BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RECIPROCAL SWITCHING

OPENING COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

The National Grain and Feed Association ("NGFA") hereby submits these opening comments in response to the Surface Transportation Board's ("Board" or "STB") Notice of Proposed Rulemaking ("NPRM") served on July 27, 2016 in this docket proposing revisions to the current rules governing the provision of reciprocal switching service pursuant to 49 U.S.C. §11102(c). NGFA enthusiastically commends the Board's action in this docket to revise the current regulations and overturn 30-year-old agency precedent implementing section §11102(c) that has stifled its use by rail shippers. Such action is long overdue, and we commend this Board for its initiative to propose doing so. NGFA therefore supports the Board's overall effort in this NPRM, and offers several comments and suggestions with the intent of improving the final rules.

I.
IDENTITY AND INTEREST OF NGFA

The NGFA, established in 1896, consists of more than 1,050 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers;

exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. The NGFA also consists of 26 affiliated State and Regional Agribusiness Associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

The NGFA and its rail-user member-companies have long been advocates for changes to the Board's reciprocal switching rules to make them workable and useable. Switching arrangements pursuant to reasonable fees and terms are essential for many agricultural industry stakeholders to efficiently move their commodities to domestic and export markets. In EP 705, *Competition in the Railroad Industry*, the NGFA described to the Board how railroads utilized extremely high switch charges to discourage – or even in some cases, to demarket – rail traffic they do not wish to transport, and NGFA proposed certain changes to the existing rules to address this issue.[1] NGFA also actively participated in EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*. In that proceeding, the NGFA and a large group of agricultural entities (the "Agricultural Parties") were one of only a few commenters that responded to the Board's request for empirical data on how the National Industrial Transportation League's ("NITL") proposal contained in its Petition for Rulemaking in EP 711 might have affected agricultural shippers and the Class I railroads. While not in agreement with every aspect of the NITL's proposal, the NGFA and the other Agricultural Parties wholeheartedly agreed with the purpose and intent of NITL's Petition, which was to replace the requirement that a shipper seeking relief under 49 U.S.C §11102(c) must demonstrate whether the incumbent railroad "has engaged or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise

[1] EP 705, *Competition in the Railroad Industry*, Reply Comments of the National Grain and Feed Association (filed May 27, 2011) at 4.

anticompetitive"[2] with rules more consistent with the language and intent of the statute, and more usable for rail shippers.

II.
COMMENTS ON PROPOSED RULES

A. The Board's Overall Approach in Following the Statutory Language is Correct

The rules proposed in the NPRM would (1) remove the references to reciprocal switching in the current regulations at 49 C.F.R. Part 1144, and (2) create a new Part 1145 "to govern reciprocal switching under either of the two statutory prongs provided in §11102(c)." NPRM at 17. The primary and most positive feature of the NPRM is the elimination of the aforementioned requirement that a rail user seeking reciprocal switching demonstrate competitive abuse on the part of the incumbent railroad as a prerequisite for being eligible for relief. The inclusion of this element in the ICC's rules and standards essentially imposed on shippers the impossible task of "produc[ing] a smoking gun" of intentional anticompetitive conduct on the part of the incumbent railroad. *Id*. at 32 (concurring statement of Vice Chairman Miller). The "competitive abuse" standard primarily was responsible for no shipper obtaining or even seeking any reciprocal switching relief since the late 1980s. However, as this Board recognizes, "neither of the two statutory bases for reciprocal switching – practicable and in the public interest, or necessary to provide competitive rail service – mandates a finding that a rail carrier has engaged in anticompetitive conduct." *Id.* at 10. Moreover, as this Board also rightfully recognizes, there have been many changes in the rail industry over the past 30 years, most significantly the consolidation of the Class I railroads into four major carriers that carry more than 90 percent of all

[2] *Midtec Paper Corp. v. Chicago & Northwestern Transportation Co*. ("*Midtec*"), 3 I.C.C. 2d 171 (1986) at 181.

freight traffic, and the creation of increasingly significant short line and regional railroads with strong ties to a particular Class I railroad. *Id*. at 9. Therefore, it is reasonable and logical for the Board to conclude that "the agency's regulations and precedent, in which the public interest and competition statutory bases for reciprocal switching were consolidated into a single "competitive abuse" standard, makes less sense in today's regulatory and economic environment," and therefore plainly justify a reversal of that prior policy. *Id*. The NGFA strongly supports this fundamental and necessary change as proposed by the Board.

In the NPRM the Board has proposed to replace the "competitive abuse" standard with a two-pronged test based on the specific statutory language of §11102(c). While the NGFA posits comments and suggestions on the elements contained in each "prong" of the test for relief, it fully supports rules that attempt to track the statutory language of §11102(c) and related Congressional intent. Accordingly, NGFA supports the NPRM's general approach of adopting rules that permit reciprocal switching relief to be granted if a shipper demonstrates either (1) reciprocal switching is practicable and in the public interest; or (2) reciprocal switching is necessary to provide competitive rail service.

B. The Final Rules Should Not be Limited to Class I Railroads

The NPRM proposes that under either prong of the new regulations, reciprocal switching relief could be sought only in instances where the shipper is served by a Class I railroad that could interchange with another Class I railroad. The Board states that this exclusion of Class II and Class III railroads has been included in the NPRM "due to a lack of specific information on this matter and concerns expressed by the [American Short Line and Region Railroad Association in EP 711]." NPRM at 20-21.

To the contrary, the NGFA submits that Class II and Class III railroads should be subject to the new reciprocal switching rules. This is particularly important to agricultural shippers, given the significant, and growing, number of facilities located on shortlines – shippers that also need competitive options. With the spin-off of many lines by the Class I carriers for reasons ranging from volume to maintenance cost to track capacity, Class II and II railroads may be the sole source of rail service for many agricultural facilities. Accordingly, exempting Class II and III carriers from being subject to the new reciprocal switching rules may shut facilities located in entire regions of the country out of the opportunity for access to a second railroad via reciprocal switching. Regardless of the category of railroad, a shipper is dependent upon that carrier to be competitive and serve its customers. The NGFA also notes that Class II carriers comprise increasingly larger and more regionally important freight rail service providers, and, in at least one case, are larger than one of the Class I carriers. Further, excluding Class II and III carriers could lead to unintended consequences, providing an incentive for Class I railroads to split off segments of their lines that serve the "last mile" of a route.

Given these considerations, and particularly given the case-by-case approach being proposed by the Board for considering requests for reciprocal switching arrangements – a position with which the NGFA agrees – it makes little sense to categorically exclude Class II and III rail carriers from consideration in the event a situation arises in which a shipper posits a persuasive case for such an arrangement.

C. The Final Rules Should Provide Guidelines for "Reasonable Distance" Determinations

The NPRM also proposes that under either prong of the new regulations, reciprocal switching relief could be sought only in instances where "there is or can be a working interchange

between the Class I carrier servicing the party seeking switching and another Class I carrier *within a reasonable distance* of the facilities of the party seeking switching." *Id*. at 21 (emphasis supplied). The STB declined to accept the NITL's proposed conclusive presumption that if there is or could be a working interchange within 30 miles of a shipper's facility, the facility is considered to be within a "reasonable distance" of the interchange for purposes of obtaining reciprocal switching relief. NPRM at 21. Instead, the NPRM would leave the term "reasonable distance" undefined in new 49 C.F.R. §§1145.2(a)(1)(ii) and (2)(iii), to be determined in individual cases. Nevertheless, the NPRM invited parties to comment on defining the term "reasonable distance" in an effort to provide guidelines to parties that might seek reciprocal switching relief. *Id*.

The NGFA did not support the 30-mile conclusive presumption proposed by NITL in EP 711 primarily because "many NGFA commodity shippers are not located in terminal areas and not within 30 miles (or even 100 miles) of a working Class I interchange point." Agricultural Parties Opening Comments in EP 711, Verified Statement of Gerald W. Fauth III at 9. *See also,* Agricultural Parties Reply Comments at 4. In response to these and other comments in EP 711, the Board has acknowledged in the NPRM that to limit the definition of "reasonable distance" to 30 miles would preclude many shippers of agricultural commodities from relief under §11102(c). NPRM at 14. Given the fluidity of agricultural markets, agricultural shippers need responsive alternatives that potential reciprocal switching arrangements over a larger, not smaller, geographical area will provide. Agricultural markets, and hence shipping needs, can vary markedly from year to year based upon factors such as (1) the commodity or products shipped; (2) weather and crop growing conditions (e.g. drought, flooding and other weather-induced anomalies that can dramatically affect crop yields and quality in the United States and other major production

areas around the world); (3) changing demand pulls from end-users of commodities based upon customer response for their products; (4) fluctuations in domestic and export markets; (5) embargoes, competing rail traffic (e.g., surges in rail demand for non-agricultural commodities, as occurred in 2013-14 with crude oil and fracking sand); (6) rail capacity, and (7) other factors. The NGFA submits that in some areas of the country, agricultural shippers could be up to 100 miles – or perhaps even farther – away from the nearest interchange with another railroad. Such distances could nevertheless be reasonable for purposes of reciprocal switching under particular facts and circumstances. That being said, to provide some certainty and guidance under the final rules, the NGFA is not opposed to the Board setting a maximum distance of 100 miles, beyond which reciprocal switching relief generally would not be granted – while still allowing individual shippers to argue for a longer distance on a case-by-case basis.

D. Whether a Working Interchange "Is or Can be" Present Should be Further Clarified

The proposed rules in new Part 1145 also do not include definitions of the terms contained in the phrase "is or can be a working interchange." However, the Board in the NPRM has indicated it will determine that there "is" a working interchange "if one already exists and is currently engaged in switching operations." NPRM at 21. As for whether there "can be" a working interchange, the NPRM would so find "*only* if the infrastructure currently exists to support switching, without need for construction, regardless of whether switching operations are taking place or have taken place using that infrastructure." *Id.* (emphasis added). Having advanced this latter criteria, the Board nevertheless posits that it may be proposing a narrower definition than that proposed by NITL in its Petition. *Id.*

The NGFA does not object to the proposed criteria for determining whether there "is" a working interchange at a particular location, subject to the Board accepting the NGFA's recommendation that an interchange also can meet the criteria if in fact it is being used for railroad switching operations by Class II or Class III railroads.

On the other hand, the NGFA believes the Board's proposal for determining whether there "can be" a working interchange is indeed too narrow and could have unintended consequences. *Id*. First, the Board has rejected the NITL's proposal that the "can be" test should include a demonstration that a working interchange could be reasonably constructed. *Id.* The NGFA understands the Board's reluctance to include in the final rules a requirement that an incumbent railroad initially bear all of the costs of constructing brand new interchange facilities as part of relief granted under §11102(c). However, the NGFA does not believe that potential construction of new interchange facilities should be categorically precluded if the shipper and/or the railroad whose cars are being switched (1) can demonstrate construction could occur without materially interfering with the incumbent railroad's operations; (2) reach agreement on how to finance the costs of such construction; and (3) enter into acceptable agreements with the incumbent railroad regarding insurance and liability for entering onto the incumbent railroad's property. Further, the Board's reciprocal switching rules need to be adaptable to a changing rail network environment that may be characterized by reduced traffic and revenues generated by energy carloads (e.g., coal and crude). In this environment, working interchanges that can be rehabilitated with a minimum of investment may become increasingly attractive to railroads.

Second, the proposed requirement that there must be physical infrastructure in place to support switching at the time a shipper files a petition seeking relief under the new regulations is problematic because it will provide incumbent railroads seeking to avoid competition with a

perverse incentive to remove existing infrastructure supporting potential reciprocal switching operations as a way of avoiding reciprocal switching arrangements they oppose. For this reason, the NGFA urges that the Board incorporate an interchange baseline date of July 27, 2016 (date of NPRM issuance) into the final rules to establish a point in time at which a shipper could demonstrate that its request meets the "can be" test of proposed subsections §§1145.2(a)(1)(ii) and (2)(iii). Under this NGFA proposal, an interchange would be deemed to meet the "can be" test if infrastructure supporting an interchange existed as of the baseline date.

E. The Market Dominance Determination Under the Second Prong Should be Either Eliminated or Greatly Simplified

Under the second prong of §11102(c), a party may seek an order requiring a reciprocal switching arrangement by demonstrating the arrangement is necessary to provide competitive rail service. In addition to demonstrating it is served by a single "Class I rail carrier," and also that the working interchange/reasonable distance criteria described above exist, the shipper under the NPRM's rules also would be required to prove that the incumbent railroad has market dominance. While demonstrating a lack of intermodal and intramodal competition was a feature of the NITL Petition, the Board has rejected the NITL's proposed conclusive presumptions that would have provided a means for some clearly captive shippers to circumvent this aspect of the demonstration of eligibility for relief. As such, in the NPRM, determinations of "effective competition" under the "necessary to provide competitive rail service prong" of the new rules would be made on a case-by-case basis. NPRM at 22. The NGFA submits that if not modified or removed, this element of the new rules will add considerable cost, time and complexity to reciprocal switching proceedings, which would be a deterrent and significant hurdle to shippers pursuing a case in the first place.

As an initial comment, the NGFA observes that the inclusion of a market dominance test in the second prong is inconsistent with the stated purpose of the NPRM, which is to closely adhere to the statutory language of §11102(c). The dual statutory prong approach adopted in the NPRM generally follows the statutory language. However, the Board in the NPRM also acknowledges that there is no requirement in §11102 that a party must demonstrate market dominance to obtain relief in the form of reciprocal switching. *Id*. at 22. Nevertheless, the Board deviates from this statutory language by proposing to include a market dominance component in the NPRM, stating "there is nothing in §11102 that prohibits the use of the market dominance test here as part of the analysis…." *Id.* The NGFA submits that this reasoning is inconsistent with the overall intent, purpose and approach of the NPRM to both adhere to the statutory language of §11102 and to remove significant barriers to considering legitimate reciprocal switching arrangements. For these reasons, the NGFA urges the Board to remove the market dominance requirement under the second prong.

The NGFA believes that the second prong of the new rules is more likely to be utilized by rail shippers, mainly because it has the potential to be relatively less costly, complicated and time-consuming than the significantly more opaque and uncertain "practicable and in the public interest" first prong. The primary barrier to the second prong being reasonable and useful, however, is the previously cited proposed requirement that the shipper demonstrate that the incumbent railroad has market dominance, which can be a lengthy and costly exercise. The Board's only explanation for rejecting the NITL's proposed conclusive presumptions as to market dominance[3] is a vague reference to "the reasons discussed above" for rejecting all of the NITL's

[3] Under the NITL proposal, qualitative market dominance would be conclusively presumed if (a) the rate for the movement for which competitive switching was sought had a revenue to variable cost ratio greater than 240 percent, or (b) the landlord railroad had handled 75 percent or

suggested presumptions. NPRM at 22. However, the referenced discussion addressed primarily the Board's recognition that establishing a distance of only 30 miles from a workable interchange to conclusively presume relief would exclude many shippers – particularly grain shippers – from this procedural benefit. *Id*. at 14-15.

If the Board rejects the NGFA's recommendation to remove the market-dominance test under the second prong, we strongly suggest that it establish reasonable presumptions for market dominance by utilizing such factors as rate revenue-to-variable cost ratios, which would not have the same effect of rendering classes of commodities ineligible for relief as would occur under a distance-based market dominance presumption. Therefore, the NGFA believes the benefits of adopting such presumptions – for example, the final rule could contain a conclusive presumption that there is market dominance if the rate for the movement for which reciprocal switching is sought has a revenue-to-variable-cost ratio greater than the Staggers Rail Act threshold of 180 percent – outweigh the detriments. Moreover, the use of such presumptions would not affect the incumbent railroad adversely, which will be compensated in accordance with §11102(c) in any event.

Finally, the NGFA recommends that if the Board retains a market dominance component to the second prong of Part 1145, the Board should clarify whether the applicable test for market dominance would be (1) the test traditionally applied in the coal rate cases and other cases cited in the NPRM at 22-23, or (2) the so-called "Limit Price" test adopted in two rate reasonableness proceedings involving chemical shippers.[4] The NGFA seeks this clarification because in

more of the freight volume transported for a movement for which competitive switching is sought in the 12 months prior to the petition seeking relief.

[4] *M&G Polymers USA, LLC v. CSX Transp., Inc.,* NOR 42123 ("M &G"); *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.,* NOR 42121 *("Total").*

discussing the applicable rules for determining market dominance, no citation is included in the NPRM to the "Limit Price" cases. As it has stated in other proceedings, the NGFA does not favor use of the "Limit Price" test for market dominance pending further comments by affected stakeholders and deliberations by the Board.[5]

F. The Standards for the Level of Compensation Paid to the Incumbent Carrier Should be the Same Regardless of Whether or Not the Incumbent and Non-Incumbent Railroad Agree

The rules the STB adopts concerning the compensation to be paid to an incumbent railroad required to enter into an agreement to provide reciprocal switching services ultimately will be a significant determinant of whether NGFA-member rail-user companies, as well as shippers of other agricultural and non-agricultural products, are able to seek relief under the new reciprocal switching rules. Under §11102(c)(1), rail carriers required to enter into a reciprocal switching agreement "shall establish the conditions and compensation applicable to such agreement, but, if the rail carriers cannot agree upon such conditions and compensation within a reasonable period of time, the Board may establish such conditions and compensation." §11102(c)(1). Consequently, and importantly, the statutory language provides no guidance as to the standards

[5] In its Opening Comments in EP 665 (Sub – No. 1), *Rail Transportation of Grain, Rate Regulation Review*, at 35 (footnotes omitted), the NGFA stated it "does not support testing qualitative market dominance in ag commodity rate cases using the so-called "Limit Price" test for qualitative market dominance developed by the Board [applied in *M&G* and *Total*]. This test appears to have been developed and applied by the Board to address the specific facts before it in two very complicated SAC adjudications involving non-agricultural commodities, one of which (M&G) settled prior to issuance of a final, unappealable decision. In the *Total* case, CSXT has appealed the Board's *sua sponte* use of the "Limit Price" test to the D.C. Circuit. The NGFA maintains that, before the "Limit Price" test, or some version of it, is proposed to be applied more broadly to determine qualitative market dominance in rate cases involving other commodities, particularly ag commodities, the Board first should receive additional public comment on the test and its theoretical underpinnings. In the meantime, the Board should apply the established rules for determining "effective" competition that it historically has applied in rail rate cases, combined with a commitment to expeditiously decide qualitative market dominance disputes."

the Board should apply to judge the reasonableness of switch charges or other compensation agreed to by the railroads after reciprocal switching is ordered. Nor does the statutory language provide any guidance on the standards the Board should apply to establish appropriate reciprocal switching charges and conditions if the carriers don't mutually agree.

The NPRM contains no discussion of the former issue. Rather, it seeks comment solely on the standards that should apply "[t]o the extent the Board would become involved in establishing switching fees (i.e., when the rail carriers do not agree)." NPRM at 24. To the contrary, the NGFA submits that the standards the Board should apply to challenges to the switch fees agreed upon by the railroads are just as significant – indeed, we would argue are more significant – as the rules governing the establishment of compensation when the carriers don't agree. More specifically, the NGFA and numerous other parties have, in EP 711 and other dockets such as EP 705 and EP 665, presented testimony and comments informing the Board of the significant reduction in rail-to-rail competition that has accompanied the consolidation of the railroad industry into four major railroads. As the Agricultural Parties pointed out in their reply comments in EP 711, shippers' concern about the lack of competition in the rail industry was borne out by the fact that *all* of the U.S. Class I railroads uniformly and forcefully opposed *any* changes to the rules and precedent implementing §11102(c), despite the fact that increased competition can benefit railroads and their customers. Agricultural Parties Reply Comments in EP 711 at 10-13. The Board has acknowledged these concerns in the NPRM by rejecting the attempt by BNSF Railway and the Association of American Railroads to have the Board rule that an order mandating reciprocal switching automatically would preclude a finding of market dominance in a rate case challenging the line haul rates charged by either the incumbent railroad or the carrier for which the incumbent performs reciprocal switching services. NPRM at 23.

The NGFA is concerned that in today's concentrated railroad industry, the strong possibility exists that agreements between railroads for reciprocal switching fees and terms in cases where reciprocal switching is ordered under §11102 could result in fees set at unjustifiably high levels that economically preclude reciprocal switching arrangements and result in maintaining the non-competitive *status quo* at a particular location, instead of enabling shippers to serve market destinations or enhancing competition. As documented by the NGFA in EP 705 and again in EP 711, in many cases, railroad-imposed switch charges had been elevated to $500 to $700 per car, which in some cases were five to seven times the variable cost for actually providing the switching service. Agricultural Parties Opening Comments on EP 711 at 3.

In cases where the railroads agree to a reciprocal switching fee that the shipper believes is too high - which the NGFA would hope would be infrequent given the pro-competitive intent of §11102(c) - shippers must have a clearly defined and efficient means to challenge the agreed-upon reciprocal switching fee before this Board. The NGFA accordingly requests that the Board provide an explanation and clear guidance on the rules and standards governing such challenges of switching fees. The NGFA believes the most straight-forward, efficient and reasonable approach would be for the final rules to establish that the standards for challenging reciprocal switching fees agreed to by railroads under §11102(c) shall be the same as the standards to be applied when they *cannot* agree. Among other reasons for adopting this approach, it simply is illogical to apply different standards of reasonableness to the compensation to be paid the incumbent railroad for the exact same rail service ordered by the Board. Simply put, rail carriers should not have an unfettered ability to economically cut off access to markets by agreeing to switching charges that exceed a reasonable level. Allowing that to occur would undermine the national freight rail network. The NGFA reiterates its previously stated view that the STB should consider establishing

a revenue-to-variable-cost-based standard (such as 180 percent) for switching charges which, if exceeded, would shift the burden of proof to the rail carrier to demonstrate that such charges are reasonable.

As for the methodology for determining compensation to the incumbent when reciprocal switching is ordered under §11102(c) the NPRM proposes two methodologies for public comment, and asks for comment on any other proposed methodologies. The two proposed methodologies are (1) access pricing based on a specific set of factors (i.e., geography, distance, cost of service, capacity of interchange facility, etc.); and (2) a variant of the agency's "SSW Compensation Methodology" used primarily in trackage rights cases. Finance Docket No. 31281, *Arkansas and Missouri RR Co. v. Missouri Pacific RR Co*., 6 I.C.C. 2d 619 (1990). In the Agricultural Parties' opening comments in EP 711, the NGFA and other agricultural interests voiced their collective objection to the adoption of the "SSW Compensation Methodology." *See* NPRM at 25. A primary basis for this objection was the methodology's reliance upon the valuation of track assets, which is a costly and complex process that might be suitable for trackage rights cases, but which is disproportionately burdensome in reciprocal switching cases where the use of the tracks at issue would be much more infrequent, and switching could involve more than one shipper facility at a destination or origin. Agricultural Parties Opening Comments in EP 711 at 18-19. The NPRM does not address these concerns, which the NGFA maintains remain valid and persuasively argue against adoption of the "SSW Compensation Methodology."

Consequently, of the two methodologies proposed in the NPRM, Alternative 1, which would take into account specified factors, such as cost of service, geographic considerations and distance to the interchange point, would be more acceptable to agricultural shippers. The specified factors must be chosen with the goal of assisting the Board in reaching a fair result in an efficient

and cost-effective manner. Factors that the NGFA believes would be useful for determining appropriate reciprocal switching fees for agricultural shippers could include: (1) the type of commodity being switched; (2) the cost of service; (3) unit size (e.g., single carloads, unit trains, shuttle trains, etc. versus a single one-size-fits-all approach now used by Class I carriers); (4) switch rates charged by the incumbent and other railroads for such service from terminals or interchange points in the geographic region or market for the commodity(ies) being shipped; and (5) the amount of reciprocal switching that the incumbent railroad would provide.

A methodology that entails the examination of cost of service, market conditions and other defined factors is consistent with the suggestion of the Agricultural Parties in EP 711 that examination of existing terminal switching rates could serve as a benchmark for an access price methodology for reciprocal switching ordered pursuant to §11102(c). *Id.* at 19.

In any event, however, the Board should summarily reject the suggestion by Union Pacific Railroad that the incumbent railroad should be paid for lost contribution or opportunity costs if reciprocal switching is ordered. NPRM at 25. As the Agricultural Parties demonstrated in EP 711, the Board long ago disposed of the dubious notion that the creation of competition where shippers are captive requires paying opportunity costs or lost profits to the incumbent railroad. Agricultural Parties Reply Comments in EP 711 at 11-13, *citing* Finance Docket No. 32630, *Omaha Public Power District – Petition under 49 U.S.C. 10901(d)*(served August 1, 1996) 1996 WL 428901 at *2 (in a decision in which UP obtained competitive access to a coal-fired power plant via a shipper build-out that involved crossing the predecessor to the BNSF Railway, the STB rejected Burlington Northern Railroad's (BN's) claim that its compensation for competitive access being established by the crossing should have been a fee set at the level of BN's potential lost profit, minus the cost to the shipper of establishing the access. Accordingly, BN's proposed crossing fee

of $28.2 million was rejected and a fee of $5,320 was established by the Board, which added that "BN's proposed [lost profits] compensation plan is contrary to the Congressional directive that we foster competition." *Id*. at *3). Therefore, UP's suggestion should be dismissed out of hand.

G. The Feasibility, Safety and Service "Affirmative Defense"

Under either prong, the Board's proposed rules would not grant reciprocal switching if either the incumbent railroad or the other Class I railroad demonstrates that the proposed switching is "not feasible or unsafe" or that the presence of such switching will "unduly hamper the ability of that railroad to serve its shippers." This is characterized as an affirmative defense, meaning the railroad asserting this defense would bear the burden of proof. Given the strong resistance from the U.S. Class I railroads in EP 711 to any changes to the Board's rules governing reciprocal switching, and their collective strong negative reaction to the NPRM,[6] the Board and rail shippers should anticipate that an incumbent railroad will raise this affirmative defense in every instance where relief under new Part 1145 is sought. Indeed, the Board should not discount the possibility that the railroad standing to gain access to a rail shipper via reciprocal switching also raises this defense on occasion. For this reason, the Board should consider carefully the standards and processes it will apply concerning this aspect of the final rules. While this component of the final rules should permit valid concerns about feasibility, safety, and service effects to be raised and considered, it should not provide an opening for railroads to drag out proceedings under Part 1145 and unnecessarily increase their cost and complexity in an effort to forestall the establishment of competition. More specifically, the Board should consider imposing appropriate limits on

[6] See, https://www.aar.org/policy/economic-regulation, where AAR has described the NPRM as "a radical approach that would force carriers to turn over traffic to other railroads, potentially at below-market rates and without any showing of competitive abuse. This 'forced access' rule also would significantly compromise the efficiency of the nation's rail network."

discovery associated with this aspect of the rules. The Board also should narrowly tailor the scope of the affirmative defense to the specific facts of the proposed switching arrangement, as opposed to expanding the inquiry to include arguments on how the proposed switching arrangement would adversely affect the incumbent railroad's systemwide operations and revenues, or the nationwide rail system as a whole. For this reason, the determination of "network effects" mentioned in the NPRM should be construed narrowly. NPRM at 19.

H. The Board Should Adopt Procedures for Seeking and Resolving Requests for Reciprocal Switching Relief

Finally, the Board has included no procedures for presenting and considering, and no deadlines for deciding, reciprocal switching cases, other than stating "any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis" (proposed 49 C.F.R. §1145.2(b)). The opened-ended litigation aspect of the proposed rule constitutes a rejection by the Board of the concerns expressed by NGFA and other rail shipper interests in EP 711, which asserted that revised reciprocal rules that entail costly, complex and lengthy litigation will be a major deterrent to a shipper seeking relief, even if the facts support such relief.

The NGFA recommends that the Board look to the recently finalized revisions to its Arbitration Procedures (EP 730) as a model for setting specific reasonable procedures and timelines for initiating, considering and deciding requests for reciprocal switching orders under new Part 1145.

I. Duration of Prescription and Standards for Reopening

The NGFA generally supports the NPRM's proposal that the reciprocal switching relief would last for as long as the criteria for either prong are met, unless otherwise ordered by the Board in a particular proceeding after the filing of a petition to reopen and a demonstration that there are substantially changed circumstances. NPRM at 19, note 21. However, the NGFA recommends that once granted, a reciprocal switching arrangement should remain in effect for at least one year before being eligible for challenge by an incumbent railroad, particularly given the new origin-destination pair(s) and contractual relationship(s) that will have been made possible and established between the shipper/supplier and the receiver/user of the product being transported by rail as a result of the reciprocal switching order.

In any event, the NGFA urges that the Board in its final rules clarify that the incumbent railroad may not unilaterally determine that the conditions requiring reciprocal switching no longer exist and attempt to suspend reciprocal switching service pending the outcome of a petition to reopen the Board's order requiring reciprocal switching.

III.
CONCLUSION

In conclusion, the NGFA enthusiastically supports the Board's publishing of the NPRM and its general approach of (1) overturning the "competitive abuse" standard of *Midtec*; and (2) replacing the prior standards with new regulations that more closely adhere to the statutory language of 11102(c). However, the NGFA urges the Board to provide more details and guidance in the final regulations and the decision adopting them to address the points raised in these Opening Comments. Moreover, given that more than five years have elapsed since the NITL filed its Petition for Rulemaking in EP 711, the NGFA urges the Board to act with all deliberate speed to promulgate final regulations in this proceeding.

Respectfully submitted,

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