need railroads that are able to invest in the infrastructure expansion, terminals, and rolling stock. I'm very concerned that if the Board makes changes to regulatory policies that it will adversely affect the ability of the railroads to continue investing in their networks.

I'm also concerned that these proposals could negatively affect rail service to customers like us by reducing asset utilization and otherwise impairing the rail network.

Ex Parte 705 Hearing Transcript at 78-79 (June 23, 2011).¹¹

¹⁰ ARC also uses its Opening Comments as an opportunity to attack a variety of STB policies and decisions as supposedly being biased in favor of railroads and against shippers. *See* Opening Comments of ARC at 5 & nn. 5 & 6. Other shippers used their Opening Comments to make similarly unrelated demands, such as the Chlorine Institute's suggestion that the Board reopen former merger decisions “to impose additional competitive conditions.” Opening Comments of Chlorine Institute at 3. The Board should reject all these proposals to rewrite long-settled decisions and policies as both substantively meritless and procedurally improper in a proceeding seeking comments about the specific merits of the NITL Proposal.

As demonstrated below, the entire shipper community—including thousands of shippers who do not want or are not eligible for NITL-style forced switching—would bear the costs of the NITL Proposal through the increased congestion and poorer service that the NITL Proposal would inevitably cause. Some shippers may be willing to trade the risk of substantially degraded rail service for potentially lower rates, but those shippers are gambling not only with the quality of their own rail service, but with the quality of service for thousands of other shippers that would not derive any benefit from forced switching.

C. Chemicals Shippers Do Not Need Another Regulatory Remedy To Reduce Rates.

Some important conclusions can be drawn from the fact that the NITL Proposal is primarily supported by and designed to benefit the chemicals industry. First, the narrow base of support for the NITL Proposal—and the lukewarm reactions it has elicited from other major shipper groups—is a strong indicator that the Proposal is one that would benefit narrow parochial interests and not the interests of the public as a whole. As demonstrated below in Section II, the Board is charged with acting in the overall public interest, and it should be extremely skeptical of any proposal advanced by such a narrow slice of the community of rail users.

Second, the record contains almost no evidence that chemicals shippers need the Board to reduce standards for obtaining forced switching. The sole stated purpose of the NITL Proposal is to enable eligible shippers to obtain lower rail rates. But there is no evidence that chemicals shippers are unable to avail themselves of the Board's processes. On the contrary, in recent

¹¹ See also NS Supplemental Comments at 28-32, Ex Parte 705 (submitted July 25, 2011), for a summary of the many shipper and economic development agency statements urging the Board to maintain its current regulatory regime.

years chemicals shippers have pursued multiple Three Benchmark cases,¹² Stand Alone Cost cases,¹³ and Simplified Stand Alone Cost cases.¹⁴ Chemicals shippers have won relief from the Board in some of their cases¹⁵ and have resolved others through negotiations.¹⁶ The Board has devoted substantial attention to improving and streamlining its rate reasonableness processes, and there is no evidence that the standard rate reasonableness process is an inadequate means of relief. *Cf.* Opening Comments of CSX Transportation, Inc. at 22-23 (describing recent reforms and simplifications of the rate process).

In short, chemicals shippers have proven to be ready, willing, and able to file rate cases, and there is no need for the Board to remake the regulatory landscape to give these shippers a backdoor rate reduction mechanism to “complement” existing rate reasonableness challenges. Indeed, the rate reasonableness process is a markedly superior method for the Board to resolve important fundamental public policy questions about the appropriate level of rates for hazardous chemicals and toxic-by-inhalation hazards. Railroads have argued that rates for this traffic appropriately incorporate factors like the inherent risk of transporting these commodities, the costs of security procedures, increased insurance premiums, and positive train control, and the

¹² See, e.g., *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100 & 42101; *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket Nos. 42114, 42115 & 42116; *Canexus Chemicals Canada, L.P. v. BNSF Ry. Co.*, STB Docket No. 42132.

¹³ See *E.I. du Pont de Nemours & Co. v. Norfolk Southern Ry. Co.*, STB Docket No. 42125; *SunBelt Chlor Alkali Partnership v. Norfolk Southern Ry. Co.*, STB Docket No. 42130; *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121.

¹⁴ See *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket Nos. 42115 & 42116 (served Jan. 28, 2010).

¹⁵ See *U.S. Magnesium, LLC v. Union Pacific R.R. Co.*, STB Docket No. 42114 (served Jan. 28, 2010).

¹⁶ See, e.g., *M&G Polymers USA, LLC v. CSX Transp., Inc.*, STB Docket No. 42123; *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42112; *E.I. du Pont de Nemours & Co. v. CSX Transp., Inc.*, STB Docket Nos. 42099, 42100 & 42101.

fact that other modes charge premiums for transporting these commodities. Chemicals shippers have objected to these suggestions, and they claim that railroads are charging too much to transport their traffic. The Board is considering multiple cases that will address these important issues, and there is no need for it to create an alternative remedy that would allow chemicals shippers to use forced switching as an end run around the rate reasonableness process.

D. The Board Should Not Make Regulatory Changes For The Benefit Of The Chemicals Industry That Would Interfere With Other Agencies' Regulatory Policies Intended To Promote The Safe And Secure Handling Of TIH Shipments.

The Board must carefully consider the safety and security implications of enacting a forced switching proposal that may be invoked often by chemicals shippers. Because the most enthusiastic advocates of forced switching are chemicals shippers, the Board can expect that chemicals shippers will be the most likely to institute forced switching litigation. As a result, it is likely that a disproportionate number of the carloads that would be subjected to additional handling would be carloads of chemicals. This creates significant safety and security issues that could lead to Board decisions that conflict with the letter and/or the spirit of other agency regulations intended to maximize the safety and security of rail transportation of hazardous materials, particularly toxic-by-inhalation chemicals. The Board should consider carefully the wisdom of allowing chemicals shippers to control routing and create operational complications through forced switching in the interest of "lower rates" when those shippers have ample access to rate reasonableness remedies for any rates they believe to be unreasonably high.

Allowing NITL-style forced switching for hazmat, including TIH commodities necessarily increases the handling and switching of that traffic. By definition, a car that is subject to forced switching will undergo additional handling and additional dwell time. Also by definition, forced switching would lead to transportation of these commodities via routes of the

shipper's choosing. Inevitably, additional handling and switching will increase the risk of an accidental release. But forced switching would not just increase risk, it inevitably would lead to controversy over how the STB's new rule would interact with multiple regulations administered by other agencies that are intended to maximize the safety and security of rail transportation of dangerous commodities.

Three federal agencies share primary responsibility for ensuring the safety and security of rail transportation of hazardous materials. The Hazardous Materials Transportation Act (49 U.S.C. §§ 5101 *et seq.*) authorizes the Secretary of the Department of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5103(b). This authority is delegated to the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). In addition, the Transportation Security Administration ("TSA") has legal authority to impose safety and security requirements on rail under the Aviation and Transportation Security Act (ATSA, Pub. L. No. 107-71, 115 Stat. 597 (2001)), and has broad authority for "security in all modes of transportation , including. . . security responsibilities over other modes of transportation that are exercised by the Department of Transportation." 49 U.S.C. § 114(d). Finally, the Federal Railroad Administration ("FRA") has additional authority over railroad safety and security, and FRA enforces PHMSA's Hazardous Materials Regulations ("HMR") (49 C.F.R. pts 171-180).

Together these agencies have fashioned multiple overlapping regulations intended to increase the safety and security of hazardous rail shipments. The NITL Proposal threatens to impact at least four of these important regulatory controls.

- DOT Routing Rule: Rail carriers are required to annually evaluate each route over which certain hazardous materials, including TIH materials, can be transported and to select the “safest and most secure” route practicable for each of those shipments. 49 C.F.R. § 172.820(j). App. D to 49 C.F.R. Part 172 specifies 27 factors that rail carriers are required to analyze when selecting the “safest and most secure practicable route.” NITL’s Proposal to allow shippers to use “forced switching” to alter the routes of TIH traffic to obtain a cheaper rate could undermine the PHMSA and FRA regulatory policy that those regulatory factors be the primary considerations when routing traffic.
- Rail Security Plans: Because the NITL Proposal would disrupt traffic flows and decrease predictability for any forced switching traffic, it would make it harder for railroads to develop and carry out the security plans required by FRA and PHMSA regulations. In developing security plans required under Subpart I of Part 172 of the HMR, rail carriers are to work with shippers and consignees to minimize the time a rail car containing one of the specified hazardous materials is placed on track awaiting pick-up, delivery, or transfer. *See* 73 Fed. Reg. 72,182, 72,183 (Nov. 26, 2008). Forced switching of TIH and hazmat traffic makes it much harder to reduce the amount of time that TIH cars are held in yards, terminals and other tracks while awaiting transportation, because forced switching would very likely result in more dwell time for dangerous commodities at unpredictable locations. *See, e.g.*, Opening Comments of CSXT at 42; Opening Comments of Norfolk Southern Ry. Co. at 54-55, 64, 77-78; Opening Comments of UP at 23.
- Secure Handoff: Railroads interchanging TIH materials must engage in a “positive and secure handoff,” that is, each railroad must have personnel at the interchange point who will be present at the handoff. *See* 73 Fed. Reg. 72,130, 72,131 (Nov. 26, 2008). It is not at all clear how the STB and TSA would reconcile a forced switching rule with an attended interchange rule. Most likely, they would agree that if an interchange that a shipper wants to force traffic through does not meet the standards that the TSA says must be met in order to interchange TIH traffic, that interchange would not be considered “feasible.” However, it is far from clear that shipper interests would concede this point. Certainly, it would have to be resolved either in a rulemaking or through subsequent litigation.
- Positive Train Control: As the Board knows, pursuant to the Rail Safety Improvement Act of 2008 (“RSIA”),¹⁷ Congress has imposed a requirement that passenger railroads and Class I freight railroads install positive train control (“PTC”) on mainlines used to transport passengers or TIH materials by December 31, 2015. Because NITL-style forced switching would give TIH shippers the ability to change the routes for their traffic at will, it could raise

¹⁷ Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, § 104, 122 Stat. 4848, 4856-57 (codified at 49 U.S.C. § 20157).

significant issues regarding the implementation of PTC rules. For example, if the owner's long-haul route is equipped with PTC, but the alternative carrier's route is not, how much latitude would the STB grant to the shipper to force TIH traffic over the route that is not equipped with PTC, either because that line currently carries no TIH or because it currently qualifies for a *de minimis* exception under FRA rules? The inherent unpredictability of TIH volumes and routing caused by forced switching orders will make compliance with STB and FRA rules even more difficult.

- Expedited Delivery: Because any shipper electing forced switching under the NITL Proposal effectively would be trading more efficient service for potentially lower rates, the proposal also contradicts the spirit of PHMSA regulations intended to “ensure the prompt delivery of hazardous materials shipments and to minimize the time materials spend in transportation, thus minimizing the exposure of hazmat shipments to accidents, derailments, unintended releases, or tampering.” PHMSA, Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments; Proposed Rule, 71 Fed. Reg. 76,834, 76,836 (Dec. 21, 2006).¹⁸ Further, some chemical products are unstable and begin to break down in a relatively short time. DOT regulations require that these products be transported from origin to destination within specified time limits. *See e.g.*, 49 CFR §§173.314(g)(1) & 173.319(a)(3). It would not seem to be a defense against a violation of those regulatory requirements that the delay was caused by forced switching mandates. CSX does not suggest that a forced switching rule would lead to an actual conflict with these regulations, but only that the PHMSA policy goals conflict with the almost certain results of implementation of the NITL Proposal. *See generally* Opening Comments of Norfolk Southern Ry. Co. at 54; Opening Comments of AAR at 19; Opening Comments of KCS at 61; Opening Comments of UP at 3, 27, 69.

In short, forced switching of TIH cars is fundamentally inconsistent with the policies underlying current regulations that are aimed at making transportation of TIH materials safer and more secure. The responsible agencies—FRA, TSA, and PHMSA—have weighed the safety and security concerns regarding TIH shipments and have developed a network of regulations to address these concerns. The Board should not adopt NITL's call for a new regulatory scheme

¹⁸ The HMR also requires that shipments of hazardous materials be forwarded “promptly and within 48 hours (Saturdays, Sundays, and holidays excluded)” after acceptance of the shipment by the rail carrier. 49 C.F.R. § 174.14(a). If only biweekly or weekly service is performed, the carrier must forward a shipment of hazardous materials in the first available train. *See id.* Carriers may not hold, subject to forwarding orders, tank cars loaded with certain hazardous materials. *See id.* § 174.14(b).

that would allow TIH and hazmat shippers looking for a better rate to cause disruptions, reroutes, and delays that are at odds with the national regulatory goals of these other agencies. CSXT submits that the most responsible way for the Board to resolve a TIH shipper's complaint about the level of its rates is for that shipper to challenge the reasonableness of those rates—not for the Board to undermine the efforts of those agencies to improve safety and security.

II. THE NITL PROPOSAL SHOULD BE REJECTED BECAUSE IT IS NOT IN THE PUBLIC INTEREST.

The Board's lodestar in evaluating any proposal for change to its railroad access regulations must be whether such change would advance the public interest. The threshold limitation on the Board's statutory powers to order competitive access to a rail carrier's facilities is that such forced access must be "in the public interest." *See* 49 U.S.C. § 11102(a) (Board may order owning rail carrier to allow another rail carrier to use terminal facilities owned by the first carrier if the Board finds that such use is "practicable and *in the public interest*") (emphasis added); *id.* § 11102(c) (Board may require rail carriers to enter agreement to switch and transport cars of a competing carrier if Board finds such a requirement is "practicable and *in the public interest*") (emphasis added); *see also* 49 U.S.C. § 10705(a)(1) (providing for prescription of through rates, and joint rates and divisions if the Board finds them "desirable *in the public interest.*") (emphasis added).

The Board and its predecessor have consistently applied this statutory directive by recognizing that, in each case, competitive access should be ordered only if the overall public interest would be advanced by such a requirement. *See, e.g., Vista Chem. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 5 I.C.C.2d 331, 335 (1989) (in considering a request for forced switching, "the substantive test is, overridingly, a public interest one"); *Intramodal Rail Competition*, 1 I.C.C.2d 822, 823 (the agency's "first obligation is to implement and administer

[the Commerce Act's] provisions in a manner consistent with the broader public interest considerations set out in the Rail Transportation Policy . . ."); *Golden Cat Div. of Ralston Purina Co. v. St Louis Southwestern Ry. Co.*, 1996 STB LEXIS 132 (April 17, 1996); *see also* 49 U.S.C. § 10101(4) (Rail Transportation Policy provides that a goal of U.S. rail regulation is "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") (emphasis added).

A. Proponents Of The NITL Proposal Have Failed To Present Evidence Or Argument To Support A Finding That The Proposal Would Serve The Public Interest.

Critically, the "public interest" the Board is charged with protecting and advancing through its regulatory actions is the broad overall interest of all of the public, not the parochial interests of a subset of the public such as a select group of shippers. Some participants in this proceeding have a narrow and distorted view of the Board's overarching responsibility to serve the public interest, *i.e.* that what may advance certain private, short-term interests of a narrow segment of the public also necessarily serves the public interest. But the Board's mandate to advance and protect the public interest is far broader and more comprehensive than the narrow conception fostered by some members of the NITL, including certain chemicals shippers. Rather than catering to the vocal minority of shippers clamoring for forced-access-on-demand to serve their narrow self-interests, the Board's primary duty is to identify and pursue policies designed to foster and maintain public benefits.

Commenters supporting the NITL Proposal fail to acknowledge that while they believe they would obtain private benefits from the proposal, many other shippers would be hurt by, for example, reduced carrier and rail network efficiency, operational problems causing congestion, delays, longer transit times, and degraded service, as well as greater costs. While it appears that

potential financial “benefits” of the NITL Proposal would be confined to a concentrated group of shippers, the corresponding operational and network detriments and costs would be widely dispersed to most shippers, including the majority that would obtain no benefit from forced switching. Thus, the narrow group of supporters of the NITL Proposal essentially seek the Board’s intervention to pick winners and losers among shippers, as well as between certain shippers and rail carriers and their employees. The new policies and increased regulatory intervention urged on the Board by the NITL and its supporters would advance their private interests by sacrificing both other private interests and the greater public interest in an efficient, high quality, stable freight rail network able to maintain and improve service for all rail shippers through continued capital investments and improvement.

Advocates of commencing a rulemaking aimed at radically changing the Board’s competitive access regulations and forcing access based on a one-size-fits-all set of mechanical presumptions have failed to demonstrate that their proposals would generate broadly distributed public benefits. Indeed, they have not even attempted to show that their proposals would result in any net *public* benefit whatsoever. Their far narrower claim is essentially that they believe the proposal would generate *private* benefits—primarily in the form of lower rail transportation rates—for *some* shippers. As demonstrated elsewhere, any attempt to quantify potential rate changes that might result from the NITL Proposal is an inherently speculative endeavor, and the methods used by proponents of the proposal are particularly unreliable and incomplete, and produce dubious results. *See infra* Section V; Reply Comments of AAR at Section II.B.

But even if it were possible to project with some degree of accuracy the changes in rail rates that some favored shippers might obtain under the NITL Proposal, that narrow exercise misses the point. It would not allow the Board to analyze the net effect of the proposal on the

broader public interest, including the effect on rail service quality; the overall effect on the capacity, fluidity, and efficiency of the national freight rail network; the effect on rail carrier costs and future capital investment; the potential effect on rail rates for customers who would not seek or be eligible for forced switching; and the overall effect on the national transportation system, the millions of businesses and consumers that depend on it, and the national economy and economic growth. Those net costs and effects—not the speculative potential rate reductions touted by a narrow group of self-interested proponents of the NITL Proposal—are what the Board must consider when it evaluates whether that proposal would serve the public interest.

In evaluating whether a proposed action or regulation would advance the public interest, this agency has carefully distinguished between public benefits and private benefits. Private benefits of a proposal should not be given weight in evaluating whether it is in the public interest. As the ICC explained in considering a proposed consolidation, “every proposed consolidation will produce private benefits, such as cost reductions and service improvements. . . . Our inquiry is whether the private benefits will also accrue to the public interest.” *CSX Corp – Control – Chessie Sys. Inc. and Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 521, 551 (1980). Without more, the claim that some shippers might obtain rail rate reductions under the NITL Proposal is at best a claim of private benefit that should be afforded little weight in the Board’s assessment of the broader public interest.¹⁹

Virtually all parties supporting the NITL Proposal focused primarily on potential rate reductions they speculate might result from a forced switching regime. None promised that they

¹⁹ See, e.g., Opening Comments of ACC at 5 (only cited “benefits” of proposal are potential rail rate reductions, primarily for chemicals shippers; asserting without support that corresponding revenue losses to rail carriers would “not unduly harm” them); Opening Comments of NITL at 45-54 (focusing on private benefits of reduced rates to shippers, asserting that a ten percent reduction in net rail revenues would not cause undue financial harm to rail carriers, and broadly asserting that rail traffic volume “possibl[y]” might increase due to reduced rates).

would pass their savings on to their customers or consumers. If a shipper obtained rate reductions as a result of forced switching but did not pass its cost savings along to others, this would be a purely private gain to that shipper and forced switching would neither generate a public benefit nor advance the public interest.²⁰ As the ICC warned, “some . . . private benefits may harm the public interest.” *See, e.g., Guilford Transp. Indus., Inc. – Control – Boston and Maine Corp.*, 366 I.C.C. 294, 335 (1982). Here, the forced switching proposal would result in a regulation-impelled wealth transfer from carriers to selected shippers. Such a forced transfer creates no net benefit, and certainly no net public benefit.

Moreover, as discussed in more detail below, the purported private benefit of lower rates for some chemicals shippers should be accorded even less weight in the analysis because those shippers already have direct, robust avenues to challenge rates they believe are unreasonable. *See I.C. infra*. Because shippers already have multiple statutorily mandated regulatory methods to challenge rail rates, the potential “benefits” of the NITL Proposal to a select group of shippers would be limited to: (1) an ability to use forced access to circumvent the rate case process mandated by Congress and developed and refined by the Board through years of experience; and (2) to seek to use forced access claims and litigation to obtain rates below the levels supported by a maximum rate reasonableness analysis under governing law and regulations. Neither of these two potential private benefits would advance the public interest. As demonstrated below, forced access cases (whether under the NITL Proposal or a variant that is more consistent with

²⁰ Some private benefits, such as carrier cost savings or efficiencies resulting from a merger, are also public benefits. *See CSX – Control – Chessie Sys. and Seaboard*, 363 I.C.C. at 551-52; *see also* 49 C.F.R. § 1180.6(b) (merger applicants should include as public benefits the cost savings that would accrue to them as a result of the proposed consolidation). However, private benefits to selected shippers in the form of a net revenue transfer from rail carriers plainly are not public benefits. *See, e.g.*, Opening Comments of AAR at 16-18; Reply Comments of AAR, V.S. Fagan at 2.

governing law and policies) would be complex, time-and-resource-consuming, and difficult to litigate. Accordingly, creating such a complex new regulatory regime to “supplement” the Board’s rigorous existing rate reasonableness methods and remedies (*see* Opening Comments of NITL at 16) would consume substantial additional private and public resources without generating additional public benefit. And there is no public benefit or interest in allowing selected shippers to rely on regulatory intervention to obtain rates below maximum reasonable levels.

Aligned against these purported “benefits” is an array of negative effects and public detriments that could result from the forced switching proposal. For example, forced switching threatens to undermine and undo the rail service efficiencies and productivity gains that have resulted from rail system rationalizations, minimization of interchanges and switching, and network consolidation painstakingly implemented by rail carriers over the last three decades. As CSXT and other commenters have explained, some of the greatest efficiency improvements and cost reductions achieved by carriers since the Staggers Act have been the result of reductions in switching, shorter terminal and rail yard dwell times, and longer single-carrier hauls. *See, e.g.*, Opening Comments of CSXT at 25-33; Opening Comments of AAR, V.S. Rennie, at 10-18; Opening Comments of UP at 53-57. Requiring new and additional switching of foreign carrier traffic at the demand of a shipper could reverse those gains by introducing more interchanges and switching, increased terminal dwell times, and shorter single-carrier hauls. Together, such additional car and equipment handlings, delays, and operating burdens and complications could dramatically reduce efficiency and increase costs, thereby undermining the hard-won efficiency,

productivity, and service quality gains that have been achieved by rail carriers and generated substantial and broad public benefits over the last 30 years.²¹

Another public detriment of the NITL Proposal is that it would reduce the incentive for rail carriers to make capital investments necessary to improve and maintain their networks. Forcing carriers to allow competitors to use rail facilities built with the owning carrier's private investments at anything less than fully compensatory access prices would reduce their expected return on those capital investments and discourage future investments. If a carrier and its investors cannot reliably project an adequate return on capital invested in the rail network, they will choose to invest elsewhere. Results of reduced or inadequate capital investment in the rail system would likely include inadequate capacity to meet projected growth in demand for rail transportation services, rail system congestion and delays, deterioration of rail service and efficiency, and potentially more traffic transferred to over-the-road trucks which would result in more pollution and greater strain on public infrastructure. Each of these consequences would have a significant negative effect on the public interest and weigh heavily against the limited—and largely private—potential “benefits” of the NITL Proposal.

In addition to potential reductions in capital investments by rail carriers, the forced switching regime embodied in the NITL Proposal would almost certainly increase the operational costs of rail carriers who would be forced to use their property, equipment, and resources to switch and transport traffic for their competitors. Rail carriers that have tailored

²¹The NITL Proposal not only would require changes to railroad operations, it also could lead to potential changes of railroad ownership on affected line segments. If forced switching orders were to result in the rerouting of enough traffic to degrade the profitability of a line segment, rail carriers would have to consider responsive measures, which might include sale of those segments to short line railroads. This is yet another example of how NITL's desire to grant certain shippers the ability to reshuffle traffic patterns could cause wide-ranging, unintended consequences.

their operations—from optimizing facilities and allocating equipment, to local and terminal service plans and schedules, to crews, to maintenance, to the numerous other components of their operations—to serve their traffic in an efficient and cost-effective manner could be forced to make *ad hoc*, disruptive changes to those operations in order to interchange and accommodate different and varying flows of traffic injected by other carriers. The introduction of new and unforeseen traffic into busy terminal areas through forced switching would increase the owning carrier’s operating costs substantially at the same time it eroded that carrier’s efficiency and service quality. This agency has repeatedly recognized that cost *reductions* realized by a carrier as result of an approved consolidation or action constitute public benefits. *See, e.g., CSX Corp. – Control – Chessie Sys. and Seaboard*, 363 I.C.C. at 551 (cost reductions are considered to be a public benefit); 49 C.F.R. § 1180.6(b) (cost savings included as benefits of proposed consolidation). By the same logic, cost *increases* resulting from a carrier action or transaction required by agency regulation or order must be considered public detriments that negatively affect the public interest.²²

B. Use Of An R/VC Ratio To Establish One-Size-Fits-All Classes Of Movements Entitled To Forced Switching Would Be Arbitrary, Inaccurate, And Contrary To The Statute.

A central premise of the NITL Proposal is the erroneous notion that the Board may determine the public interest in forced switching cases *categorically* through the mechanical

²² Proponents of the NITL Proposal may contend that there are other public benefits that would result from the imposition of forced switching. As discussed above, their opening comments focused primarily on their projected *private* benefits, *not* public benefits. If forced switching proponents were to identify potential public benefits of their proposals, any such benefits would have to be measured against the public detriments (including increased costs) of the proposal to determine whether there might be any *net* benefits accruing to the public as a result of the proposal.

application of a pre-established one-size-fits-all ratio or percentage.²³ NITL proposes the application of “conclusive presumptions” to make forced switching determinations, displacing the Board’s longstanding approach of determining the public interest based on individualized consideration of the specific facts and circumstances of each case.²⁴ The use of a single R/VC ratio or a one-year traffic volume share as the determinant of the public interest for all of the different potentially eligible facilities and traffic would disregard the myriad varying material facts, circumstances, and conditions of each peculiar individual facility, location, shipper, and type of traffic that might be at issue in forced access requests. As the agency has recognized in an analogous context, application of simplistic arithmetic ratios (such as a single static R/VC ratio) is a crude and inaccurate way to determine whether there is effective transportation competition for specific traffic. *See, e.g., Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118-122 (1981) (rejecting use of R/VC ratios to determine market dominance, in favor of “more accurate . . . determinations on a case-by-case basis.”).²⁵

²³ *See, e.g.,* STB Ex Parte No. 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, Notice at 4 (served July 25, 2012) (describing the two “conclusive presumptions” that are “central to NITL’s propos[als],” R/VC > 240, or serving rail carrier handled 75% or more of the traffic at issue); *id.* at 5 (conclusive presumptions regarding whether workable interchange exists within reasonable distance of shipper’s facilities).

²⁴ Under the NITL Proposal, the conclusive presumptions would operate as a one-way ratchet: Traffic meeting the ratios is conclusively deemed eligible for forced switching, but shippers whose traffic does not qualify under those ratios are not deemed ineligible for competitive switching. *See* NITL Petition at 41-52, 65-67; Opening Comments of NITL at 7. Instead, a shipper that does not meet the conclusive presumption requirements may still seek forced access by arguing that there is a “lack of effective competition” for transportation of its traffic. *See* NITL Petition at 7, 46, 67. Thus, the NITL Proposal would impose crude wooden presumptions in instances in which they favor shippers, and ignore the logical inverse presumption by allowing a fact-and-circumstance-specific assessment where the presumptions do not favor shippers.

²⁵ Even the ICC’s initial use of R/VC ratios—which the agency rejected after a short time as inaccurate given the numerous varied factors affecting competition and market dominance—established only *rebuttable* presumptions, not the conclusive, irrebuttable presumptions NITL has now proposed. *See Market Dominance Determinations*, 365 I.C.C. 118.

It is an even more arbitrary and capricious way to make determinations regarding the multi-faceted and variable requirements of the public interest.

Not only would uniform application of a single arithmetic ratio to determine forced access requests be inaccurate and arbitrary, it would also be contrary to the statute authorizing the Board to order such access. Section 11102 clearly contemplates an individualized determination of each request for competitive access, not mechanical application of the same pre-determined arbitrary ratio to each unique access request. *See* 49 U.S.C. § 11102(a) (providing for forced access and use of a carrier’s terminal facilities “if the Board finds *that use* to be practicable and in the public interest without substantially impairing the ability of the [owning] rail carrier” to use the facilities for its own business) (emphasis added); *id.* § 11102(c) (authorizing forced switching “agreements” in those instances “*where it finds* such agreements to be practicable and in the public interest”) (emphasis added).

Importantly, the statute does *not* state that the Board may make *categorical* determinations for entire classes or types of traffic. Nowhere does the statute grant the agency the power to make broad, one-size-fits all determinations—whether through “conclusive presumptions” or otherwise—that entire classes of traffic are entitled to forced switching or forced access. Where Congress intended to authorize the STB to make broad regulatory determinations for entire categories or classes of persons or traffic, it expressly enumerated that power in the language of the statute. *See, e.g.,* 49 U.S.C. § 10502 (a), (b) (authorizing the Board to exempt from regulation “*class[es]* of persons,” in addition to individual persons, transactions, or services) (emphasis added). Because Congress did not authorize the Board to make broad general access determinations for classes of traffic (*e.g.,* all shippers at a single-served facility within 30 miles of an interchange that generates an R/VC > 240%), the Board may order

competitive access only after a petitioning shipper proves that under the specific facts and circumstances at issue, such an order is in the public interest or necessary for competitive rail service. *See id.* § 11102.

Application of a simplistic ratio as the keystone for forced switching determinations may be quick, simple, and inexpensive, but it is far from an accurate, reasonable, or sound way to evaluate or advance the public interest under the peculiar circumstances, facts, and conditions obtaining in each individual request for forced switching. Moreover, the categorical approach embodied in the conclusive presumptions of the NITL Proposal are not authorized by the statute.

In sum, supporters of the NITL Proposal have identified few public benefits of such a forced switching regime. They speculate that *some* shippers might realize short-term *private* gains (largely in the form of rail rate reductions that would be a zero-sum transfer from rail carriers to a subset of shippers), but *private benefits are not public benefits*. And the Board is charged with promoting the latter, not the former. On the negative side of the ledger, CSXT, AAR, and other commenters have identified numerous and substantial negative effects of the proposal on the public interest, including significant harm to the operations and efficiency of the national rail network and degraded rail service to the many rail shippers who would not benefit from the proposal. Even crediting the largely unsupported claims of limited potential public benefits made by proponents, the net effect of the NITL Proposal on the public interest would be negative.

Because the negative effects of the NITL's Proposal would far outweigh any potential benefits identified in this information-gathering proceeding, the proposal fails to satisfy a fundamental threshold requirement for major new regulation by the Board—that it serve and advance the public interest. As the ICC has long held, in order to show that forced access is

“practicable and in the public interest” a proponent must demonstrate “more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them.” *Jamestown Chamber of Commerce v. Jamestown W. & N. R. Co.* 195 I.C.C. 289, 291 (1933); *see Midtec Paper Co. v. United States*, 857 F.2d 1487, 1492 (D.C. Cir. 1988) (quoting *Jamestown Chamber of Commerce* in affirming present forced access rules and standards). Because proponents have not, and cannot, demonstrate that the NITL Proposal would be in the public interest, the Board should reject the proposal and terminate this proceeding without further action.

III. PROPONENTS OF FORCED SWITCHING HAVE NOT ADDRESSED THE NEGATIVE CONSEQUENCES OF NITL’S PROPOSAL ON RAIL SERVICE.

Among the issues that the Board asked the parties to address in their submissions was “whether increasing the availability of mandatory competitive switching would affect efficiencies or impose costs on the railroads.” Notice at 8 (served July 25, 2012). In its Opening Comments, CSXT demonstrated that NITL’s Proposal would undermine the major improvements in service efficiency and reliability that CSXT and other railroads have delivered for their customers in the post-Staggers era. *See* Opening Comments of CSXT at 24-43. By generating unnecessary car handlings, diverting shipments away from efficient high-volume routes, and disrupting the predictability of traffic flows upon which modern rail service planning is predicated, forced switching would impair the ability of railroads to operate “scheduled” train services, to minimize car dwell time at yards and interchange points, and to maintain cooperative operating arrangements (including run-through trains and “pre-blocking” of interline traffic) with connecting carriers. As CSXT has shown, those adverse service consequences would affect all

rail customers, including shippers who would derive no benefit from NITL's ill-conceived proposal.²⁶

Conspicuously absent from the Opening Comments filed by NITL and other proponents of forced switching is any meaningful discussion of the potential impact of forced switching on the quality or cost of rail service. Based upon what it characterizes as “the Canadian experience,” NITL blithely asserts that its proposal “will not adversely affect rail network efficiency at all.” Opening Comments of NITL at 58. Remarkably, NITL suggests (without presenting any supporting evidence) that diverting traffic to a plethora of new routes and interchanges “may increase network efficiency.” *Id.* (emphasis in original).

Highroad Consulting dismissed the potential impact of NITL's Proposal on rail network fluidity by pointing out that “[t]he railroad industry has responded to change positively in the past. They are innovative and accomplished at identifying opportunities to improve the efficiency of operations and to grow their business.” Opening Comments of Highroad Consulting at 11. Highroad misses the point: the concern raised by CSXT and other rail carriers is that forced switching would destroy the very service innovations and efficiency-enhancing operating practices that railroads have developed and implemented over the past two decades. Moreover, Highroad's observation begs the question of why the Board should risk harm to service quality—at the expense of all rail customers—for the sake of a limited group of shippers who seek lower rates.

The American Chemistry Council (“ACC”) based its claim that NITL's Proposal “will not unduly harm freight railroads” solely on its forecast that forced switching would reduce

²⁶ The concerns expressed by CSXT regarding the adverse effects of forced switching on rail service quality were echoed in the Opening Comments of other railroad parties. *See, e.g.*, Opening Comments of AAR, V.S. W. Rennie; Opening Comments of KCS at 14-17; Opening Comments of Norfolk Southern Ry. Co. at 71-79; Opening Comments of UP at 22-53.

carrier revenue by 2.4%. Opening Comments of ACC at 5-6. Nowhere in its comments does ACC mention—much less analyze—the potential effects of forced switching on the efficiency or reliability of the rail network. Likewise, the Interested Agricultural Parties contend that forced switching “would not significantly impact the Class I railroads” because “the amount of ‘at risk’ revenues . . . would be insignificant.” Opening Comments of Interested Agricultural Parties at 20-21. However, the Opening Comments of the Interested Agricultural Parties make no mention whatsoever of the potential adverse impacts on railroads or their customers that would result from a degradation in service. The Opening Comments of Olin Corporation focus entirely on the supposed “lack of competition” for chemical traffic, and make no mention whatsoever of the impact on rail safety of dispersing that traffic (including shipments of chlorine and other hazardous chemicals) among numerous routes and interchanges. The Alliance for Rail Competition (“ARC”) acknowledges that it is “possible” that forced switching could lead to “unsafe operations or inadequate investment,” but argues that “these dangers should not head up the Board’s list of concerns in this proceeding.” Opening Comments of ARC at 9. Indeed, ARC chides the Board for asking interested parties “to do extensive and expensive cost-benefit analyses” of the effects of NITL’s Proposal, and asserts that “rail-to-rail competition needs to increase, even if shipper benefits are uncertain.” *Id.* at 5-6 (emphasis added).

In short, the Opening Comments of NITL and other proponents of forced switching do not address the operating concerns identified by the railroads, nor do they demonstrate that the purported competitive benefits of NITL’s Proposal outweigh the likely harm to rail network efficiency, service quality and reliability, and future investment incentives that would flow from implementation of a “forced switching on demand” regime. Instead, they urge the Board simply to assume that, because Canada’s century-old interswitching regulation has not caused major

service problems in that country, the impact of NITL's far broader proposal on the United States rail network would likewise be benign. As the following discussion (and the Opening Comments of CSXT and other railroad parties) demonstrate, such a leap of faith is dangerous and unsupported by the record evidence.

A. Forced Switching Would Undermine The Modern Operating Practices That Have Enabled Railroads To Deliver More Efficient And Reliable Rail Service.

Despite NITL's claims to the contrary,²⁷ there is ample evidence that its forced switching proposal would undermine modern railroad practices that have enabled carriers to deliver major improvements in rail service and efficiency. *See* Opening Comments of CSXT at 33-47. NITL envisions a rule that would allow a qualifying shipper to demand access to a second carrier anywhere "there is or can be 'a working interchange'" within 30 miles of the shipper's facility." July 25 Decision at 4 (emphasis added). As the Opening Comments submitted by CSXT and other railroads show, such a rule would significantly increase car handlings and dwell time at yards and interchange locations, divert traffic from the high-volume, lower cost routes that carriers have developed to maximize service efficiency, and increase overall transit time. *See* Opening Comments of CSXT at 33-47.

Permitting shippers to demand service via any interchange point of their choosing would convert large volumes of traffic that currently move in single-line service to less efficient interline movements. The immediate impact of such a rule would be to generate a major increase in the number of car handlings required to transport such cars across the rail network. As the Opening Comments of CSXT and other railroads showed, such additional handlings would degrade service by increasing both dwell time in yards and overall transit time. For

²⁷ *See, e.g.*, Opening Comments of NITL at 33, 62.

example, CSXT illustrated that shifting even the simplest car movement from a single-line routing to an interline movement involving a second carrier would increase the number of handlings required to serve the movement from four to seven. *See* Opening Comments of CSXT at 40-41. CSXT’s average system-wide terminal dwell time is approximately 24 hours. *Id.* at 42. Thus, the record indicates that each additional interchange required in response to a demand for forced switching would delay the subject car(s) by approximately 24 hours. The Opening Comments of NS and UP likewise support a finding that forced switching would add significant delays to car transit times.²⁸ As NS pointed out, carload shipments spend much of their overall transit time not actually moving in a train, but being handled at origin, destination and intermediate locations. *See* Opening Comments of Norfolk Southern Ry. Co. at 74 (noting that, on average, carload traffic spends 41% of its transit time in handling locations). Indeed, this agency has long recognized that “[i]nterchanging freight . . . adds significantly to delivery time, since the time a railcar spends in a yard or terminal is most of its time in transit and an inefficient use of cars.” *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry. Co.*, 360 I.C.C. 788, 940 (1980).²⁹ NITL’s forced switching proposal would degrade service and network efficiency by requiring more frequent car handlings and increasing the amount of time that cars spend in rail yards. Indeed, as CSXT showed, NITL’s Proposal could lead to

²⁸ *See* Opening Comments of Norfolk Southern Ry. Co. at 77-79 (describing current dwell times and illustrating that increased car handlings in interchanges would increase dwell time at those locations); Opening Comments of UP at 22-23 (“[F]rom the time the empty cars arrive in a terminal until the loaded cars depart, even in relatively uncomplicated interchange situations, where two railroads are operating in the same terminal and delivery cars directly into each other’s yards, reciprocal switching would add 48 to 96 extra hours during which the affected cars would remain in yards, increasing car inventory and consuming capacity.”).

²⁹ Even Highroad witness Thurston acknowledged that “switching rail cars between railways at interchange points or within rail yards for train-building or shipper placement objectives is a more time consuming and resource demanding activity than simply hauling trains along a mainline operation.” Opening Comments of Highroad Consulting, V.S. Thurston at 27.

significant increases in car movements through yards and wayside interchange points that are not equipped to accommodate such an increase in daily activity. *See* Opening Comments of CSXT at 45. Such a result would negate the efforts of railroads to eliminate costly and inefficient interchanges by consolidating traffic over a smaller number of high-volume routes. *See* Opening Comments of CSXT at 37-39; Opening Comments of Norfolk Southern Ry. Co., V.S. Ehlers at 11-13.

NITL's Proposal would not only complicate carriers' yard operations; it would also undermine train operations and overall network planning.³⁰ As CSXT's Opening Comments explained, railroads have implemented a variety of efficient, modern operating practices to enhance the quality and reliability of their service offerings. CSXT and other carriers have adopted "scheduled" train service plans that offer more consistent, reliable service to customers. A "scheduled" train service plan also enables carriers to coordinate the arrival and departure of road and local train with the yard operations required to support on-time train performance. Scheduled service benefits shippers by providing greater predictability regarding the arrival and departure times for their shipments. Coordinating the movement of road trains and local trains with yard operations promotes fluid movement of traffic across a carrier's network.

Another important operating practice utilized by CSXT is the development of a "trip plan" for each carload shipment that traverses its rail lines. Nearly two-thirds of the general freight carload traffic transported by CSXT moves in two or more road trains during its journey. *See* Opening Comments of CSXT at 32. A "trip plan" enables CSXT to assign individual cars to those trains that can handle the movement most efficiently. CSXT also employs a "hub and spoke" train and yard service plan that seeks to route cars through high-capacity hump yards in

³⁰ *See* Opening Comments of CSXT at 24-47; Opening Comments of KCS at 14-16; Opening Comments of Norfolk Southern Ry. Co. at 71-79; Opening Comments of UP at 22-57.

order to expedite the transfer of cars from one train to another. CSXT and other carriers employ detailed “blocking plans” at each major yard, pursuant to which cars moving to a common destination (or point further along the network) are classified into “blocks” that travel together. Transporting cars in blocks reduces the number of times that individual cars must be switched at intermediate points, by allowing entire blocks of cars to be “swapped” from an in-bound train to an out-bound train without further classification. *See* Opening Comments of CSXT at 28-33.

CSXT employs similar efficient operating practices in handling interline traffic. For example, CSXT and connecting carriers expedite the movement of interline freight by operating “run-through” trains between points on their respective systems. Run-through trains are built at a major yard on one railroad’s lines and operate intact to another yard (beyond the interchange point) on the receiving carrier’s system. This practice eliminates the need for either railroad to handle or reclassify individual cars at the point of interchange.³¹ Indeed, run-through trains often bypass major terminals such as Chicago and New Orleans, thereby avoiding costly delays incurred in handling traffic via congested lines and gateways.

Where run-through train service is not feasible (for example, where merchandise traffic does not move in sufficient quantities to fill out an entire train), CSXT and its connecting railroads may “pre-block” cars for one another prior to interchange. Like cars moving in run-through trains, such blocks are built at a major yard on one railroad’s lines for through movement to a point on the receiving carrier’s system, and are “swapped” intact at the interchange location. This practice reduces car handlings by allowing “blocks” of cars to be

³¹ These and numerous other practices implemented by carriers have improved car and equipment utilization and thereby further improved efficiency and reduced rail costs. To cite one recent example, the North American Boxcar Pool was able to reduce days per load from 31.2 to 29.9 in the span of just four years, from 2009 through 2012. This increased efficiency was equivalent to creating more than 300 new rail cars of transportation capacity.

transferred from an in-bound train to an out-bound train without further classification. *See* Opening Comments of CSXT at 28-29.

As CSXT's Opening Comments demonstrate, the key to the success of these efficiency-enhancing operating practices is the predictability of the traffic flows for which a railroad must plan. *See* Opening Comments of CSXT at 33. NITL's Proposal offers no element of predictability or stability upon which CSXT and other carriers could plan their operations. There is no minimum time commitment or other limitation upon a shipper's right to shift the routing of its traffic. Rather, shippers would be free to demand forced switching at any time, at any location, and for any reason, without making any commitment to move their freight via the new route for any period of time. Indeed, under NITL's Proposal, a shipper could demand forced switching and reroute its traffic for a short period of time simply to induce the original carrier to offer a reduced rate, then immediately shift its traffic back to the original route were it to successfully achieve lower rates.³²

CSXT and other U.S. railroads have invested massive resources to develop a modern, efficient national rail network. As *The Economist* recently observed, America's rail system today is "the most cost-effective" in the world.³³ NITL's forced switching proposal would derail the efforts of CSXT and other carriers to meet the growing demand for safe, efficient and reliable rail transportation services. A regulatory regime that permitted shippers to demand that U.S. railroads establish new (and less efficient) routings and interchange arrangements on a whim,

³² If a shipper committed its traffic to an alternate route by entering into a contract with the second carrier, that shipper would, under current law, have the ability to obtain a rate from the original carrier under the Board's "bottleneck" process. What NITL is seeking in this proceeding is relief that is essentially the same as that available under the bottleneck remedy, without being required to commit its traffic to the alternate route.

³³ "Back on track: The quiet success of America's freight railways," *THE ECONOMIST* (April 13, 2013), available at <http://www.economist.com/news/business/21576136-quiet-success-americas-freight-railways-back-track>.

and shift traffic back and forth between alternative routes at any time, would wreak havoc on the train service plans, yard operations and cooperative arrangements upon which CSXT and other carriers rely to provide that service to their customers. The fact that a forced access “remedy” would be available only to a subset of shippers, while the adverse impacts of its proposal would be felt by all rail customers, further underscores the wisdom of rejecting NITL’s Proposal.

B. CSXT Video Exhibit 1 Illustrates The Adverse Operational Impacts Of The NITL Proposal.

In light of proponents’ abject failure to address the significant potential operational effects of the NITL Proposal, CSXT submits with its Reply Comments a video exhibit to illustrate some of the operational problems that the NITL Proposal would cause. *See* attached Exhibit 1. The video focuses on three real-world scenarios on the CSXT system where NITL-style forced switching would lead to significant operational complications. These three scenarios are not unique or unusual. On the contrary, they are only examples of the kinds of problems that could occur in many similar situations across the rail network if the NITL Proposal were to be adopted.³⁴

The first video example of a scenario in the Norfolk-Newport News area shows the extreme inefficiency and absurd results that would result from adopting NITL’s Proposal to conclusively presume that switching would be reasonable “within a radius of 30 miles of an interchange.” While NITL has never clarified whether it means air miles or rail track miles, the

³⁴ CSXT emphasizes that these comments and in particular these specific examples are offered solely by CSXT. They are not intended to represent the position of Norfolk Southern or any other rail carrier. Moreover, CSXT’s use of these three examples to illustrate the effects of the NITL Proposal is not intended to suggest that forced switching would be warranted, feasible, or lawful at any of these examples—even if the NITL Proposal were to be adopted. CSXT reserves all its rights to challenge the lawfulness and feasibility of forced switching at any of these locations in any future proceeding.

dictionary definition and ordinary use of the term “radius” mean straight-line air miles.³⁵ Using the common meaning of “radius,” the NITL Proposal would lead to a “conclusive presumption” that switching was feasible over rail line distances that far exceed 30 rail miles. For example, the coastal geography of southeastern Virginia means that many areas that are within 30 miles of each other “as the crow flies” are separated by a much greater distance of rail track miles. The Norfolk-Newport News portion of Exhibit 1 shows that a shipper who invoked forced switching for a shipment to the CSXT Pier IX coal terminal would add hundreds of miles and significant circuitry to the route for its traffic. *See* Exhibit 1 at 2:40—4:35. And the costs of that inefficiency would not be borne only by the customer requesting forced switching. On the contrary, the disruptions and delay attributable to the inefficient movement would impact thousands of other customers who depend on efficient and fluid rail operations.

Second, the video exhibit illustrates the significant operational impacts that can occur when a forced switching request disrupts the “hub and spoke” nature of carload operations. *See* Exhibit 1 at 5:32-15:11. The Jacksonville scenario depicted in the video was described in CSXT’s Opening Comments at pages 39 to 40, where CSXT explained the significant operational difficulties that result from forcing switching at flat serving yards. In the Jacksonville scenario, the active interchange within 30 miles of the customer’s facility is not actually used by trains serving that facility. That is, under the CSXT operating plan, there is no train that runs between Moncrief yard (the interchange point) and Busch yard, which is the customer serving yard. Moreover, given switching and service demands of existing traffic served by the yard at the interchange point (Moncrief yard), that yard likely would not have the capacity to flat-switch and block a significant additional volume of forced-switch cars.

³⁵ *See* Webster’s Third New Int’l Dict. 1874 (defining “radius” as “a line segment extending from the center of a circle or sphere to the curve or surface”).

Depending on the size of the cut of cars that would be released to CSXT at Moncrief yard, it might be possible for CSXT to accept such additional cars at that yard. However, it is another thing entirely to assume that Moncrief yard would have the capacity to flat switch the cars onto a departure train bound for the customer(s) facility. It would not. As this example illustrates, it is critical to understand that *not every interchange can function as a classification yard*.³⁶

Because of these operational constraints, cars arriving at that interchange due to a forced switching order would have to be routed north to CSXT's Waycross, GA, hump yard for blocking into another train that would serve the customer. The reason that CSXT's and other railroad's operating plans work to process as much traffic as possible through regional hump yards is that classification and switching at those regional hubs is far more efficient than classification at flat switching yards—as the video illustrates.³⁷ *See id.* at 7:30 – 12:15. The irregular and inefficient operations that forced switching would create significantly interferes with the fluidity of the “hub-and-spoke” model that is the backbone of CSXT's carload service plan, and that interference and inefficiency has downstream effects that impair service to other CSXT customers.

The third illustration in Exhibit 1 demonstrates the significant congestion and disruption that can occur when forced switching moves are added to complex metropolitan areas like Baltimore. *See Exhibit 1 at 15:12–20:35.* Baltimore is one of many locations on CSXT's

³⁶ As CSXT has discussed elsewhere in its comments, one of the significant operational problems posed by forced switching on demand is the variability and unpredictability of traffic flows and volumes it would introduce to operating plans that are based on known and relatively predictable traffic patterns. Under CSXT's current operating plan for its existing traffic and customers, the Moncrief yard operates very close to its capacity, and thus has very limited ability to handle additional traffic.

³⁷ CSXT's video exhibit is illustrative and conceptual. The video is not intended to be a technically precise depiction of actual operations, but rather a generally accurate animated illustration of some of the principles, concerns, and operational effects described in these comments.

network where busy freight and commuter operations require precise balance and careful planning. Adding forced switching movements to the mix can disrupt that balance and create significant congestion and service impacts for other customers. Exhibit 1's Baltimore example shows how a single forced switch ethanol movement could create serious backups for other freight movements and commuters, as well as require the movement of hazardous materials through the downtown area, a routing that CSXT avoids today.

In short, the video Exhibit demonstrates that the NITL Proposal would cause significant complications throughout the rail network. These effects would not be limited to the examples in Exhibit 1. For as Exhibit 1 depicts, if the NITL Proposal is adopted operational harms like these can be expected across the rail network. *See* Exhibit 1 at 19:38—20:35.

C. NITL's Recommendation That Railroads Be Permitted To Demonstrate That An Individual Request For Forced Switching Is Infeasible Or Unsafe Does Not Save Its Ill-Conceived Proposal.

One of the “four basic principles” underlying NITL's forced switching proposal is that competitive switching would not be available if the rail carrier can show the switching would be infeasible or unsafe, or would unduly hamper the ability of that carrier to serve its existing customers.

Opening Comments of NITL at 8. According to NITL, this proviso “assures that competitive switching would not result in operational or safety problems.” *Id.* at 64. NITL is wrong.

While this suggested limitation on the availability of forced switching might defeat a proposal that is, on its face, “infeasible”—for example, a demand by a shipper that carriers switch unit trains at a little-used wayside interchange location that is equipped with a single 2,000 foot track—it utterly fails to address the fundamental problem identified by CSXT and other carrier parties. Viewed in isolation, one shipper's demand that a railroad deliver its cars to another railroad at an existing interchange location for line-haul movement by the second carrier would not, in many instances, be “unsafe” or “infeasible.” However, the cumulative impact of

having hundreds of shippers demand that carriers shift thousands of rail cars to new routings via less efficient alternate interchanges—and, perhaps, subsequently requesting that the traffic be returned to its original route of movement—would undermine the network planning and “scheduled” train and yard operations that have enabled the industry to provide improved service to all customers. NITL’s proposed “basic principle” does not take such cumulative impacts into consideration.

Moreover, NITL’s Opening Comments leave unanswered a host of issues that might arise in connection with an individual demand for forced switching service. For example, assume that two railroads interchange a total of 20 cars daily at a wayside location equipped with two interchange tracks totaling 1500 feet in length. If a shipper made a new request that the carrier serving its facility switch four outbound loaded cars and four inbound empty cars per day with the second carrier at that “active” interchange point, the 1500 feet of track would be insufficient to handle that modest volume of additional interchange traffic.³⁸ In such a case, would the requested switching be “infeasible” under NITL’s Proposal? How would the Board evaluate a shipper’s request that would require additional track construction?

Likewise, suppose a shipper demanded switching service via an interchange location at which the main line is used to perform interchange switching? (The scenario discussed in the paragraph immediately above would, in all likelihood, involve such a location). Where road or local trains occupy the main line while performing interchange switching (or place cars on the main line while serving an industry or interchange track), any increase in daily switching volume would necessarily reduce the available capacity of the main line for through train movements.

³⁸ A 1500-foot interchange track can hold a maximum of 25 60-foot rail cars. In the example in the text, the eight new cars to be interchanged would bring the daily interchange volume to 28 cars.

Moreover, congestion caused by increased switching at one location can result in delays to other trains operating along the network. Would NITL's proposed rule permit a carrier to refuse a request for forced switching on the basis of such "network" impacts?

As these examples illustrate, NITL's facile suggestion that a railroad could defeat a demand for switching service by showing that such switching is "infeasible" or "unsafe" is, at best, illusory.

D. The "Canadian Experience" Provides No Support For NITL's Forced Switching Proposal.

In its Opening Comments, NITL asserts that the "Canadian Experience" proves that "there will be no adverse operational or network effects" for U.S. railroads and their customers if NITL's forced switching proposal is adopted. Opening Comments of NITL at 59. Other proponents of forced switching likewise rely on Canada's "inter-switching" regulation to support the premise that NITL's Proposal could be implemented without inflicting harm on the U.S. rail network. *See, e.g.*, Opening Comments of Highroad Consulting at 17-20, V.S. Thurston; Opening Comments of ARC at 11; Opening Comments of Diversified CPC International, Inc. at 8-10; Opening Comments of Roanoke Cement Company at 9-10. NITL's reliance upon Canada's experience with mandatory inter-switching as a basis for imposing forced switching in the United States is misplaced, for several reasons.³⁹

First, the size and scope of Canada's rail network—and, in particular, the number of locations at which inter-switching can take place—is minuscule in comparison to the number of interchanges that would be subject to NITL's Proposal. As NITL's own witness Maville testified, there are only 70 interchange locations, spread across seven large provinces, at which

³⁹ For similar and related reasons, the Canadian interswitching fee system is neither a reasonable proxy for forced switching access prices in the United States, nor a meaningful foundation for estimating potential effects of the NITL Proposal. *See V.C, infra.*

Canadian-style inter-switching applies. Only two Canadian provinces (Ontario with 33 and Quebec with 10) have more than seven designated interchange points. Opening Comments of NITL, V.S. Maville at 23, Table 6. Thus, from an operational standpoint, the geographic reach of Canada's inter-switching regulation is quite limited.

Conversely, the number of interchange points at which shippers might demand forced switching under NITL's Proposal is far more extensive. For example, NS' Opening Comments showed there were 150 active interchange locations between CSXT and NS alone in 2011. Opening Comments of Norfolk Southern Ry. Co., V.S. Ehlers at 10-11.⁴⁰ In other words, there are more than twice as many CSXT-NS interchanges alone as there are in all of Canada. Moreover, the volume of rail traffic handled by U.S. railroads is far greater than the number of cars transported in Canada by CN and CP. *See, e.g.*, ASSOCIATION OF AMERICAN RAILROADS, RAILROAD FACTS at 69-81 (2011 ed.). NITL's Proposal, which would mandate forced switching for any traffic moving to or from a shipper facility within 30 miles of an active interchange location, sweeps more broadly than Canada's inter-switching regulation, which applies only to traffic originating or terminating within 30 kilometers (18.6 miles) from a designated interchange point. As these figures demonstrate, NITL's assertion that the Canadian inter-switching system "is far more extensive than what the League has proposed" (Opening Comments of NITL at 62) is ludicrous. Notwithstanding NITL's unsupported assertions to the contrary, implementation of forced switching in the United States would be vastly more complex from an operating standpoint than the inter-switching that takes place in Canada.

⁴⁰ As NS witness Ehlers explained, NS and CSXT have consolidated traffic flows over 36 of those interchange points, which efficiently handle approximately 90% of all CSXT-NS interline traffic. *See id.* The NITL Proposal, however, would threaten to undo those efficient traffic flows and accompanying service improvements.

Second, as NITL witness Maville acknowledges, Canada's inter-switching regime has been in place for more than a century. Canadian rail regulators first adopted an inter-switching requirement in 1904, and mandated it for all railroads beginning in 1908. Opening Comments of NITL, V.S. Maville at 6-7. Indeed, the first inter-switching order was issued in response to a dispute regarding the construction of what was only the second set of interchange tracks connecting the Grand Trunk Railway and Canadian Pacific. *Id.* See also Opening Comments of Highroad Consulting, V.S. Thurston at 7.

As these facts demonstrate, today's Canadian rail network—including the locations at which traffic is interchanged between CN and CP—was designed and constructed with the regulated inter-switching rule in mind. Canada's railroads built their lines and facilities, and have developed their train service and yard operating plans, with full knowledge of the traffic patterns generated by the inter-switching requirement. In particular, Canada's rail network was constructed with the necessary capacity (including adequate track at each CN/CP interchange point) to handle the anticipated volume of inter-switched traffic. Likewise, decisions involving investment in new track, facilities, and equipment have been made on the basis of a regulatory regime that includes mandatory inter-switching. It should come as no surprise that, having more than 100 years of experience with inter-switching, and the opportunity to tailor their physical plant and operating practices to accommodate the inter-switching requirement, that Canada's railroads have experienced few major operational problems in implementing Canada's inter-switching rules.

The situation presented by NITL's Proposal is entirely different. The U.S. rail system is the product of the laws and regulations that have governed America's railroads over the past century. In particular, exercising the regulatory freedoms embodied in the Staggers Act over the

last 35 years, U.S. railroads have rationalized their physical plant and adopted more efficient operating practices, in order to reduce costs and to improve the quality and reliability of rail service. As CSXT’s Opening Comments explain, those efficiency-enhancing measures include consolidating traffic flows over a smaller number of high-volume routes and interchanges, and implementing train and yard service plans designed to minimize the number of times that cars must be handled enroute. Those strategies have been explicitly sanctioned by both Congress and this agency.⁴¹ Indeed, more than 30 years ago, the ICC approved the U.S. railroads’ strategy of closing inefficient interchanges. *See Rulemaking Regarding Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982) (“*Traffic Protective Conditions*”). In deciding to remove the so-called “DT&I Conditions”—which included a requirement that merging carriers allow shippers “to route traffic over any and all existing routes and gateways”—the ICC endorsed the practice of increasing inefficiency by allowing U.S. railroads “to rationalize their systems.” *Traffic Protective Conditions* at 114. Thus, while Canadian railroads have operated for more than a century under a regulatory system that incorporates mandatory switching at all CN-CP interchange points, the policies governing U.S. railroads have promoted the elimination of inefficient interchanges to reduce costs and enhance service. Given that reality, NITL’s assertion that Canadian-style mandatory switching could be imposed in the United States without any significant operational impacts is unpersuasive.

Third, NITL’s suggestion that Canada’s policy decision to adopt mandatory inter-switching provides a justification for the Board to impose a forced switching requirement in the United States ignores the fact that Canada’s inter-switching rule is part of a regulatory regime

⁴¹ *See, e.g.*, 49 U.S.C. § 10101(3) (expressing policy “to promote a safe and efficient rail transportation system”); *id.* § 10101(4) (“to ensure the development and continuation of a sound rail transportation system”).

that is markedly different than that which exists in the United States. The rail regulatory system established by Congress in ICCTA prescribes rate litigation as the appropriate remedy for unreasonably high rates. Opening Comments of CSXT at 5-8. The Board's regulations offer shippers multiple rate procedures, including full SAC cases, "Simplified" SAC and a streamlined "Three-Benchmark" methodology, by which they can pursue rate relief (depending on the magnitude of the rate dispute). Those procedures are well-established, and provide an effective regulatory remedy for shippers who believe that their rates are too high. The primary proponents of forced switching—including coal and chemical shippers—invoke the Board's rate processes on a regular basis.

Canada's approach to resolving rail rate disputes is fundamentally different. While the Canadian Transportation Agency ("CTA") does have a process for pursuing a rate complaint against a Canadian carrier, the procedures and decisional standards employed by the CTA are significantly different than those that apply in the United States. *See* Opening Comments of Highroad Consulting, V.S. Thurston at 5. Unlike the STB, the CTA does not offer a variety of regulatory procedures (like the SAC, SSAC and 3-B methodologies) that allow a shipper to align the cost and complexity of the rate proceeding to the amount at issue. These differences in approach to rate regulation exist, in part, because Canadian shippers have access to mandatory inter-switching. Indeed, Highroad witness Thurston acknowledges that "[r]egulated interswitching has been the corner stone of the competitive access provisions contained in the *Canada Transportation Act*." Opening Comments of Highroad Consulting, V.S. Thurston at 23.

NITL (and other proponents of forced switching) ignore these fundamental differences in the regulatory approaches adopted by Congress (in the United States) and Parliament (in Canada). The Canadian rate regulatory system is built on a different foundation than the

American system—Canada’s backbone is mandatory inter-switching, while U.S. regulators have opted for a case-by-case approach to resolving rate disputes. By seeking to impose a forced switching requirement in addition to the Board’s existing, robust rate regulation procedures, NITL attempts to engraft a single element of the Canadian Parliament’s regulatory model on the fundamentally different approach to resolving process rate disputes that Congress adopted in the United States. NITL offers no persuasive reason why the Board should do so.

IV. THE NITL PROPOSAL WOULD INCREASE REGULATION AND DO NOTHING TO DECREASE IT.

The Opening Comments also made clear that the NITL Proposal would result in a massive increase in Board regulation. CSXT’s Opening Comments explained that forced switching cases under the NITL Proposal would be contentious and fact-specific inquiries that would increase regulatory burdens on the Board and on litigants. *See* Opening Comments of CSXT at 48-57. Other opening comments confirm that CSXT was correct, and that forced switching cases under the NITL Proposal would involve multiple disputes that the Board would need to resolve in individual cases. Moreover, the opening comments made clear that advocates of forced switching have no intention of scaling back the Board’s existing rate reasonableness jurisdiction—rather, they unabashedly ask the Board to create an alternative regulatory shortcut for shippers who want to pay lower rates but do not want to bring a rate case (or do not think they can prevail in such a case). NITL’s request for a substantial expansion of Board regulation is at odds with Congress’s clear directions in the Staggers Act, ICCTA, and Ex Parte 705 comments⁴² to reduce and streamline regulation, and the Board should reject it.

⁴² *See infra* at 77-78 (citing congressional letters submitted in Ex Parte 705 urging Board not to revise its current regulatory approach).

A. The NITL Proposal Would Not Reduce Board Regulation.

The Board’s Decision requesting further comments on the NITL Proposal identified the potential of reduced regulation—and particularly reduced rate litigation—as a possible benefit of more forced switching. *See* July 25 Decision at 6. The Board’s comments may have been inspired by shippers’ claims that reciprocal switching would be “deregulatory.”⁴³ But in their opening comments shippers have admitted that they want the Board to aggressively increase its regulation of the rail industry. *See, e.g.*, Opening Comments of ARC at 14 (“It is time for the Board to focus on regulatory remedies against abuses of market power.”); Opening Comments of NITL at 16 (forced switching proposal “is intended to operate as a supplement to, and not a replacement for, the existing remedies available to shippers”). In this vein, advocates of the NITL Proposal unanimously have urged the Board to ensure that the availability of forced switching would not have any impact on a shipper’s ability to challenge the reasonableness of its rates. *See, e.g.*, Opening Comments of NITL at 15-16; Opening Comments of NGFA at 17 (arguing that availability of competitive switching should have “no effect” on market dominance determination); Opening Comments of Olin at 7; Opening Comments of USDA at 7. In other words, NITL and its allies want the Board both to give them an additional regulatory remedy and to provide a guarantee that the availability of that remedy would not impact their ability to pursue rate relief through existing means.

The Board cannot give that guarantee, for the Interstate Commerce Act does not allow the Board to pre-ordain that lowering the standards for shippers to obtain forced access orders would not affect shippers’ ability to pursue rate relief. The statute requires the Board to determine whether effective transportation competition exists for a movement before it may

⁴³ *See* Ex Parte 705 Hearing Transcript at 61 (June 22, 2011).

consider the reasonableness of any rate, and provides that the Board has no jurisdiction over movements for which there is effective competition. *See* 49 U.S.C. § 10707(a). Given that unwaivable jurisdictional prerequisite, the Board may not take dramatic regulatory action under the rationale of enhancing “competition” and then issue a blanket ruling that these newly available competitive remedies are not an effective competitive option for rate reasonableness purposes.

On the contrary, if the Board were to adopt NITL’s proposal to reduce a shipper’s burden of proof to obtain forced switching orders, the Board would have to take those lowered burdens into account in the market dominance determination. The Board has long recognized that shippers can be expected to take reasonable self-help efforts to avail themselves of competitive options. In *FMC Wyoming* the Board found that a railroad was not market dominant where a shipper could have spent millions of dollars to build infrastructure to support truck shipments.⁴⁴ Similarly, in *Seminole Electric v. CSXT* the Board gave serious consideration to whether a coal shipper’s potential to spend millions of dollars to construct barge facilities and purchase a barge option was sufficiently feasible to preclude a finding of market dominance.⁴⁵ And in other cases the Board has considered whether a shipper could “build out” to a second carrier to create intramodal competition.⁴⁶

The same analysis would apply to a forced switching option under the NITL Proposal. For if a shipper’s ability to build out access to another railroad is relevant to whether a defendant

⁴⁴ *See FMC Wyoming Corp. v. Union Pacific R.R. Co.*, 4 S.T.B. 699, 712-14 (2000) (noting that amortized cost of new infrastructure “would be roughly comparable” to \$1 million annual demurrage charge).

⁴⁵ *See Seminole Electric Cooperative v. CSX Transp., Inc.*, STB Docket No. 42110 (May 19, 2010) (ordering oral argument on whether shipper’s ability to construct barge facilities was sufficiently feasible to constitute effective competition).

⁴⁶ *See Texas Municipal Power Agency v. BNSF Ry. Co.*, 6 S.T.B. 573, 583-84 (2003).

railroad possesses market dominance, then a shipper's ability to obtain that same access to a second carrier through an STB order is similarly powerful evidence that would weigh against a finding of market dominance. The Board cannot promise that it would not consider that evidence in rate cases simply because NITL and its allies want to have a choice of whether to bring rate reasonableness cases or forced switching requests.

B. The NITL Proposal Would Lead To A Substantial Increase In Complex Regulatory Litigation.

CSXT's opening comments warned that adoption of the NITL Proposal would lead to complicated and time-consuming litigation over a variety of aspects of forced switching. The opening comments in this proceeding confirm the truth of CSXT's comments: the NITL forced switching regime would create a raft of complex and contentious regulatory litigation.

NITL's Proposal that the Board adopt "conclusive presumptions" that would automatically trigger a forced switching order does not alter this conclusion. In the first place, NITL's "conclusive presumptions" nearly all relate to eligibility for forced switching orders, and fail to address the many contentious issues that would arise concerning issues like pricing, agreement terms, and service impacts. Moreover, as discussed above, NITL's "conclusive presumptions" are all one-way propositions. While establishing a "conclusive presumption" would relieve shippers from their burden of proof, a shipper who fails to establish one of the conclusive presumptions is not precluded from raising other arguments. Shippers located more than 30 miles from an interchange are still free to argue that they are a "reasonable distance" from an interchange. Shippers who pay rates lower than 240% R/VC and who ship more than 25% of their product by truck can still argue that they are entitled to a forced switching orders. The one-way operation of NITL's conclusive presumptions guarantees that no fixed R/VC level or interchange distance could be used to fix the bounds of shippers eligible for forced switching.

If the Board adopts the NITL Proposal, everything relating to forced switching would be subject to litigation. Indeed, many of the opening comments seeking expansion of NITL’s “conclusive presumptions” suggest that even if the Board rejects those requests, shippers who do not qualify for a “conclusive presumption” would seek to obtain forced switching orders in individual adjudications.

CSXT’s Opening Comments identified five sets of distinct issues that would need to be resolved in forced switching cases: (1) which shippers would qualify for forced switching orders; (2) what are the conditions of forced switching agreements, including pricing, equipment, shipment priority, and liability allocation; (3) the appropriate duration of any forced switching order; (4) what labor protections are appropriate and who would pay for them; and (5) what environmental review would be necessary for a forced switching order. These complex and fact-intensive issues would require the Board to make many difficult judgments, and many of the issues would arise again and again in adjudications of forced switching requests. The regulatory regime that would be created by the NITL Proposal would not be easy to administer, would not be simple or quick, and certainly would not be “deregulatory.”

1. There Would Be Significant Litigation Over The Application Of Eligibility Criteria To Determine Which Shippers Would Qualify For Forced Switching Orders.

CSXT’s Opening Comments explained that there would be significant disputes about which shippers would qualify for forced switching orders, including, for example, about whether the 30-mile distance should be measured by rail miles or air miles and about the definitions of “terminal” and “regular switching.” *See* Opening Comments of CSXT at 49-51. With respect to measuring the mileage limit, NITL itself has been inconsistent. The NITL Proposal prescribed radial air miles as the distance limit for determining forced switch eligibility. But, its expert used rail track miles for his analysis. *Compare* NITL Petition at 68 *with* Opening Comments of NITL,

Roman V.S. at 16.⁴⁷ In many instances, the choice between air miles and rail miles would lead to dramatically different numbers of shippers are eligible for forced switching.⁴⁸

But even if the rail miles versus air miles issue were resolved conclusively for all cases, several commenters argue that the Board should consider forced switching orders over distances of over 30 miles. *See, e.g.*, Opening Comments of NGFA at 24 (urging Board to not be limited by 30-mile proposal and instead make a “liberal, case-by-case determination of when a shipper facility is a ‘reasonable distance’ from a working interchange point”). As written, NITL’s Proposal already allows shippers to argue that movements outside the “conclusive presumption” zone of 30 miles are nonetheless a reasonable distance for forced switching. Once again, NITL’s one-way “conclusive presumption” leaves the door open for a shipper to litigate further, here over whether a longer distance is “reasonable.”⁴⁹

An additional likely source for disputes and litigation would concern the 75% of traffic eligibility criterion. As proposed, the criterion is ambiguous and susceptible to manipulation. For example, the proposed regulation states that either a “shipper” or “group of shippers” could rely upon the 75% criterion. *See* Petition at 67 (proposed 49 C.F.R. § 1145(c)). But the proposed regulations do not explain whether for a “group of shippers,” the 75% would be applied

⁴⁷ In context, Mr. Roman’s suggestion that he modeled track miles rather than air miles to be “more equitable to railroads” is disingenuous. *See* Opening Comments of NITL, V.S. Roman at 16. An analysis that intentionally understates the reach and effect of the actual NITL Proposal as written and the shippers eligible to obtain forced switching, submitted as a basis for evaluating the effects of the proposal, is not “more equitable” to railroads than an analysis of the actual terms and effects of the NITL Proposal as submitted.

⁴⁸ For examples of points where “a radius of 30 miles of an interchange” encompasses points far more than 30 track miles, see Opening Comments of CSXT at 50, Opening Comments of Norfolk Southern Ry. Co. at 51-52, and CSXT Reply Video Exhibit 1 at 2:40—4:35.

⁴⁹ To be clear, CSXT strongly disagrees that movements over such a distance could qualify as switching over a reasonable distance. The point is simply that the NITL Proposal leaves the door open for shippers to seek Board determinations of whether switching over a greater distance is reasonable.

to the aggregate of all traffic of the group at a facility, or to each shipper's traffic individually. Because in some circumstances the difference could be significant, there likely would be litigation over the application of the 75% trigger to "groups of shippers." Similarly, if a shipper(s) sought forced switching at multiple facilities, would the 75% trigger be applied on a facility-by-facility basis, or to all facilities for which switching is sought?⁵⁰ As further discussed below, the 75% of traffic for 12 months trigger would create substantial opportunity and incentive for manipulation. *See infra* at V.A. For example, shippers with competitive transportation options might award 75% proportion of their traffic to a rail carrier for a year solely in order to take advantage of the conclusive presumption and resulting eligibility for forced switching. This and other potential manipulation and gamesmanship are a potentially fertile source of litigation over eligibility for, and the propriety of, forced switching under the NITL Proposal.⁵¹

Other eligibility questions such as what constitutes a "terminal" and what is "regular" switching are left to case-by-case determination by the Board, as NITL admitted in its Petition. *See* NITL Petition at 57 ("The determination of when the carrier has in fact 'established' a 'terminal' is left undefined."); *id.* at 59 ("How 'regular' such switching must be would be left to the Board's determination."). Neither NITL nor any of its allies has proposed a way to simplify or streamline these case-by-case determinations, which therefore would have to be litigated in individual cases.

⁵⁰ The NITL's proposed regulation also inserts the term ("or a controlled affiliate") following a description of the "shipper's facilities . . . for which switching is sought," creating confusion as to how and to whom that "controlled affiliate" modifier would apply. *See id.*

⁵¹ As discussed, NITL and other supporters of its proposal have not even attempted to estimate the volume of traffic or revenues that would be eligible for forced switching under the proposed 75% trigger.

Finally, the fact that many shippers have clamored for the Board to lower the R/VC at which a “conclusive presumption” of no effective competition would arise strongly suggests that, even if the NITL Proposal were adopted without alteration, many shippers with rates below 240% R/VC might seek forced switching orders that would require case-by-case determinations of whether those shippers faced effective competition.

Simply put, shippers’ eligibility for forced switching orders would be a hotly contested and fact-specific issue in many forced switching cases, despite NITL’s proposed “conclusive presumptions.”

2. There Would Be Significant Disputes Over The Pricing And Conditions Of Forced Switching Orders.

CSXT’s Opening Comments explained that a Board decision on a forced switching order would not be the end of the regulatory process, but rather only the beginning. The compensation and the conditions of the agreement would be negotiated by the affected railroads in the first instance, and the Board would need to step in if the railroads could not come to an agreement. This process would not be simple and would require resolution of multiple case-specific issues by the affected railroads and potentially the Board. As CSXT’s Opening Comments detailed, the conditions that the Board might be asked to resolve span from pricing, to car compensation, to shipment priority, to liability. *See* Opening Comments of CSXT at 52-53.

3. The Duration Of Forced Switching Orders Would Require Case-By-Case Resolution.

CSXT’s Opening Comments also explained that the NITL Proposal fails to address how long a forced switching order would be in effect. *See* Opening Comments of CSXT at 53-54. It remains entirely unclear whether NITL-style forced switching orders would be permanent or would have a fixed duration, and it is not clear what standards the Board would apply to requests to reopen or reconsider forced switching orders.

4. The Board May Be Required To Consider Labor And Environmental Impacts.

CSXT's Opening Comments also noted that under Section 11102 the Board may be statutorily required to consider labor effects of a forced switching request, and explained some of the scenarios in which labor protections might apply. *See* Opening Comments of CSXT at 54-55; 49 U.S.C. § 11102(c)(2) (Board may require "reciprocal" switching agreements to include labor protection provisions). Determination of labor protection in forced switching cases could become quite complicated, in part because it may not be clear which party should be responsible for paying for such protection. *See id.* at 55. The interest of United Transportation Union—New York State Legislative Board ("UTU-NY") in this proceeding, and UTU-NY's call for "mandatory employment protection" in any forced switching case, confirms that labor protection would be a contested issue in many such cases. And as CSXT explained on Opening, NEPA likely requires the Board to consider the environmental impacts of forced switching orders. These statutory requirements to consider the labor and environmental impacts of a forced switching order cannot be ignored, and they would significantly complicate and elongate the regulatory process in any forced switching case.

C. The Many Difficult And Complex Issues That Would Have To Be Litigated In Forced Switching Cases Would Tax The Resources Of All Parties, Including Shippers, Railroads, And The Board, At A Time Of Significant Budgetary Constraints.

As explained previously, forced access cases under any rules adopted pursuant to the NITL Proposal would entail resolution of a host of difficult and complex issues, including *inter alia*, whether the complaining shipper's facilities qualify under the rules; whether there exist operational difficulties with a particular request, including undue interference with the defendant railroad's operations; whether additional tracks or other facilities would have to be constructed to provide the requested service, and if so who should pay and how much; what the appropriate

level of access charges should be for a particular forced switching request; whether there would be resulting impacts on rail labor and if so, who should pay and how much; and a number of other matters.

Resolution of these issues would require significant and time-consuming evidentiary proceedings addressing, among others, legal, operational, safety, economic, and labor matters. Such proceedings would inevitably include expert testimony from a variety of witnesses with expertise in numerous specialties. As the Board and parties to railroad rate and practices cases know, evidence on these types of issues is often complex, extensive, and costly. In short, the Board ought not to take lightly the burdens and complexities of forced access cases, recognizing as it has in other contexts the likelihood that both railroad and shipper parties may have “to respond to hundreds of discovery requests” and that the Board’s consideration of the evidence on such varied issues would “tax[] its resources as well, requiring complex, in-depth analyses of [transportation and] non-transportation issues.” *Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Stations*, Decision at 2 (served March 19, 2013). Certainly the suggestion in the Board’s July 25, 2012 Order in this proceeding that adoption of the NITL Proposal “could permit the agency to rely on competitive market forces to discipline railroad pricing from origin to destination, and regulate only the access price for the first (or last) 30 miles” (July 25 Decision at 2) would appear to be overly simplistic at a minimum, and completely illusory at worst.

V. NITL’S ANALYSIS OF ELIGIBILITY FOR, AND THE REVENUE IMPACT OF, ITS PROPOSAL FAILS TO ANALYZE THE ACTUAL NITL PROPOSAL, WHICH IS FAR BROADER THAN ASSUMED BY ITS WITNESS.

NITL submitted comments and witness statements that purported to fully analyze and respond to each of the questions posed by the Board concerning the NITL Proposal. *See, e.g.,*

Opening Comments of NITL at 2-4. However, review of NITL's submission reveals that it neither evaluated its actual proposal nor even attempted to conduct a complete analysis. As a result, NITL's comments are nearly worthless for purposes of estimating the full effects and impact of its actual proposal. Below, CSXT highlights some of the major deficiencies of the NITL studies and comments.⁵²

A. NITL's Economic Analysis Fails To Estimate Either The Number Of Shippers Eligible Under The NITL Proposal Or Its Potential Effect On Revenues Or Contribution Generated By Such Traffic.

Flaws in the assumptions and analysis of NITL's expert witness render meaningless NITL's estimates of the eligible traffic and economic effects of its forced switching proposal. Several erroneous assumptions and major omissions by NITL's expert witness Roman make his analysis both inaccurate and unreliable as a measure of the potential traffic and revenue effects of the NITL Proposal. *First*, Mr. Roman uses rail miles rather than radial air miles to measure the distance between a solely served customer location and a "working interchange," for purposes of identifying traffic that would be deemed to be within a reasonable distance of a working interchange. The conclusive presumption of the NITL Proposal, however, would apply to all traffic within a 30-mile radius (i.e. air miles) of a working interchange. Because rail mile distances are frequently longer (and never shorter) than radial miles, Roman's use of rail miles systematically understated the number of shippers and carload volumes that would satisfy the "reasonable distance from a working interchange" criterion of the NITL Proposal.

Second, the Roman analysis makes no attempt whatsoever to estimate the traffic and revenue that would be swept into the forced switching proposal because a shipper moved 75% of

⁵² These comments do not attempt to address all of the flaws and errors in studies submitted by NITL and others in support of the NITL Proposal. The reply comments submitted by the Association of American Railroads describe additional flaws and erroneous assumptions, analyses, and conclusions of such studies, and CSXT joins and endorses the AAR comments.

its traffic on one carrier during the preceding 12 months. Thus, the analysis conducted on behalf of NITL understates eligible traffic by excluding traffic that would qualify for forced switching under one of two conclusive presumptions of market dominance. *Third*, Roman’s analysis defined “working interchanges” as solely those AAR Rule 260 junctions at which the Waybill Sample indicates cars were switched. This restrictive definition excludes shippers that would be eligible for forced switching because they are located within the boundaries of a terminal area, as well as interchanges at which cars are switched that were not included in the Waybill Sample reviewed by the NITL witness. The effect of each of the foregoing erroneous assumptions and omissions is to understate the number of shippers and hence carload volumes that would be eligible for forced switching under the NITL Proposal. Together, these significant methodological flaws and omissions unquestionably cause a substantial understatement of the number of shippers and volume of traffic that the NITL Proposal would make eligible for forced switching.

1. Use Of Rail Miles Rather Than Radial Miles Proposed By NITL.

The analysis conducted on behalf of NITL understated the number of shippers who would be eligible under the NITL Proposal because it used rail miles rather than radial miles to determine the number of shippers within 30 miles of a working interchange. *See* V.S. Roman at 15-16. While this would be a more fair and reasonable way to determine whether a shipper is within 30 miles of a working interchange, it is *not* what the NITL proposed. Rather, the NITL Proposal specifies that a shipper or receiver would be conclusively presumed to be within a reasonable distance of a working interchange if its facility is “within a *radius* of 30 miles of [such] an interchange.” NITL Petition for Rulemaking at 8, 36 and App. B at 67-68 (language of new regulations under NITL Proposal). By definition, “radius” is a straight line from the center of a circle (here the working interchange) to its outer circumference or edge. Because of

topography, bodies of water, and other physical limits and requirements, rail miles between two points are nearly always longer than radial miles, and 30 rail miles almost invariably covers less straight line distance than radial (or “air”) miles.

While using actual rail miles to determine a reasonable rail distance is both more logical and more fair than using rail miles, it is not what the NITL has proposed. As CSX showed in its opening comments, use of radial miles could result in forced switching eligibility for rail shippers who are hundreds of miles apart by rail track-miles.⁵³ Intended or not, the NITL Proposal could have the effect of forcing rail carriers to carry traffic hundreds of miles for their competitors. Because the Roman analysis used rail track miles rather than the radial miles posited in the NITL Proposal, his analysis significantly understates the number of shippers and carload volumes that would be eligible for forced switching under the NITL Proposal. This disconnect between the actual NITL Proposal and the Roman analysis alone results in a substantial understatement of the volume of traffic and amount of rail carrier revenue that could be subject to forced switching under the NITL Proposal.

2. NITL Makes No Attempt To Quantify Or Otherwise Analyze Traffic That Would Be Eligible For Forced Switching Under The 75% Presumption.

The NITL submission entirely ignores one of two proposed conditions triggering a conclusive presumption of lack of transportation competition, that over the preceding 12 months one rail carrier has moved 75% or more of the traffic for which the shipper seeks forced switching. *Compare* NITL Petition at 67 (text of regulations proposed under new 49 C.F.R. § 1145, including proposed 75% market dominance presumption) *with* Opening Comments of NITL at 41, V.S. Roman at 14-24 (determining carloads potentially subject to forced switching

⁵³ See Opening Comments of CSXT at 50.

using only the R/VC > 240 presumption). NITL's analysis instead focused exclusively on estimating the shippers and traffic who would be eligible for forced switching under the R/VC > 240 conclusive presumption, thereby ignoring both the 75% presumption and proof of lack of effective competition using other evidence in their estimate of the amount of traffic that would be eligible under the NITL Proposal.⁵⁴ Thus, even if NITL's estimate of the volume of traffic eligible under the R/VC > 240 rule were reasonably accurate, its failure to account for the effect of the other two methods of demonstrating eligibility for forced switching would mean the NITL's analysis significantly understates potentially affected rail traffic volumes. This failure alone renders the NITL's estimate of potentially affected traffic volumes and revenues invalid and unusable for purposes of accurate evaluation of the proposal.

Moreover, the 75% of traffic presumption is not an appropriate basis for evaluating whether there is effective transportation competition, let alone to impose forced switching. The fact that a rail carrier transported 75% of a shipper's traffic to or from a particular facility over a one-year period does not prove a lack of effective competition for that transportation. In the first instance, shippers with competitive transportation options can and do award 75% or even all of their traffic to or from a facility to the winning bidder for a year or more, to take advantage of a volume discount or for operational or administrative efficiency. This does not indicate a lack of transportation competition but rather that the shipper has determined shipment of most of its traffic on a single carrier during a particular period best serves the shipper's interests. Second, creation of a conclusive presumption arising from shipment of 75% of a shipper's traffic via one

⁵⁴ In addition to the two conclusive presumptions, the NITL Proposal would also allow shippers to demonstrate a lack of effective transportation competition through other evidence. *See* NITL Petition at 35. Thus the NITL submission did not even attempt to analyze or estimate the volume of traffic or revenue potentially subject to its proposal under two of three methods shippers could use to demonstrate eligibility for forced switching under its proposal.

carrier would create a regulatory incentive for a shipper to manufacture such “market dominance” artificially in order to obtain forced switching. A shipper that has competitive transportation options could nonetheless obtain forced switching simply by shipping 75% of its traffic on a single rail carrier during a 12-month period. Thus, the proposed 75% of traffic volume trigger would not prove lack of effective competition, but rather would encourage gamesmanship by shippers seeking to drive down their transportation rates through forced switching.

3. NITL’s Restrictive Identification Of “Working Interchanges” Understates The Number Of Shippers And Carloads That Could Be Eligible For Forced Switching Under Its Proposal.

The NITL analysis substantially understates the number of shippers and volume of traffic that could be eligible for forced switching by including less than ten percent of junctions at which carriers switch or interchange cars. *See* Opening Comments of NITL, V.S. Roman 16-17. By NITL’s count, there are 4,225 “260 Junctions” at which rail carriers “have agreed to switch cars.” *id.* at 16. For purposes of determining the number of cars that would be eligible for forced switching because they are within 30 miles of a “working interchange,” however, NITL used only 407 (9.6 %) of the 4,225 junctions where switching may be performed. *See id.* at 17. NITL’s witness included in his analysis only those junctions at which the 2010 Carload Waybill Sample indicated carriers had switched cars. *Id.* This approach understates the interchanges covered by the NITL Proposal for at least two reasons.

First, by its terms the NITL Proposal would apply to all shipper facilities within a reasonable distance of a location where “there is or *can be* a working interchange.” NITL Petition at 67 (text of proposed new 49 C.F.R. § 1145(c)) (emphasis added). The proposal does not define “working interchange,” but any Rule 260 junction (where carriers “have agreed to switch cars”) necessarily would qualify as a location where there “can be” a working

interchange.⁵⁵ Once again, NITL’s witness has failed to evaluate the actual NITL Proposal and instead substituted a narrower rule that substantially understates the volume of rail traffic potentially subject to forced switching under the actual NITL Proposal.⁵⁶

Second, the fact that the Carload Waybill Sample (“Waybill Sample” or “CWS”) for a single year did not show that cars were switched at a junction does not mean cars have not been switched previously or will not be switched in the future at that location. A single year Waybill Sample is a snapshot of one point in time that does not account for the dynamics of freight movements, shifts in traffic patterns, and changes in carrier interchange arrangements over time. Further, because the Carload Waybill Sample is indeed a sample, it will inevitably fail to capture cars that were switched at some junctions, particularly for relatively low volume interchanges.

Reliance on a single year’s CWS thus likely understates the number of interchanges that would be eligible to serve as a locus for the “within 30 miles of a working interchange” conclusive presumption.

4. NITL Does Not Estimate How Many Shippers Would Be Eligible For Forced Switching Because They Are Within The Boundaries Of A Terminal.

The analysis conducted by NITL does not estimate the number of shippers or volume of traffic that would be eligible for forced switching because a shipper or receiver facility is “within the geographic boundaries of a[n existing or future] terminal.” *Compare* Petition at 67-68

⁵⁵ Indeed, under NITL’s definition of Rule 260 junctions as locations “where carriers have agreed to switch cars,” all such junctions could be characterized as “working interchanges,” because they are junctions that carriers have designated as available for switching, regardless of whether, how often, or how many cars were switched or interchanged there during a given time period.

⁵⁶ The additional requirement that cars be “regularly switched” between carriers at an interchange applies only to the conclusive presumption of a working interchange within a reasonable distance of a shipper facility. *See* Petition at 68, proposed new regulation 49 C.F.R. § 1145(c)(iii).

(proposing conclusive presumption that there is a “working interchange” within a reasonable distance of a facility located within the boundaries of a terminal, rendering the facility eligible for forced switching) *with* Opening Comments of NITL at 35-44 (considering only the “within 30 miles of an interchange” criterion in estimating the potentially affected shippers and traffic). To be sure, there likely would be overlap between facilities that would qualify because they are within 30 miles of an interchange and those that would qualify as within the geographic boundaries of a terminal. However, NITL’s failure to estimate the number of facilities and traffic volumes that would qualify based exclusively on the “within the boundaries of a terminal” criterion is an implicit assumption that the separate and independent terminal criterion would not make any additional facilities eligible for forced switching beyond those qualified under the 30-mile radius of an interchange criterion. Particularly given the lack of a definition of a “terminal” in the NITL Proposal (discussed below), it is quite unlikely that traffic rendered eligible for forced switching under the terminal boundaries criteria would be limited to a subset of the traffic eligible under the 30-mile radius criterion. Once again, the approach used by NITL’s witness very likely understates the volume of traffic potentially subject to its forced switching proposal.

Moreover, had NITL’s witness attempted to estimate the volume of traffic swept into the NITL Proposal by the “within the boundaries of a terminal” criteria, he would have had to define what NITL means by “terminal,” and identify terminal locations. The NITL Proposal does not define the term “terminal,” a term that has no universal definition in the rail industry. Indeed, agency precedent holds that the questions of whether a particular area is a terminal and the definition of boundaries of any such terminal are fact-and-circumstance-specific determinations requiring individual evaluation of a number of factors in each instance. *See, e.g., Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171, 179, *aff’d sub nom. Midtec Paper Corp v.*

United States, 857 F.2d 1487 (D.C. Cir. 1988). Thus, in order to apply “within the geographic boundaries of a terminal” criteria, the Board would be required to conduct a fact-intensive examination of each purported terminal to determine both whether it would qualify as a terminal and the geographic boundaries of such a terminal. Particularly given the lack of a definition or criteria for determining whether an area qualifies as a terminal, proceedings to identify and define the boundaries of terminals alone could consume substantial resources of the Board, carriers, and shippers.

Because NITL has neither defined “terminal” under its proposal nor identified locations it believes would qualify as terminals, it cannot estimate the facilities or traffic that would fall within its terminal criteria. Thus, out of three bases for a conclusive presumption that a “working interchange” between rail carriers exists “within a reasonable distance of” a shipper’s facility, NITL and its witness only even *attempt* to evaluate one. *See* Petition at 67 (proposed 49 C.F.R. § 1145(c)). Any analysis that disregards the effect of two of three conclusive presumptions is incomplete on its face and forms an inadequate and unreliable basis to estimate the impact of proposed regulations triggered by those presumptions.

In sum, the NITL study is woefully incomplete and inadequate to provide a reasonable estimate of the facilities and traffic that could be eligible for forced switching under the NITL Proposal. NITL’s witness used rail miles rather than the radial miles specified by the NITL Proposal to identify eligible facilities. NITL failed entirely to estimate the traffic that would be subject to its proposal by virtue of being located within the boundaries of a “terminal.” It also failed to estimate or take into account the volume of traffic rendered eligible under its 75% of traffic conclusive presumption. Finally, NITL made no attempt to estimate how much additional traffic or revenue would be eligible for forced switching under its proposal without relying on

the 75% or R/VC > 240% presumptions. *See* Petition at 67 (proposed regulation 49 C.F.R. §1145(b) (allowing forced switching orders even when neither criterion for presumption is satisfied)). Thus, contrary to NITL’s suggestion, it did not study the traffic volume and revenues potentially affected by its proposal. Rather, it conducted a study of some of the potential effects of a substantially diluted proposal with significantly fewer conclusive presumptions. The result is a substantially incomplete study that significantly underestimates the likely effects of the actual NITL Proposal in terms of facilities, volume of traffic, lost owning carrier revenues, and negative effects on rail operations and service.

For the foregoing reasons alone the NITL study, and the narrower and less complete studies offered by other proponents of the NITL Proposal, fail to address essential questions posed by the Board and cannot form the basis of a meaningful evaluation of the NITL Proposal and its effects. Based on the record in this inquiry, the Board can only conclude that proponents of the proposal have failed to address (let alone resolve) foundational issues and practical questions that are essential to reasoned review and analysis of the rulemaking proposal.⁵⁷ Proponents’ failure to address the Board’s fundamental threshold questions about the NITL Proposal is a failure to meet their burden to demonstrate that a rulemaking is appropriate. Accordingly, rather than consuming further resources considering this ill-advised and indefinite proposal, the Board should terminate this inquiry without further action.

⁵⁷ *See Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities*, STB Docket No. EP 717, slip op. at 7 (served Mar. 19, 2013) (declining to proceed because petitioner failed to present a “practical framework” or resolve “practical difficulties”).

B. Shippers Provide No Support For The Claim That Forced Switching Would Result In Rail Traffic Volume Increases.

The American Chemistry Council and other shippers speculate that forced switching may result in shipment of greater volumes by rail and thereby offset reductions in rail revenues caused by lower rates. *See, e.g.*, Opening Comments of ACC at 5. This entirely speculative assertion suffers from at least two fundamental flaws. First, it is unsupported by evidence or analysis. ACC provides no evidence to support the notion that reduced rail rates would result in increased shipment volumes.⁵⁸ ACC provides no basis for its speculation that forced switching would result in increased rail traffic volumes beyond the conclusory assertion that if rail rates declined chemical industry output might increase.⁵⁹ *See id.* Merely positing a direct causal relationship without any evidence or support proves nothing. Moreover, as ACC concedes, it made no attempt to quantify *either* projected “traffic increases or the resulting [rail] revenue offset.” *Id.* Thus, ACC failed to provide any support for the assumption that rail traffic would increase where forced switching was imposed, while at the same time failing to analyze or estimate the magnitude of any such notional volume increase.

Second, even assuming for the sake of discussion that rail shipment volumes might increase in some circumstances in which rail rates declined significantly as a result of forced

⁵⁸ Indeed, to the extent the prediction of increased rail traffic volumes is based on the assumption that shippers would switch from other modes of transportation to rail, it flouts the primary rationale for forced switching—that the shipper(s) in question lack effective competitive transportation alternatives and as a result pay higher rail rates than they would in a transportation market providing such alternatives.

⁵⁹ This notion also misapprehends basic economic principles. To the extent that a rail carrier could lower its price and increase traffic volume by an amount sufficient to add earnings to its bottom line, it would have done so already. It is reasonable to assume that a rail carrier has established its rates at profit maximizing levels, and that any reduction below that level would reduce its earnings even if volume rose. Accordingly, it is manifestly incorrect to assume that a forced rate reduction would be accompanied by an increase in volume that would fully offset earnings that would otherwise be lost as a result of the rate reduction.

switching, there is no evidence to suggest that increased volumes would be sufficient to overcome the revenue losses caused by reduced revenue per car. Again, ACC concedes that increased volumes likely would not generate additional revenues sufficient fully to offset revenue losses resulting from depressed rates. *See* Opening Comments of ACC at 5 (asserting that railroads’ “revenue loss would be at least *somewhat offset* by traffic increases”) (emphasis added). Thus, shipper speculation that traffic volume increases would generate increased traffic volumes or net increases in rail revenue are both dubious and utterly unsupported. They merit no consideration in the Board’s assessment of the NITL Proposal.

C. NITL’s Assumed Access Prices Are Unsound, And This Fundamental Flaw Further Undermines Its Estimate Of The Effects Of The NITL Proposal On Rail Rates And Service And The Rail Network.

Independent of other flaws in its analysis, NITL’s assumed access prices render its analysis useless for purposes of evaluating the potential effects of its proposal. The access price assumption that NITL posits as a foundation of its estimate of the financial effect of its proposal on rail shippers and carriers is simplistic and inaccurate, unsupported, and inconsistent with governing law and regulations. Access prices are perhaps the single most important determinant of the financial effects of forced switching regulations on carriers and shippers. Accordingly, NITL’s invalid access price assumptions fatally undermine its assessment of potential effects of its proposal.

1. Canadian Interswitching Rates Are Not Reasonable Or Accurate Proxy For A Compensatory Access Price.

Without meaningful explanation or justification, NITL uses a simplified version of “the switching fees established under the Canadian interswitching system as its ‘assumed access pricing methodology.’” Opening Comments of NITL at 30. This simplistic approach fails to apprehend or address the numerous material differences between the Canadian and U.S. rail

transportation systems, including their history and development; governing legal and regulatory systems and requirements; railroad economics; rail network structure and geography; and numerous other differences that make Canadian access fees inapposite to the NITL forced switching proposal for U.S. rail carriers. *See* III.D, *supra*. As summarized below, as a matter of law, policy, and practicality, Canadian access fees could not be engrafted onto the separate and distinct U.S. rail network and regulatory system in the manner posited by NITL.

The access prices developed by Escalation Consultants for several commenters, including NITL and the U.S. Department of Agriculture (“USDA”), rely on the assumption that a single static pair of access prices would apply to all eligible switching under the NITL Proposal. *See, e.g.*, Opening Comments of NITL at 34-35 (positing uniform access price of \$300/car for 1-59 car movements, and \$88/car for movements of 60 or more cars). This rigid one-size-fits-all access price approach suffers from a number of flaws that render it unsuitable and unreliable for purposes of projecting effects of the NITL Proposal. First, unlike the Canadian Transport Act, the Interstate Commerce Act does not authorize the STB to impose any specific access fee on the affected carriers. Instead, ICCTA provides that, in instances in which the Board finds mandated switching is appropriate under statutory standards, it may direct carriers to enter switching agreements. *See* 49 U.S.C. § 11102(c). Critically, the statute further requires that, once the Board directs carriers to enter into such a switching agreement, the *rail carriers* themselves—not the Board—are to negotiate and establish the terms and conditions of such an agreement, including access price. *See id.* (providing, in relevant part, “[t]he rail carriers entering into such a [forced switching] agreement shall establish the conditions and compensation applicable to such an agreement”).

Thus the statute presumes that *carriers* will *negotiate* access prices and other conditions of switching agreements. Like other arms-length transactions between rational economic actors, the access prices established by carriers would reflect market forces and conditions, and the applicable forces and conditions would vary substantially between different junctions, locations, and types of traffic. The fundamental premise of a single set access price assumption, however, is that the regulator would set uniform access prices for all forced switching. Because the statute provides that private carrier negotiations, not regulatory fiat, are the presumptive method for setting access prices, comments and analyses assuming of any single access price (or set of access prices) proceed from a fundamentally flawed and legally untenable premise. This foundational flaw renders all of the analyses that flow from it—including estimates of financial effects of the NITL Proposal on shippers and the rail industry—at least equally flawed and uninformative.

Second, even in those instances in which carriers are unable to agree on terms and conditions of a forced switching arrangement, the Board would nonetheless be required to investigate and determine reasonable and adequately compensatory situation-specific access prices, as well as other terms and conditions to govern the mandated switching. As a backstop to carrier-negotiated switching agreements, the statute provides that if affected carriers are not able to reach agreement, the Board may establish reasonable terms and conditions to govern forced switching in a particular location or circumstances. *See* 49 U.S.C. § 11102(c). Importantly, the statute does *not* authorize the Board to impose a single inflexible access fee to any and all forced switching it may order. Instead, the Board must determine a reasonable fee adequate to compensate the burdened carrier fully for its involuntary loss of the exclusive use of its property, facilities, and equipment. *See, e.g., Southern Pac. Transp. Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir.

1984) (per curiam) (upholding ICC order forcing terminal use, where agency provided for determination of adequate compensation to the terminal owner using condemnation proceeding principles); 49 U.S.C. § 11102.

The myriad variables affecting either negotiated access fees or appropriately calculated reasonable and compensatory fees imposed by the Board preclude a one-size-fits-all access fee, however derived. Railroad negotiations over access prices for voluntary switching arrangements are based upon numerous variables and situation-specific factors. Such factors include, for example, the location of the interchange; volume of eligible traffic in the affected areas; shipper demand characteristics and other market factors in the area served by the new switch; effects on capacity and congestion; operational feasibility; maintenance and capital investment needs; whether and to what extent reciprocity is available; and allocation of risks, particularly risks for hazardous and TIH shipments.⁶⁰ To use a hypothetical example, the access fee that might be appropriate to compensate a carrier for (i) a simple switch of grain cars on a low-density line in a rural area serving relatively few shippers; would be much different than the fee necessary to adequately compensate a carrier for forced switching of (ii) a block of cars carrying a TIH commodity in an operationally complex high density urban area with constrained capacity, significant congestion, and large numbers of shippers with relatively inelastic demand for rail transportation services. Imposition of the same access fee for such disparate situations would be illogical, uneconomic, and unfair.

Third, the Canadian access pricing regime is a pure cost-based model under which the regulator conducts extensive cost surveys and analysis, develops interswitching cost estimates,

⁶⁰ This list is only illustrative and far from exhaustive. The many fact-, location-, and circumstance-specific factors that may affect reasonable and compensatory access fees and other terms and conditions governing a switching agreement are too numerous and varied to attempt to catalog thoroughly here.

and then establishes a small set of uniform cost-based access fees. Under United States law and rail transportation policy, in contrast rail rates are market-based, not cost-based. U.S. rail rates are established by rail carriers without regulatory intervention and based on market factors and conditions that properly incorporate various non-cost factors, including demand characteristics. *See, e.g.*, 49 U.S.C. § 10101(1), (2).⁶¹ A purely cost-based fee—like that used in the Canadian regulatory system—is inconsistent with the U.S. system. Therefore, cost-based fees imposed by foreign regulators under a substantially different regulatory regime on a different railroad network with far fewer interchange points provide no reliable proxy or estimate of reasonable access prices for forced switching in the U.S. rail system.

2. NITL’s Application Of The Canadian Cost-Based Fee Approach Is Flawed And Internally Inconsistent.

Even if it were appropriate or feasible to engraft the Canadian interswitching fee system onto the U.S. rail regulatory system—and it assuredly is not—NITL’s implementation of that approach would be deficient and unsupported. NITL did not even apply the actual Canadian interswitching fee system, but rather a “simplified” version of that system. Thus, instead of seeking to adapt a foreign fee system to the requirements of the substantially larger, different, and more complex U.S. rail system, NITL “simplified” the system used in Canada, thereby making it more facile and less applicable to the real world railroad system, operations, and economics in the United States. Some of the resulting inaccuracies and distortions are summarized below.

⁶¹ Even where the Board considers a challenge to the reasonableness of a carrier-established rate for transportation over which the carrier has market dominance, the Board’s determination of maximum reasonable rates under CMP is based upon the price that would be charged in a competitive market, not simply the costs of providing the service.

First, rather than apply the Canadian approach of dividing the fee structure into multiple zones based on distance from the interchange point, NITL applied a single fee to all switching without regard to distance. Without meaningful explanation or support, NITL's witness states that "it was decided that . . . it was desirable to simplify the analysis to apply a single average fee for each 'cut' of cars" Opening Comments of NITL, V.S. Roman at 12.⁶² Thus, for a 61% longer switching distance than that applied by the Canadian system, the NITL analysis applies a single fee rather than the distance-based four-zone system used in Canada.⁶³

Second, despite advocating the use of a cost-based system to calculate forced switching fees, NITL conducted no switching cost analysis whatsoever. After describing the extensive cost analysis conducted by Canadian regulators for each zone at each eligible interchange in order to derive applicable interswitching fees, NITL's witness simply posits a single rate to apply to all forced switching of 59 cars or less, throughout the U.S. rail system. NITL's witness made no attempt whatsoever to take account of the actual switching costs that carriers in the U.S. might incur. Instead, he merely averaged the charges per zone under the Canadian system (making a mileage-based adjustment for distances greater than 30 kilometers) to manufacture a single Canadian-rail-cost-based hypothetical access fee to apply to forced switching by carriers operating on the U.S. rail network under the U.S. regulatory regime.

Even assuming that a cost-based approach was appropriate to calculate access fees for rail carriers operating in the United States, that approach could not be based on costs calculated under a foreign rail cost accounting system that is substantially different from that used by the

⁶² The explanation offered for this further simplification was the witness's casual observation that carriers' published switching fees in tariffs "do not appear to be driven by distance . . ." Opening Comments of NITL, V.S. Roman at 12.

⁶³ The NITL Proposal would apply a 30-mile radius (48.27 km) from a junction as the boundary for areas eligible for forced switching. The Canadian interswitching regime uses a 30 kilometer radius. $((48.27 - 30)/30 = 61\%)$.

Board. Moreover, NITL's approach is internally inconsistent. After asserting that the use of mileage zones are not necessary because U.S. carrier switching fees do not appear to be based on distance, NITL calculates its proxy access fee by averaging Canadian fees for different distances (including an adjustment to account for longer distances under the NITL Proposal than those subject to interswitching in Canada). It appears that NITL cannot decide whether its position is that: (i) distance matters; or that (ii) distance does not matter in determining reasonable forced switching fees.

Third, the \$300 interswitching rate that NITL derives from Canadian rates and uses as a one-size-fits-all proxy for fees under the NITL Proposal is, based on its own estimates, at least 33% *lower* than the *average* switching fee charged by carriers in the Eastern United States. *See* Opening Comments of NITL at 23-24 (noting that voluntary reciprocal switching charges are as high as \$1000 or more, that most charges in the East are "in the \$400 to \$500 range," and that the average charge in the East is approximately \$400 per car); *id.* at 34-35 (using fees of \$300 per car, and \$89 per car for blocks of 60 cars or more, as the assumed access fees under the NITL Proposal).⁶⁴ Thus, according to NITL's own evidence and assumptions, its assumed access price understates the average existing voluntary switching fees in the East by at least 33%.

Moreover, the existing access fees surveyed by NITL's witness involve reciprocal switching agreements entered voluntarily by carriers that determine the subject switching is to their mutual advantage and operationally workable. In the case of forced switching like that proposed by NITL, in most instances at least one of the affected carriers would not regard the

⁶⁴ NITL does not state whether it determined a separate range of switching fees published by rail carriers in the U.S. for blocks of 60 cars or more, or if its \$400 per car average switching fee included all switching regardless of the size of the cut of cars switched. If it is the latter, then NITL's assumed access fee for larger blocks of cars (60 cars or more) understates average access fees published for the Eastern U.S. by nearly 78%.

arrangement as serving its best interests or those of its customers. Accordingly, the access prices that carriers would negotiate for involuntary forced switching would likely be substantially higher than the current range of access prices for voluntary switching. Thus, even under NITL's own flawed Canadian-style cost-based access fee approach, it substantially understates an assumed access fee, both by failing to account for higher negotiated fees that would result from forced rather than voluntary switching, and by selecting a fee level that is substantially lower than the current average switching fee charged by Eastern carriers (as determined by NITL's own witness) for voluntary, mutually beneficial inter-carrier switching.

In sum, the assumed access fees posited by NITL and others⁶⁵ are inconsistent with U.S. law and regulations, seek to impose a foreign regulator's cost-based fees on the market-based American rail rate structure, and fail to apply even the inapplicable Canadian system to the materially different facts and circumstances of U.S. carriers and their networks. Cumulatively, these fundamental flaws render the access price assumptions advocated by NITL invalid and meaningless as a basis to assess the potential effects of access fees under the NITL Proposal. Because access price is an essential factor in estimating the effects of any forced switching proposal, NITL's flawed access price assumption alone dooms its entire analysis by rendering it unreliable and without value for purposes of assessing the impact of the NITL Proposal.

⁶⁵ USDA used the same witness and what appears to be essentially the same analysis to propose Canadian-fee-based one-size-fits-all access fees of \$279/car for single cars and blocks up to 59 cars, and \$84/car for blocks of 60 cars or more. *See* Opening Comments of USDA at 20. USDA's analyses of potential effects of the NITL Proposal, however, used different access price assumptions. *See id.* Moreover, as discussed elsewhere, USDA expressed a number of other concerns and reservations about the NITL Proposal and suggested that the Board should substantially lower eligibility triggers (*e.g.* by reducing the R/VC threshold and/or increasing the distance between a shipper location to a junction that would trigger eligibility for forced switching). Thus, while the assumed access price proposed by USDA is similar to that posited by NITL, USDA's other proposals would result in greater numbers of shippers eligible for forced switching, which would exacerbate all of the operational, service quality, and financial problems and detriments that would be generated by the NITL Proposal.

Overall, the NITL analysis fails to evaluate the actual NITL Proposal, but instead provides an incomplete analysis of an approach that is not what NITL proposed and necessarily substantially misstates the revenue and financial effect of the actual NITL Proposal. It appears that the net effect of the flawed NITL analysis would be to understate the potential revenue and financial effects of its proposal. Even that tentative assessment is subject to doubt, however, because of the lack of lawful, realistic, and properly applicable foundational assumptions, including assumed access prices. Thus, while the myriad negative operational and service effects that would arise from the NITL Proposal are clear, any assessment of its effect on carrier revenues or carrier or shipper finances is entirely speculative and unsupported.

VI. THE BOARD DOES NOT HAVE THE LEGAL AUTHORITY TO ENACT A FORCED SWITCHING REGIME, AND EVEN IF IT, DID IT WOULD BE IMPRUDENT TO TAKE DRAMATIC ACTION WITHOUT DIRECTION FROM CONGRESS.

A. As Opening Comments Demonstrated, The NITL Proposal Is Precluded By Law And Contrary To Well-Established Policies And Regulations.

CSXT and other parties to this proceeding explained in their opening comments several reasons why the NITL approach conflicts with the statute and with longstanding sound regulatory policies. *See, e.g.*, Opening Comments of CSXT Opening at 4-21; Opening Comments of BNSF at 3; Opening Comments of Norfolk Southern at 21-32.⁶⁶ CSXT will not reiterate all of those arguments here, but only offer a brief summary of some of the significant arguments. *First*, NITL’s proposed “new regulatory regime” is inconsistent with the regulatory regime and policies established by Congress in the Staggers Act and ICCTA. *Second*, the premise of NITL’s Proposal—that forced switching would necessarily promote competition and

⁶⁶ CSXT hereby incorporates to these comments its opening comments in this proceeding as well as relevant legal arguments and comments it submitted in its Opening, Reply, and Supplemental Comments in STB Ex Parte 705. *See* Opening Comments of CSXT at 4, n.4.

benefit shippers—is belied by the agency’s experience with automatic requirements for open interchanges in the absence of evidence of anti-competitive behavior. *See generally Rulemaking Regarding Traffic Protective Conditions in Railroad Consolidation Proceedings*, 366 I.C.C. 112 (1982) (concluding, *inter alia*, that merger conditions requiring a carrier to maintain all pre-existing routings and gateways were actually anti-competitive and ultimately hurt shippers). *Third*, Congress ratified the current interpretation and application of 49 U.S.C. § 11102 when it refused requests that it overrule *Midtec* at the time it enacted ICCTA. Absent a change in the statute, this legislative ratification doctrine prevents the Board from adopting the new, contrary regulatory regime embodied in the NITL Proposal.⁶⁷ Thus, as a matter of law, the Board may not adopt the NITL Proposal.

B. Even If The NITL Proposal Were Lawful, Good Public Policy, Prudence, And Deference To Congressional Prerogatives Support Denial Of NITL’s Proposal To Adopt Canadian-Style Policies And Regulations Unless And Until Congress Directs The Board To Change Course.

As CSXT has demonstrated, the NITL forced switching proposal is foreclosed by law and contrary to U.S. rail transportation policy and regulations. However, even assuming for the sake of discussion that the Board had legal authority to depart from current law and adopt new forced switching policies and regulations, repeated congressional refusal to adopt such changes in regulation and other public policy considerations would militate against adopting the NITL Proposal or any other new forced access proposal. Over the past 25 years, Congress has rejected at least 18 different bills that would repeal *Midtec* and change other established access and routing policies. As CSXT and other commenters demonstrated in Ex Parte 705, this uniform and repeated congressional rejection of specific proposals to overturn the agency’s competitive access rules and regulations implementing Section 11102 and its predecessor is compelling

⁶⁷ *See* Opening Comments of CSXT at 11-21.

evidence that Congress approves of the agency's current construction and application of the statute.

It is Congress' responsibility and prerogative to set the general parameters and direction of rail transportation policy in the United States, and it is the Board's responsibility to implement policy. With respect to the general policies governing competitive access, Congress has been remarkably consistent in demonstrating its satisfaction with current policies and standards over the 26-plus years since *Midtec*. During that period, the party controlling the U.S. Senate has changed *six* times, and the party controlling the House has changed three times. Since Congress ratified the agency's application of Section 11102 in enacting ICCTA, the majority party in the Senate has changed three times and majority control of the House has changed twice. One constant through those 26 years is that Congress has consistently rejected bills seeking to overturn the current interpretation and application of competitive access provisions now codified in Section 11102. During that time, Congress has considered 18 bills providing for changes in the standards and regulations adopted and applied in *Intramodal Rail Competition* and *Midtec*, and *none* of those bills has passed either House of Congress. It is difficult to envision a clearer, more consistent indication of congressional support for existing rail access policy and regulations.

More recently, many U.S. Senators and Representatives participated in STB Ex Parte 705, *Competition in the Railroad Industry*, to urge the Board to maintain its current policies.⁶⁸ The Chairmen and ranking minority members of the House Transportation Committee submitted a joint letter urging the Board to maintain the current regulatory balance

⁶⁸ NITL cites comments from two members of Congress at the Ex Parte 705 hearing, but ignores the fact that the vast majority of legislators who participated in the proceeding urged the Board not to alter its current policies.

established by the Staggers Act and voicing the Committee's opposition to any changes that would restrict rail carriers ability "to invest, grow their networks and meet the nation's freight transportation needs." *See* Letter from U.S. House Committee on Transportation and Infrastructure Chairman Mica, Subcommittee on Railroads Chairman Bill Shuster, and ranking minority members Nick Rahall and Corrine Brown to STB Chairman Daniel Elliott III, filed in STB Ex Parte Nos. 704, 705 (Jan. 24, 2011). Even more recently Congress cut available agency resources through sequestration, and further cuts are possible. Implementation of the NITL Proposal, including numerous proceedings to determine whether and to what extent forced switching might be ordered and to determine the appropriate access price where carriers are unable to agree, would consume substantial agency time and resources. Particularly in the current federal budget environment, there is no indication that Congress wants the agency to embark on a new re-regulatory initiative, or to adopt a new forced switching regime that would further strain the agency's resources. No matter how much certain shippers might wish otherwise, Congress simply does not support efforts to remake the rail regulatory landscape or a rail transportation system that works well to serve the public interest and advance the overall best interests of shippers, commerce, and the nation.

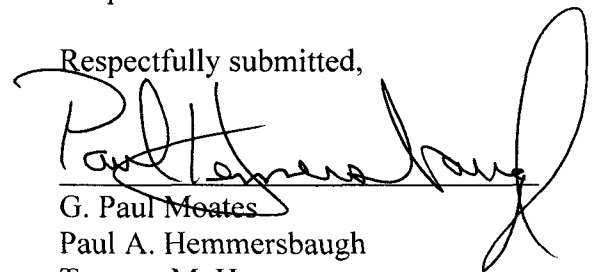
NITL and advocates of its proposal are attempting to circumvent the legislative process by persuading the Board to change policies and regulations that Congress approved and has refused to change despite myriad opportunities. If these parties believe their forced switching proposal or the Canadian rail regulatory regime is superior to the system established by Congress in the Staggers Act, ICCTA and other rail legislation, they may attempt to persuade Congress to change the law. As the eighteen unsuccessful bills attest, shipper interests have repeatedly petitioned Congress for such changes in the past. However, there is no basis in law, regulatory

history, or current rail policy for the Board to undertake such a dramatic revision to rail regulatory policies unless and until Congress enacts legislation directing it to do so.

VII. CONCLUSION

For the reasons detailed above and in CSXT's Opening Comments, the NITL Proposal should be rejected and the STB should maintain its current competitive access rules.

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Dated: May 30, 2013

**VERIFIED STATEMENT OF
CINDY M. SANBORN**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 711

**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

VERIFIED STATEMENT OF CINDY M. SANBORN

1. My name is Cindy M. Sanborn, and I am Vice President and Chief Transportation Officer of CSX Transportation, Inc. (“CSXT”), a position I have held since December 31, 2009. I am responsible for safety across the CSXT system and for coordinating operations and service across the CSXT rail network. Among my previous positions with CSXT, I have served as Vice President of the Northern Region and as Assistant Vice President of Network Operations. I am very familiar with our railroad system and the many challenges inherent in maintaining and coordinating our varied and complex operations day to day, week to week, and month to month.
2. I hold a Bachelor’s Degree in Computer Science from Emory University and a Master’s in Business Administration from the University of Miami.
3. The purpose of this brief statement is to sponsor CSXT Reply Exhibit 1, a video exhibit addressing some of the damaging consequences that the NITL proposal under consideration in this proceeding would impose on the CSXT rail system and its customers. In particular, the video exhibit explains some of the significant problems and inefficiencies that would result from adoption of a mandated switching requirement, impacts that would clearly not be in the public interest.

4. Our purpose is to make clear to the Board that the adverse impacts of the NITL proposal would not be minor or limited. We are very concerned about the adverse effects that such a mandated switching regime would have on our carefully crafted operating plan; including such elements as train schedules, blocking plans, dispatch protocols, and a host of other factors that affect the smooth and efficient running of our rail system. At the end of the day, this proposal bears all the indicia of a change in the status quo that would benefit a select few at the expense of the many.

VERIFICATION

I, Cindy M. Sanborn, do certify and attest that I have read the foregoing “Verified Statement of Cindy M. Sanborn” and have reviewed CSXT Reply Exhibit 1, that I know the contents thereof, and that the information contained therein is true and correct to the best of my knowledge and belief. I further certify that I am qualified and authorized to file this Statement.


Cindy M. Sanborn

Executed on this 22nd day of May, 2013

STB EX PARTE NO. 711

CSXT REPLY EXHIBIT 1 - VIDEO