BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No. 2)

Reciprocal Switching for Inadequate Service

OPENING COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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I. INTRODUCTION

The Association of American Railroads ("AAR") respectfully submits these opening comments on the Board's proposed rule for evaluating petitions for reciprocal switching orders to address inadequate rail service. *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (STB served Sept. 7, 2023) (Notice of Proposed Rulemaking ("Proposed Rule" or "NPRM")). The Board has explained that concerns about the quality of freight rail service motivate the Proposed Rule. Providing safe, reliable, efficient, cost-effective, quality rail service is what AAR's members are in business to do. AAR offers these comments to contribute to a constructive dialogue among the Board and stakeholders on issues within the framework that the Board has put forward. AAR understands the Proposed Rule's framework to be the following: *First*, the service metrics the Board has identified will serve as indicators of service inadequacy. *Second*, the Board will then consider the railroad's reply on issues such as affirmative defenses and practicability. *Third*, relief in the form of a switching order can be granted, if the Board makes certain findings.

AAR's comments are intended to help the Board refine that framework to flexibly and efficiently consider relevant facts and circumstances of each case, consistent with applicable law. Failing to meet appropriately defined service metrics (set at appropriate levels) would be a

reason for close examination of the service the affected shipper is receiving, but the picture behind a metric may—or may not—be considerably more complicated. And where a service inadequacy exists, the Board must focus on *remedying* that inadequacy, whether that is achieved by the incumbent carrier curing the inadequacy, by a forced switching order involving an alternate carrier, or by some other tool entirely. Accordingly, AAR supports giving a shipper access to alternative service in the event of ultimate findings that (1) the incumbent carrier consistently does not provide adequate service to the specific customer under the circumstances and cannot cure its failure; (2) an alternative service design exists that is safe and practicable, and will remedy the service inadequacy; and (3) the shipper has (as Congress has required) a compelling reason for that alternative service. *Jamestown N.Y. Chamber of Com. v. Jamestown, Westfield & Nw. R.R.*, 195 I.C.C. 289, 292 (1933) ("*Jamestown*") (forced access ordered in "the public interest" demands a shipper show "some actual necessity or some compelling reason" for relief).

Implementing any forced switching concept, as the Board is aware, has challenges because switching entails complex tradeoffs among a variety of interests. Rigid generalizations are impossible, and forced switching orders, if deployed improvidently or indiscriminately, will have serious negative consequences for the industry and those who rely on it. To take just one facet of the issues: A forced switching order, by definition, requires alternative service that is more operationally and economically complex than existing service. Any such proposal arrives with potential downsides and unintended consequences. Those risks are multiplied by the number of locations at which switching might be ordered, and magnified by their potential to cascade through a complex, interconnected network industry. As the Board knows, forced switching also can discourage investment, pose operational risks, create inefficiencies, come

with added costs, and even undermine the long-run economic health of the railroad industry by limiting demand-based differential pricing. Those considerations do not mean switching can never be ordered, but they are weighty reasons for caution.

With those principles in mind, AAR supports the Board's decision to close the EP 711 (Sub-No. 1) proceeding that considered on-demand orders to force switching, in favor of a new approach that aims to identify and address service inadequacies. Although closed, the record in that proceeding remains a highly informative resource on a number of issues that are relevant to any proposal for forced switching, and in particular the costs that broad forced switching can visit on the Nation's rail network. Being attentive to those issues requires taking into account all the relevant facts and circumstances when presented with a request for a switching order.

The Board has expressed a desire to offer a more structured, predictable, and expeditious process under the Proposed Rule. AAR agrees that those values can have benefits for all stakeholders. But those values come with tradeoffs, and the Board should take care that the framework here does not become a straitjacket. Service issues have many overlapping causes. Not every failure to meet a particular shipper's desires equals inadequate service, especially in a network where carriers have obligations to all customers. And switching arrangements are economically and operationally complex and varied. Although the Board reasonably wants to promote clarity, clarity should not come in the form of artificially limiting consideration of relevant factors, ordering switching that will not benefit the petitioning shipper, or imposing undue costs on other shippers and the broader network.

In short, AAR's members want shippers to have safe, reliable, efficient, cost-effective, quality service. For that reason, AAR agrees that using service metrics to identify a potential service inadequacy worthy of further examination is an appropriate starting point. Ultimately,

the Board will need to decide, under settled legal standards, whether the shipper's petition can and should be remedied with a forced switching order, and if so, how that order will work in the circumstances of an individual case. Working within the Board's proposed framework, AAR's opening comments offer a number of important modifications intended to ensure that any rule the Board adopts will be consistent with established law, achieve results that will benefit those that rely on and operate the national rail transportation system, and minimize the inherent and unavoidable downsides that attend regulatory intervention in switching. AAR summarizes some of the most important refinements in Part II of these comments. Part III discusses some overarching legal and policy issues that underlie a number of AAR's comments. Part IV provides specific comment on particular provisions of the Proposed Rule. Finally, the Appendix to these comments summarizes some of the recurring issues that any forced switching proposal raises, relating to operations, investment, and the long-run economic health of the industry.

II. RECOMMENDED KEY MODIFICATIONS TO THE PROPOSED RULE

The issues of greatest concern to AAR fall into three categories. *First*, the substance and procedures of the rule should ensure that a proceeding resolves the ultimate statutory question of whether the shipper has "some actual necessity or some compelling reason" for a switching order, *Jamestown*, 195 I.C.C. at 292. In other words, a service metric failure can warrant inquiry, but for relief to be ordered, there must be findings that the service is inadequate for that particular shipper in those particular circumstances and that a switching order will remedy that inadequacy. *Second*, the Board's own questions raise important issues about the Proposed Rule's proper scope, in both legal terms (what is the proper relationship between the Proposed Rule and contract traffic and exempt traffic) and practical terms (how will the Proposed Rule operate depending on how certain quantitative parameters are set). *Third*, several improvements

should be made to the Proposed Rule to promote fair and well-informed adjudications in individual cases by the Board.

A. The Rule Should Be Structured to Implement the Longstanding Legal Standard

Congress, the Board, and the ICC have always understood the "public interest" language of 49 U.S.C. § 11102(c)(1) to require a shipper to show actual necessity or a compelling reason to obtain a switching order. "'[I]n the public interest' means more than a mere desire on the part of shippers or other interested parties for something that would be convenient or desirable to them," but rather looks for "some actual necessity or some compelling reason . . . before [the agency] can find such action in the public interest." *Jamestown*, 195 I.C.C. at 292. A shipper that is "inadequately served" may obtain relief. *Id.* It may not be "possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times," and "[i]ndividual service desires are not necessarily the proper determinant of the adequacy or inadequacy of rail service." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. 968, 975, 978 (1998). But it is surely central for the Board to consider whether service falls outside the range of reasonable variation inherent in the kind of service the shipper receives—something persistently and distinctly inferior to that available to similarly situated shippers. *Infra*, Part III.A.

Observance of the "actual necessity or compelling reason" standard will guide proceedings under the Proposed Rule in a number of ways, and the Board has flexibility in how it receives information and how it assigns burdens on many issues. But several implications bear note here. *First*, a switch cannot be a "necessity" or a "compelling" way to address a service inadequacy unless the alternative service actually remedies the service inadequacy. That is not a foregone conclusion, when the alternative service will be more operationally complex, and there

will be some variability in the alternate carrier's common carrier service performance just as there is across the large and complex network of any Class I carrier. Accordingly, a proceeding under the Proposed Rule inherently requires a finding that access to the alternative service will improve the shipper's situation. *Infra*, Part III.B.1.

Second, the causes of—and cures for—service issues are highly varied and situation specific, which is why the Board was correct to recognize the need for case-by-case affirmative defenses. Although the Proposed Rule identifies many relevant considerations, it is impossible to anticipate all combinations of facts that might arise in a proceeding under the Proposed Rule. Moreover, because the Board has limited experience with metric-based regulation in general (and no experience with the lane-by-lane data called for in the Proposed Rule), it is difficult to anticipate the kinds of cases that may be brought under the Proposed Rule. For example, a deterioration in transit time for a lane could be associated with a service inadequacy warranting a forced switching order—but it could instead be the product of measuring this year's sound performance against last year's unusually expeditious service. For those reasons, in applying the "actual necessity or compelling reason" standard, an unrebutted showing of a failure to meet a service metric could be powerful evidence, but the Board should always allow the development of an informative record, especially when the railroad raises the case-by-case affirmative defense in proposed 49 C.F.R. 1145.3. *Infra*, Part IV.E.1.

Third, the Board should not assume that all shippers (or all lanes) are alike. The operational challenges of serving one shipper may be quite different from the challenges of serving another shipper, and those differences can result in different service performance. Shippers do not all desire to pay for the same levels of service. Shippers do not all care about the same specific aspects of service performance. Thus, the fact that service on a particular lane may

trigger a general metric selected by the Board does not inherently reveal how the shipper has been affected (and other case-specific facts might show that the trigger does not reflect a service inadequacy that is in need of a switching order). *Infra*, Part III.B.1. For example, a receiver that has a large stockpile of units delivered by rail may be more affected by whether its overall stockpile dwindles below a certain level than by the timing of any individual shipment. Because the legal standard requires the Board to situate the benefit to the shipper in the context of all the other effects of a forced switching order, a shipper that experiences little harm is unlikely to have a compelling claim when the service issue is put in the context of effects on others. Accordingly, a shipper should explain in its petition under proposed 49 C.F.R. 1145.5(b) how it has been materially harmed by the potential service inadequacy. Correspondingly, proposed 49 C.F.R. 1145.6(b) should make clear that the Board will not order a switch absent harm to the shipper. *Infra*, Part IV.D.6.

Fourth, the Board's approach to multiple-lane switching must remain aligned with the "actual necessity or compelling reason" standard. Given the sheer number of lanes that exist, there is a significant number of combinations of lanes that might be proposed for switching. Under the Proposed Rule as written, well-performing lanes (for which no possible need exists for switching) could be combined in one proceeding with poorly performing lanes (for which a switching order could prove to be appropriate), with a resulting dilution of focus on the ultimate standard. The appropriate solution to this concern is to limit proceedings under the Proposed Rule to lanes that do not meet the service metrics (or aggregations of such lanes), while allowing a shipper that does not wish to argue its case on the basis of lanes to invoke the existing procedures of Part 1147. *Infra*, Part IV.D.8.

Fifth, whatever conditions may have been in the past, if the present conditions do not establish an "actual necessity or compelling reason" for a switch, then no justification exists for continued regulatory control. The Proposed Rule's process, term, renewal, and termination provisions must be conformed to those principles. In particular, the Board should adjust its pre-petition process and timeline to ensure an opportunity exists to cure the alleged inadequacy without Board intervention. *Infra*, Part IV.F.1. If the incumbent carrier is able to resolve the alleged service inadequacy, then the shipper has achieved the positive outcome it sought, and the process has served its purpose. There would be no "actual necessity or compelling reason" for a switch, the shipper would get immediate relief, and the resources of all involved, including the Board, would be conserved. The Board's framework can readily accommodate an opportunity for rapid curing, while in the meantime allowing the shipper to prepare a complete petition, including a proposed alternative service arrangement with the alternate carrier, if needed. Where the Board does prescribe a switch, it should generally adopt a shorter initial term for the prescription, with the expectation that the incumbent carrier will resolve the conditions leading to a service inadequacy. *Infra*, Part IV.H.1. Automatic renewal of a switching prescription is inconsistent with the "actual necessity or compelling reason" standard because it presumes, without any showing, the continued existence of past service inadequacies. *Infra*, Part IV.H.2. For similar reasons, the Board must be willing to entertain a termination petition from the incumbent carrier at any time, if the incumbent can show materially changed circumstances that have alleviated the shipper's previously established reason for a forced switching order. *Infra*, Part IV.H.3.

B. The Board Should Ensure that the Rule Has a Proper Legal and Practical Scope

The Board should consider and articulate the legal and practical reach of whatever rule it may adopt. *First*, as a legal matter, the Proposed Rule can have no application to contract traffic, and cannot use such traffic as a benchmark for evaluating metrics. The Board may not consider service provided under a contract as a basis for the prescription of a switching agreement that would begin after the contract expires. *Infra*, Part IV.B.1.

Second, exempt traffic must be similarly beyond the scope of the Proposed Rule. Of course, the Board always retains jurisdiction to revoke exemptions. If the Board revokes an exemption upon a proper showing, then the metrics under the Proposed Rule can be measured prospectively and a shipper may seek a switching order at that point based on those metrics. *Infra*, Part IV.B.2.

Third, the Board has asked a number of questions about the practical reach of the Proposed Rule, including levels at which certain metrics should be set. The Board has not performed the analysis to answer those questions on a lane-by-lane level, and as AAR previously informed the Board, the limited comment period does not allow for a full analysis in response to the Board's questions. But empirical analysis oriented toward the questions the Board has posed may give the Board insight into how the Proposed Rule would operate in practice, and AAR continues to develop that analysis. *Infra*, Part IV.D.2.

C. Proceedings Under the Rule Should Promote a Fair and Well-Informed Adjudication

The Proposed Rule envisions that a number of issues will be addressed by the interested parties and the Board on a compressed timeframe. The success of that proceeding will depend on the quality of information available to the Board, the presence of all the necessary participants, and the Board's experience with a new structure for proceedings of this type. AAR

suggests a number of refinements in the comments in Part IV below, but offers three important examples here as illustrations.

First, depending on the complexity of the issues involved, the Board and participants in the proceeding may need more time than allocated under the Proposed Rule to obtain relevant information and properly evaluate the relevant issues. *Infra*, Parts IV.F.1, IV.F.2. Allowing additional time in such cases will promote well-informed Board consideration of the tradeoffs implicated by the relief the shipper seeks, especially where a railroad's defense does not fit neatly into one of the enumerated affirmative defenses and therefore must be treated as a case-by-case affirmative defense.

Second, the alternate carrier is at the center of any forced switching order, but the Proposed Rule says relatively little about its participation. The alternative service design involving the alternate carrier is central to the Board's consideration of the overall petition—for example, is that alternative service design safe and practicable, and how will it impact other shippers? The alternate carrier will have important information about the safety and practicability of that service. Likewise, the alternate carrier will have information about its service performance on lanes similar to the lane proposed for switching and the impacts of a switch on the alternate carrier's other customers; neither the incumbent carrier nor the shipper will have that information, yet it will be essential for understanding if the alternative service will solve the inadequacy the shipper faces. Without the alternate carrier's participation, the Board is likely to have unanswered questions that bear heavily on its decision. Thus, the alternate carrier is appropriately a party to the proceeding, and the shipper seeking relief should be required to engage with the alternate carrier (just as it must with the incumbent carrier) so that submissions

to the Board under proposed 49 C.F.R. 1145.5 will accurately reflect information available to the alternate carrier. *Infra*, Part IV.F.3(a).

Third, the Board should gain experience under the rule with single-line traffic before extending the rule to interline traffic. Under a metrics-based regime, measuring the separate legs of interline traffic poses a number of distinct and more complex issues than doing so for single-line traffic. Interline traffic is also likely to present significantly more complicated alternative service design issues where a remedy is imposed. If the Board finalizes the Proposed Rule, it should proceed incrementally to evaluate and refine the new rule's performance in the context of single-line traffic before attempting an extension to the individual legs of interline traffic. *Infra*, Part IV.D.9. In the meantime, the existing procedures of 49 C.F.R. Parts 1146 and 1147 would remain fully available.

III. BROAD ISSUES AFFECTING THE NEW PROPOSED RULE

The Proposed Rule reflects a third approach to forced switching that the Board has considered under the EP 711 docket. The Proposed Rule is significantly different from the approach advanced in the original EP 711 petition and from the approach considered by the Board in EP 711 (Sub-No. 1). Nonetheless, any approach to forced switching implicates many of the same policy, legal, and practical issues. Because the Board is familiar with many of those issues—relating to operations, investment, and the long-run economic health of the industry—AAR recapitulates only a summary of them in the Appendix to these comments. This part of AAR's comments addresses two overarching issues that are more specific to the Proposed Rule and that should help guide the Board's refinement of the Proposed Rule. *First*, AAR discusses the law applicable here—the "actual necessity or compelling reason" standard that governs the Board's ultimate decision whether to order switching under Section 11102(c)(1)'s "public interest" language. That standard requires the Board to reserve discretion, depending upon the

complexity of the case, to consider all facts and circumstances in evaluating whether a forced switching remedy is necessary (and, if so, in fashioning that remedy). *Second*, given the focus in the Proposed Rule on inadequate service, this part discusses why and how a forced switching rule like the Proposed Rule should be oriented toward *remedying* a specific instance of inadequate service for the shipper rather than *punishing* the incumbent railroad. *Cf. Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 974 ("relief is not a punishment against the incumbent railroad").

A. The Board Should Further Align the Proposed Rule with the "Actual Necessity or Compelling Reason" and Practicability Standards

The Board "may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, or where such agreements are necessary to provide competitive rail service." 49 U.S.C. § 11102(c)(1). The Board's Proposed Rule proposes to implement the "practicable and in the public interest" provision of the statute. NPRM at 6. Any new rule authorizing forced switching must fully align with the requirements of that provision, which entails applying the established "actual necessity or compelling reason" standard to the facts and circumstances of a particular case.

1. The ICC and the Board have long recognized that reciprocal switching orders are governed by an "actual necessity or compelling reason" standard and require a showing of practicability

The Board has long understood that "in the public interest" in Section 11102(c)(1) requires a showing of a compelling need. Decades before the Staggers Rail Act was enacted, the ICC held that a compelling need must be shown before it would find that mandated terminal access is in the "public interest." *See Cent. States Enters., Inc. v. ICC*, 780 F.2d 664, 668 (7th Cir. 1985). In *Jamestown*, the ICC explained that the phrase "'in the public interest' means more than a mere desire on the part of shippers or other interested parties for something that would be

convenient or desirable to them." 195 I.C.C. at 292. "Where something substantial is to be taken away from a carrier" for the benefit of other parties and "with no corresponding benefit to the carrier," "some actual necessity or some compelling reason must first be shown before [the Commission] can find such action in the public interest." *Id.* The inquiry into "'the public interest'" considers "not only the interests of the particular shippers at or near the terminal considered, but also the interests of the carriers and of the general public." *Id.* This interpretation thus captures many of the recurring policy considerations (summarized in the Appendix) that arise in cases of forced access: What one shipper may perceive as the railroad service levels or service options that best meet its own needs in the short run may not be consistent with the larger interest in the long-term health of a complex rail network that well serves many shippers.

Applying the "actual necessity or compelling reason" standard, the Commission in *Jamestown* declined to grant joint use of a carrier's terminal facilities. The record did not show that affected shippers were "inadequately served," so "as to warrant [the Commission], from the standpoint of the public interest," to require the requested access. *Id.* The shippers had demonstrated the "desirability, but not the necessity" of the joint use. *Id.*; *see also Mfrs. Ass'n of York v. Penn. R.R. Co.*, 73 I.C.C. 40, 50 (1922) ("*York*") (refusing forced access to terminal facilities because "[t]here is no showing that the shippers are so inadequately served at present that we are warranted, from the standpoint of the public interest, in depriving the carrier first on the ground of an important volume of the traffic originating along its line").

When it adopted the Staggers Act in 1980, Congress codified the same "practicable and in the public interest" test to govern the Commission's authority to require reciprocal switching. *See Cent. States Enters.*, 780 F.2d at 668. In doing so, Congress incorporated the same actual

necessity standard that the ICC had applied to requests for joint terminal use. *Id.* ("Congress intended that the standard to be used in applying the 'practicable and in the public interest' test [for reciprocal switching] be 'the same standard the Commission ha[d] applied in considering whether to order the joint use of terminal facilities." (quoting H.R. Rep. No. 1430, at 116 (1980)); *see also id.* at 677–78; *Midtec Paper Co. v. United States*, 857 F.2d 1487, 1502 (D.C. Cir. 1988). Since then, the agency has continued to require a showing of actual necessity or a compelling reason before finding that a proposed switch is in the public interest. *Cent. States Enters.*, 780 F.2d at 677–78.

In addition to the "public interest" requirement, as the Board recognizes in the NPRM, the statute demands that any prescribed switching arrangement be "practicable." 49 U.S.C. § 11102(c)(1). In assessing practicability, the Board has looked to whether interchange and switching are feasible, whether the terminal facilities can accommodate the traffic of both carriers, and whether reciprocal switching would unduly hamper the ability of either carrier to serve its shippers. *Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 367 I.C.C. 718, 720–22 (1983). The Board recognizes the importance of these issues, and it should ensure that submissions under the Proposed Rule will provide it with the information necessary from all parties, including the alternate carrier, to make such findings.

The "actual necessity or compelling reason" and practicability requirements not only are grounded in the text and history of Section 11102(c)(1) but also are consistent with the national Rail Transportation Policy ("RTP"). The RTP expresses Congress's desire "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and "to minimize the need for Federal regulatory control over the rail

transportation system." 49 U.S.C. § 10101(1), (2).[1] That policy is an important guide for the Board and must be considered. *See Ass'n of Am. R.Rs. v. STB*, 237 F.3d 676, 680 (D.C. Cir. 2001). In the context of this rulemaking, the RTP cautions against overreliance on any across-the-board regulatory metric for judging service levels in all contexts. As explained in the attached verified statement of Jonathan M. Orszag and Yair Eilat, tying mandated switching orders to defined service performance metrics operates as a form of quality regulation, which in turn has effects on the price and output of rail service more generally. Orszag & Eilat V.S. ¶¶ 15–19. The more that pre-defined service metrics dominate the inquiry, the more a rule threatens to operate as a broad-based direct regulation of service quality rather than a framework for reasoned adjudication of claims for relief in particular cases. The Board should ensure, therefore, that the Proposed Rule requires all parties to offer information necessary to make the appropriate findings to support whatever relief is granted.

2. The Board ultimately must make an affirmative finding that the "actual necessity or compelling reason" standard is met under all the relevant facts and circumstances, and that the alternative service will be practicable

Before the Board can order reciprocal switching in any given case, it must make affirmative findings that the proposed switch is both supported by "actual necessity or compelling reason" and—as the Board notes (NPRM at 2)—practicable. Section 11102 is clear

[1] As the ICC explained in its brief to the D.C. Circuit in *Midtec*, the "central philosophy of the Staggers Act" is that "regulation should be reserved for situations where it is needed to protect against abuses." Joint Brief for Respondents Interstate Commerce Commission and United States of America, *Midtec Paper Corp. v. I.C.C.*, No. 87-1032, at 25 (D.C. Cir.) (filed Mar. 14, 1988); *see also id.* at 18 n.12 ("intrusion into carrier operations and pricing practices in the absence of some real or threatened abuse simply cannot be squared with a fair reading of the rail transportation policy"). Congress built on that deregulatory emphasis when it adopted the ICC Termination Act, seeking to "afford[] remedies only where they are necessary and appropriate." H.R. Rep. No. 104-311, at 93 (1995).

in authorizing the Board to prescribe a switching arrangement only if it "finds" such a prescription to be practicable and in the public interest (or where it is necessary to provide competitive rail service). 49 U.S.C. § 11102(c)(1). And the Board can make the required findings under the public interest language of the statute only where actual necessity or a compelling reason exists. *Cent. States Enters.*, 780 F.2d at 678.[2]

That is not to oppose the use of metrics for triggering an inquiry under the Proposed Rule. AAR believes that using appropriately calibrated metrics can be a beneficial way to focus shippers' and railroads'—and ultimately, the Board's—attention on potentially inadequate service. The goal should be to use metrics in the most effective way possible, so that the Proposed Rule is properly calibrated to draw attention to potential service inadequacies for which the remedy of a forced switch could potentially be appropriate and effective. Thus, for example, longer-term, severe service issues demand the Board's intervention more than do transient, mild drops in performance. Similarly, lanes with unusually poor service levels are better candidates for the Board's attention than those with service levels that may reflect only the inherent variability in railroad common carrier service levels. Even the most well-refined service metrics, however, cannot operate to exclude an incumbent carrier's ability to respond by putting its service in full context—a point the Board correctly acknowledges in providing that it will "consider, on a case-by-case basis, affirmative defenses that are not [otherwise] specified." NPRM at 41 (proposed 49 C.F.R. 1145.3).

[2] The statute and agency practice also put some outer limits on how the Board assigns the burdens of making particular showings. *See Cent. States Enters.*, 780 F.2d at 680 (rejecting dissent's proposed burden-shifting analysis); *Jamestown*, 195 I.C.C. at 292 (rejecting proposed forced sharing because "[t]he record . . . affords no reliable basis for a conclusion" about the effect of an order on the incumbent).

That broader examination of relevant facts and circumstances may be captured in a number of places—for example, by the affirmative defenses, or because it arises when the Board considers the issues listed in proposed 49 C.F.R. 1145.6(b) within the context of a particular case. Such consideration is necessary because service issues have varied causes, varied effects, and varied solutions. The Nation's rail network is vast and interconnected, and rail performance on individual lanes is affected by many overlapping variables. *Infra*, Part IV.E.1. To name just a few, carrier construction projects, demand spikes, bad weather, supply chain disruptions, and shipper facility maintenance all can degrade service quality for a time. In a network as dynamic and diverse as the Nation's rail system, it is not possible to anticipate all of the circumstances that can impact rail service. At the same time, shippers' transportation needs vary. And a railroad's failure to meet a particular service benchmark will not affect every shipper in the same way.

Moreover, switching arrangements are themselves highly variable. While all forced switches create new complexities and inefficiencies, the implications of those issues will depend on a range of factors, such as the volume of affected traffic, the terminal area at issue, the complexity of the new service design, safety issues on the relevant lane, and challenges in coordinating the time and place for interchange of switch traffic. Adding more switching to a particular terminal area can have difficult-to-predict impacts on other shippers, depending on the amount of congestion at the terminal, the volume of traffic covered by a new prescribed switch, and local labor conditions, among other factors. *See infra*, App. Part V.C; Orszag & Eilat V.S. ¶ 27. Nor is it a certainty that a switching arrangement (including the necessary additional car handlings) will improve service for a given shipper, so the Board needs to consider whether the proposed alternative service will actually solve the service inadequacy.

In light of all those variables, the Proposed Rule must remain flexible enough to permit consideration of all relevant facts on a full record. Within the framework that the Board has proposed, that means that the Board should take into account case-specific facts in determining whether the carrier's performance sinks to the level of a service inadequacy that warrants regulatory intervention, including an understanding of how the petitioning shipper has been harmed. It also means that, in assessing an incumbent carrier's affirmative defenses (whether under an enumerated defense or under the case-by-case principle), the Board should consider any facts that may bear on the reasons for the incumbent carrier's service levels. For similar reasons, it is important for the Board to have concrete information from the proposed alternate carrier about the proposed alternative service. Without it, the Board will not be able to properly evaluate whether the proposed switching arrangement is safe and practicable and will remedy the service inadequacy. Because AAR understands that the Board's Proposed Rule proposes to treat metrics as a key *starting* point for an inquiry rather than the *ending* point, AAR believes that the framework of the Proposed Rule readily accommodates the foregoing. Several modifications to the Proposed Rule (discussed *infra*, Part IV) would ensure that those proceedings arrive at a proper application of the statutory standard.

B. The New Proposed Rule Should Be Designed for Remedial Use, Not Coercive or Punitive Purposes, Further Reinforcing the Need for the Board to Consider All Relevant Facts and Circumstances

The Board has framed the Proposed Rule as principally geared to deploying forced switching to remedy inadequate service. NPRM at 5–6. Providing alternative service where the present state of incumbent service is inadequate is a recognized and appropriate remedial use of the Board's authority. By contrast, the Proposed Rule would not properly be applied to impose (or threaten) a switching order that would not itself serve the public interest, as a way to coerce a railroad to alter its practices or to punish it for past failings. AAR believes it is vital that the

Board communicate to all stakeholders that the Proposed Rule is the Board's approach to deploying switching to directly remedy service inadequacy where it can, not a tool for laying blame or extracting unrelated concessions from incumbent carriers. Clear articulation of that purpose will ensure that proper proceedings are brought to the Board and that those proceedings are evaluated with a focus on solving identified service issues.

1. The Proposed Rule is appropriately applied only where switching would remedy a service inadequacy

The "actual necessity or compelling reason" standard is fundamentally about remedying a service inadequacy: Where a shipper has a compelling need for a service that it lacks, the Board can remedy that lack by ordering the service. That remedial inquiry necessarily begins only with a finding that a shipper is receiving inadequate service. *See Jamestown*, 195 I.C.C. at 292; *York*, 73 I.C.C. at 50.

AAR has previously explained that switching orders are one of many appropriate remedial tools the Board has to respond to an identified service inadequacy. *See* Further Supplemental Comments of AAR, EP 711 (Sub-No. 1) (filed Apr. 4, 2022) ("AAR 711-1 Further Supplemental Comments") at 17–21. Conversely, the Board should not adopt a rule that imposes remedies that will not actually address the problem it has identified. *Cf.* NPRM at 42–43 (proposed 49 C.F.R. 1145.6(b)) (enumerating certain circumstances in which "the Board will not prescribe a reciprocal switching agreement"). Misalignment between problems and solutions is undesirable in any circumstance, but is especially so here, where any switching order comes at the price of unavoidable costs and downsides. *See* Orszag & Eilat V.S. ¶¶ 26–29.

It follows from those principles that, at a minimum, an order under the Proposed Rule can be beneficial and proper only if it alleviates a service inadequacy. That, in turn, poses a question about how the alternative service would function, and how it would help the shipper, relative to

the inadequate service being provided by the incumbent carrier. Three particular showings are needed to establish that a switching order could be a suitable corrective remedy for a shipper receiving inadequate service.

First, practicability—including safety—is essential. As the Board recognizes in the Proposed Rule, a switching operation that is not practicable is no solution at all. Safety is part of practicability, and an alternative service that poses safety risks is likewise not a solution the Board should entertain. The Board should revise proposed 49 C.F.R. 1145.6(b) accordingly.

Second, the alternative service design must in fact correct the identified service inadequacy. For example, if a shipper complains of deterioration in transit time for service provided by the incumbent carrier, then improvement in the shipper's situation depends on whether the addition of the alternative service—in its entirety, considering local service, the delay introduced by the switch operation, and a realistic assessment of the alternate carrier's typical common carrier line-haul service—will improve transit time. *See Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 978 (noting in EP 628 that it is "implicit in the reason for providing relief" that "the alternative carrier" or "the combination of the alternative carrier and the incumbent carrier" "must be able to provide better service than the incumbent carrier is currently providing"). The Board could incorporate this consideration in various places, such as in the shipper's petition (under proposed 49 C.F.R. 1145.6(a)), the Board's considerations (under proposed 49 C.F.R. 1145.6(a)), or the circumstances in which the Board will not order a switch (under proposed 49 C.F.R. 1145.6(b)).

Third, the Board must find the shipper has been harmed by inadequate service. To some extent, this calls on the shipper to explain the problem that exists and that can potentially be corrected. For example, if the shipper petitions based on the incumbent carrier's failure to

provide service that meets its Original Estimated Time of Arrival ("OETA") estimates, then the shipper would ordinarily explain how that degree of unpredictability renders the incumbent's service inadequate, and how that inadequacy had frustrated the shipper's own planning and business activities. That should be a straightforward showing; a shipper is very unlikely to expend the effort to bring a case to obtain relief when it is indifferent about the outcome, and a provision for making a showing of harm can easily be incorporated into proposed 49 C.F.R. 1145.5. That showing will allow the Board to compare the effect of the incumbent's service on the shipper with the effects that alternative service would have on other stakeholders, such as other shippers in the same terminal area.

Those three criteria would not alone establish that a switching order is appropriate; the "actual necessity or compelling reason" standard also requires broader consideration of effects on the railroads involved, other shippers, and the public. But the underlying facts will set the stage for that broader inquiry: Without establishing how the alternative service would operate, it is impossible to evaluate how that alternative service would affect other interests. Without understanding how the shipper is impacted, it is impossible to situate those impacts in the context of how a switching order may affect other interests.

The foregoing reinforces the value of ensuring that the Board is sensitive to the context of a particular request for relief and considers relevant facts and circumstances. Approaching the rule as a remedial process counsels for flexible consideration by the Board for a variety of other reasons too. Understanding the causes of a service failing is obviously the first step to correcting them. But that inquiry could reveal that a switching order is not the best intervention. To take an example the Board has already identified: If poor service by the incumbent carrier results

from dispatching practices of a third party, a switching order would not make sense. NPRM at 41 (proposed 49 C.F.R. 1145.3(d)).

Likewise, a regulatory intervention may not be the most expeditious approach. If an incumbent carrier can credibly and promptly resolve the service inadequacy without intervention, then no reason exists for imposing a switch. For that reason, the Board should craft the rule to encourage the incumbent railroad to cure any service inadequacy. The Board's framework can readily accommodate an opportunity for rapid curing of the inadequacy by the incumbent carrier, once it is on notice of the shipper's concerns. Neither the shipper, the incumbent railroad, nor the alternate carrier will know that a metric has been triggered until the end of the 12-week measurement period. At that point, the shipper must raise the issue with the incumbent carrier, but the shipper is unlikely to have a proper proposal for relief to present to the Board until the shipper has discussed the situation with the incumbent carrier and worked with the alternate carrier to develop a practicable alternative service design. In the meantime, the incumbent carrier should be encouraged to improve its service. If it alleviates the service inadequacy in that period in a manner that is likely to endure, then the shipper has achieved a positive outcome, and no reason exists to conduct a proceeding to order switching. *See infra*, Part IV.F.1 (discussing in greater detail a framework that would encourage the incumbent to cure any service inadequacy).

Flexibility in remedying a service inadequacy also helps mitigate a downside of an otherwise-beneficial threshold inquiry into metrics. If the rule were entirely metric-driven, then it would lead to switching orders that are not calibrated to the particular service shortcoming. For example, a relatively brief service failing (as little as a few weeks within a twelve-week period) could rigidly translate into a switching prescription that lasts for years. The result is that dissimilar cases would be treated the same: A transient short-term service inadequacy that

resulted in the existing service barely missing a metric would be treated the same as a continuous, long-term, and severe service failure. As Orszag and Eilat explain, such disparities lead to inefficient outcomes. Orszag & Eilat V.S. ¶¶ 30–31, 36. The solution, once again, as they point out, is that the Board should consider all facts and circumstances in evaluating a case and fashioning a remedy for the service inadequacy as needed, and consider how to make the switching order commensurate with the service inadequacy. *Id.* ¶¶ 37–41.

The foregoing has one especially important consequence for the Proposed Rule: The Board should abandon the Industry Spot/Pull ("ISP") metric as a trigger for a forced switching proceeding. The utility of a switching order is giving the shipper the option to use an alternate carrier for the line-haul portion of a move. As the Board recognizes, changing the line-haul carrier but keeping local service the same cannot remedy a local service failing. NPRM at 19 n.27. If anything, service could get *worse* by introducing a switching operation into a local service design that is already not performing well. Because the ISP metric does not identify a failing that can be remedied by a switching order, that metric is not a useful trigger for initiating a proceeding for such an order. Orszag & Eilat V.S. ¶ 20.

2. The new Proposed Rule will not be efficient, effective, or lawful if it is used for purely coercive or punitive purposes

Some statements in the NPRM could be taken to suggest that the Proposed Rule would operate by using the threat of forced switching to coerce the incumbent railroad to take steps to improve service generally, or as a tool to punish railroads that fail to take such steps. *See* NPRM at 5 ("[T]he Board intends to provide appropriate regulatory incentives . . . to achieve and to maintain higher service levels."); *id.* at 31 (noting that Proposed Rule is designed to "spur carrier improvement if [service] falls below these standards"). Certainly, an incumbent railroad providing inadequate service to a shipper might feel pressure to alter its practices in the face of a

rule that would allow an alternate carrier to provide safe and practicable service that remedies that inadequacy. In those circumstances, the pressure created by the rule is an appropriate path to improved service; indeed, that reaction by an incumbent is the kind of self-curing response that the Board should foster whenever possible. Similarly, an incumbent railroad that is subject to a switching order might be disappointed by the resulting loss of line-haul traffic. But that is not punishment; it is the natural effect of a rule designed to remedy inadequate service.

A rule would go too far, however, if it were to threaten (or impose) forced switching as something so undesirable to the incumbent railroad that the railroad would alter its conduct in ways that the Board (or a shipper) would prefer but that a well-functioning transportation market does not support—especially when switching would not improve the shipper's service in the particular case. Likewise, a rule would go too far if switching were ordered as a form of punishment based on the fact that the incumbent railroad's service had been inadequate in the past, when it had since materially improved. Forced switching imposed on those bases would not be a proper use of the statutory authority, which requires that the "switching agreement[]" itself be in the public interest. 49 U.S.C. § 11102(c)(1). In the scenarios just posited, the agreement would not itself solve any problem, making such a finding impossible. Nor could the "actual necessity or compelling reason" standard be met in those scenarios because, whatever the shipper's circumstances, switching is no help, let alone a "necessity" or "compelling."

Moreover, as Orszag and Eilat explain, switching orders under the circumstances just described are likely to be counterproductive, because they are unlikely to be economically efficient; rather, they will result in overdeterrence that discourages investment and misallocates resources on the network. Orszag & Eilat V.S. ¶¶ 18–21, 23. Furthermore, coercive or punitive entries of forced switching orders risk inviting rent-seeking by shippers, if they believe they have

something to gain from negotiations with the incumbent carrier in the shadow of such an order. *Id.* ¶ 24. By definition, in such cases, the shipper would be unable to show that switching will improve its situation, so the Board would create a perverse incentive for shippers to bring cases professing to seek remedies that they do not actually want. Such proceedings are not a good use of the Board's resources, and the resulting disruption in the shipper–railroad relationship risks creating unintended consequences that the Board cannot control.

IV. SPECIFIC ASPECTS OF THE NEW PROPOSED RULE

This part of AAR's comments addresses particular aspects of the Proposed Rule, commenting on how the Proposed Rule is—or should be—aligned with the principles discussed above.

A. Terminal Area

The Proposed Rule limits the scope of any prescribed switching agreement to switching *within a terminal area*. Indeed, it defines a "[r]eciprocal switching agreement" as one that involves "the transfer of rail shipments . . . *within the terminal area*." NPRM at 37 (proposed 49 C.F.R. 1145.1) (emphasis added); *see also, e.g.*, *id.* at 42–43 (proposed 49 C.F.R. 1145.6(b)) (describing "switching service" under a reciprocal switching agreement as "the process of transferring the shipment between carriers within the terminal area"); *id.* at 26 (noting that "switching service . . . under a prescribed reciprocal switching agreement would occur within a terminal area"). AAR agrees with the Board that any forced switching agreement must be limited to traffic within a terminal area.

1. As AAR has previously explained, the terminal-area limitation is required by statute. Section 11102, which includes the Board's reciprocal switching authority, governs the "[u]se of terminal facilities." 49 U.S.C. § 11102. Where that section reaches activity outside of a terminal area, it says so expressly. *See id.* § 11102(a) (requiring incumbent railroad to make

"main-line tracks" available to another railroad "for a reasonable distance *outside of a terminal*" under certain circumstances) (emphasis added). Section 11102(c)(1), which governs reciprocal switching specifically, makes no such mention of activity outside a terminal area—it applies only within terminal areas.

Further, the limitation of reciprocal switching to a terminal area is confirmed by Congress's use of "reciprocal." That word denotes something that operates (or at least can operate) in equal and complementary fashion.[3] Accordingly, "reciprocal switching" has long been understood to refer specifically to switching within a terminal area shared by more than one carrier. *See, e.g.*, *Cent. States Enters.,* 780 F.2d at 675. ("Reciprocal switching occurs at stations or terminals served by more than one carrier. A common station or terminal area is, therefore, a prerequisite for such switching.").[4] When Congress used the words "reciprocal switching" in the

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[3] *See Webster's Third New International Dictionary* 1895 (1971) (defining "reciprocal" as "corresponding to each other: being equivalent or complementary"). Although two carriers can switch traffic to each other if both are in the same terminal area, they cannot do so if only one is in the terminal area, and it must carry traffic on a line haul outside the terminal to reach the other railroad. Thus, a terminal area within which switching may be ordered does not exist if Carrier A serves all the industries in an area, and it switches some traffic to Carrier B. Rather, the existence of a terminal area within which switching may be ordered depends on Carrier A serving some industries and Carrier B serving some industries, and they must each be capable of switching that traffic to the other for line-haul service.

[4] *See also R.R. & Warehouse Comm'n of Minn. v. Chi. Great W. Ry.*, 262 I.C.C. 437, 437–38 (1945) ("It is a common custom for carriers to publish switching charges for *intraterminal* movements between industries located upon private side-tracks on their lines and the point of interchange with other carriers . . . . The switching of cars in such service is called *reciprocal switching*.") (emphasis added); *Switching Charges & Absorption Thereof at Shreveport, LA*, 339 I.C.C. 65, 70 (1971) ("It has long been a common practice among the railroads to participate *at commonly served terminal areas* in what is called *reciprocal switching*.") (emphasis added); *Increased Switching Charges at Kansas City*, 344 I.C.C. 62, 63 (1972) ("It is the practice for the railroads serving Kansas City to engage in *reciprocal switching*. This means that a carrier on whose lines an industry is located will switch cars to or from that industry as an incident to the road-haul movement of those cars by another carrier whose tracks *in the terminal area* do not extend to the industry in question.") (emphasis added); *Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distrib. Rules & Pracs.*, 1 I.C.C. 2d 700, 702 (1985)

predecessor statute to Section 11102(c)(1) in 1980, it imported the established meaning of that term into the statute. *See, e.g.*, *McDermott Int'l v. Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses . . . a term [of art], Congress intended it to have its established meaning."); *see also* Reply Comments of AAR, EP 711 (Sub-No. 1) (filed Jan. 13, 2017) ("AAR 711-1 Reply Comments") at 24; AAR 711-1 Further Supplemental Comments at 15. Furthermore, it would be unlawful to apply a reciprocal switching rule outside the terminal area because doing so would conflict with the express statutory directives for prescribed through routes. *See* 49 U.S.C. § 10705(a)(2) (setting limits on the prescription of through routes); *see also* Opening Comments of AAR, EP 711 (Sub-No. 1) (filed Oct. 26, 2016) ("AAR 711-1 Opening Comments") at 27, 45–46; AAR 711-1 Reply Comments at 25–26.

Quite apart from the law, limiting forced switching to terminal areas is good policy. Prior proposals used the distance of the switch move as the primary geographical gauge for switch eligibility. But distance is a very poor indicator of whether a switch will be operationally feasible or can be integrated into existing operations. Although a terminal-area focus does not resolve those concerns, that focus is likely to quickly and appropriately eliminate from consideration a number of potential switching arrangements that would be highly impractical and inefficient.

2. For all those reasons, the Board should clearly spell out—in the rule's text—its intention that a prescribed switching agreement be limited to switching that can occur within a

("*Reciprocal switching* involves services performed by two road-haul railroads, rather than service performed by a single road-haul carrier in conjunction with a short-line or terminal railroad. The two railroads agree to participate at *commonly served terminal areas* in an arrangement under which one of the carriers acts as the switching carrier . . . .") (emphasis added).

terminal area. Specifically, the Board should revise proposed 49 C.F.R. 1145.2(c) and 1145.6(a) to state that reciprocal switching will be prescribed only within a terminal area.

Without that clarification, a risk exists that the regulatory text of the Proposed Rule could be misunderstood to sweep in operations outside of a terminal area. As AAR has previously explained, a large amount of traffic originating at or destined for a point outside of a terminal area nonetheless moves through a yard within a terminal area. AAR 711-1 Further Supplemental Comments at 14. But that traffic is not properly subject to an order under the Board's reciprocal switching authority. Thus, for example, industries located outside a terminal that are served by road switchers from the terminal complex should not be covered by the Proposed Rule. Confusion can be avoided with minor changes to clarify that the scope of the Proposed Rule extends only to switching that occurs within a terminal area.

3. With respect to the term "terminal area," AAR believes that the Board's effort to provide a regulatory definition of "terminal area" is likely to create more confusion than clarity. The Proposed Rule does not need to define that term. A long line of agency precedent describes how to identify a terminal area.[5] Those decisions are appropriately sensitive to the nuances that

[5] *See, e.g.*, *CSX Corp.—Control—Chessie System, Inc., & Seaboard Coast Line Indus., Inc.*, 363 I.C.C. 518, 585 (1980) ("The act does not define terminals or terminal facilities, but it does say that 'terminal areas' are areas within which carriers 'transfer, collect or deliver' freight. 49 U.S.C. § 10523. The Commission has traditionally included in the term 'terminal facility' any property of a carrier which assists in the performance of the functions of a terminal. . . . In classifying a track as a terminal facility, we look to the use to be made of the track."); *Rio Grande Indus., Inc., et al.—Purchase & Related Trackage Rts.*, FD 31505, 1989 WL 246814, at *9 (ICC Nov. 13, 1989) ("[W]hile use . . . is an appropriate starting point in defining terminal facilities, it is not the only factor bearing on the question of what constitutes terminal track. Circumstances the Commission have held significant include whether operations take place within railroad yard limits and whether service is performed within a cohesive commercial area. The presence of team tracks, freight houses or assembly facilities has also been given significant weight. Thus, the nature of the facilities and the character of the area in which they are located are as important as the use of the facility. A 'terminal area' (as opposed to main line track) must

can affect the boundaries of a terminal area. The Board already recognizes this precedent, *see* NPRM at 12 n.11, and the Board should allow its precedent to control. Layering a formal regulatory definition atop those precedents risks unnecessarily (and potentially erroneously) unsettling that existing body of law. Parties may be drawn into unhelpful debates over whether the Board intended a departure from that precedent by choosing one phrase over another in writing the regulatory text. The Proposed Rule will most effectively embody the Board's intent to limit switching arrangements to terminal areas if it relies on the well-established definition of "terminal area" and makes clear in the regulatory text that the Board will prescribe switching *only* in such areas.

A similar issue arises with respect to the Board's suggestion that whether an "area was listed as a normal revenue interchange point in the Official List of Open and Prepay Stations issued by the Association of American Railroads through Railinc" would be considered as relevant evidence regarding whether an area is a terminal area. NPRM at 12. A normal interchange in the Official List of Open and Prepay Stations merely indicates that two railroads physically connect at the junction point and that the junction *may* be used for operating and revenue purposes. Inclusion on that list does not indicate that the interchange is, in fact, used for those purposes and, more broadly, does not suggest there is a "commercially cohesive area in which two or more rail carriers undertake the local collection, classification, and distribution of shipments for purposes of line-haul service" or that there are "multiple points of loading/unloading and yards for local collection, classification, and distribution." NPRM at 11–

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contain and cannot extend significantly beyond recognized terminal facilities, such as freight or classification yards or team tracks, and a cohesive commercial area immediately served by those facilities.") (citations and footnotes omitted); *see also Golden Cat Div. of Ralston Purina Co. v. St. Louis Sw. Ry. Co.*, FD 41550, 1996 WL 197602, at *5 (STB served Apr. 17, 1996) (similar).

12. Accordingly, the Board should avoid suggesting that whether an area is listed as a normal interchange in the Official List of Open and Prepay Stations would be privileged over other evidence more directly relevant and probative of the Board's well-established definition of terminal area.

4. The Board has specifically requested comment on whether switching tariffs (in particular, of the alternate carrier) should be considered as evidence of the scope of a terminal area, and on how to reconcile inconsistencies in such tariffs. NPRM at 12 & n.12. The answers to those questions are interrelated.

There are many reasons that the existence of a tariff describing switching is not evidence of the geography of a terminal area. Most obviously, a legacy tariff describing switching service that is not used in practice would not speak to the operational realities that define a terminal area. The question in determining what constitutes a terminal area is not what appears on paper, and not what carriers have chosen to label "reciprocal switching," but rather it is *actual* switching practice that the capabilities of infrastructure within a commercially cohesive area support. Another potential problem with looking at "an existing reciprocal switching arrangement," NPRM at 12, or "the reciprocal switching tariff of an alternate carrier," *id.* at 12 n.12, is that there may be tariffs that have the label "reciprocal switching" but that do not reflect "reciprocal switching" in the statutory sense (*i.e.*, in a terminal area) and therefore do not comport with the statutory requirements for the Board to issue a switching order under Section 11102.

Even where a tariff otherwise aligns with the statutory definition of reciprocal switching, it may be limited in such a way that it cannot support the conclusion that a particular location is within a terminal area. *See* AAR 711-1 Further Supplemental Comments at 9–10. In some instances, a voluntary reciprocal switching tariff may exist more as a matter of historical

happenstance than current economic and operational reality. Other reciprocal switching tariffs may have limited scope as to shippers, destinations, commodities, or number of railcars to which they apply. Good reasons for such limitations exist, because reciprocal switching tariffs often are adopted in contemplation of narrow, specific circumstances. For instance, a tariff may have been agreed to as a mutual trade of access to one carrier's single-served shippers in one terminal in exchange for the other carrier's access to the first carrier's single-served shippers in another terminal. Construing the existence of such a tariff as affirmative evidence of a terminal area risks sweeping in areas that cannot meet the Board's established definition of that term. For the same reason, there also may be superficial inconsistencies among different railroads' reciprocal switching tariffs, which on further examination could reflect underlying limitations that the Board would need to address in considering practicability. Any perceived limitations or inconsistencies would need to be addressed on a case-by-case basis; AAR is not aware of any systematic issue relating to limitations or inconsistencies that would be susceptible of treatment in a general rule.

Indeed, the Board has previously recognized these issues, and in response has endorsed the approach AAR proposes here. In *Golden Cat*, the Board reasoned that "[c]arriers have frequently given . . . names to plants located in rural areas for ease of tariff publication. That does not make such points 'terminals;' much more is required." 1996 WL 197602, at *5. The Board made clear that "nothing" in relevant court decisions dictated that "a terminal should be defined merely as a tariff station or point of billing listed on the rail carrier's billing documentation." *Id.* at *6. The Board ultimately concluded that, although such tariffs were "useful in defining the scope of reciprocal switching services," they were not to be "the

determining factor in defining where terminal facilities are located." *Id.* The Board should follow *Golden Cat* as it assesses the utility of tariffs as evidence of terminal areas.

B. The New Proposed Rule Cannot Operate Based on the Performance of Contract Traffic or Exempt Traffic

The Board's regulations should be confined to the Board's proper sphere of authority, which does not include contract traffic, and does not include exempt traffic to the extent of the exemption.

1. Application to contract traffic

The Board seeks comment on "whether, and under what circumstances, the Board has the authority to consider reciprocal switching requests from shippers that have entered into a valid rail transportation contract with the incumbent carrier." NPRM at 27. As the Board correctly notes, "[Section] 10709(c)(1) generally prohibits challenges to a valid contract between a rail carrier and a shipper, as well as challenges to transportation performed pursuant to such a contract." *Id.* Indeed, Section 10709 sweeps more broadly still. It places a valid transportation contract—and the services provided under it—beyond the reach of ICCTA altogether. *See* 49 U.S.C. § 10709(c)(1) ("A contract that is authorized by this section . . . shall not be subject to this part."). The Board therefore has no authority to consider petitions that concern service provided under a rail transportation contract—whether for switching or otherwise.

Instead, the correct approach for a shipper that wishes to petition for switching with respect to service currently provided under contract would be to allow the relevant contract to terminate, request common carrier service, and file the petition if and when that common carrier service falls short of the Board's prescribed service standards. In no case may the Board consider performance data from service provided pursuant to a contract, whether to measure

"service reliability" under Section 1145.2(a), "service consistency" under Section 1145.2(a), or "industry spot and pull" performance under Section 1145.2(e).

a. The Board may not consider service provided under the contract as a basis for the prescription of a switching agreement that would begin after the contract expires. As noted above, contract service is not subject to ICCTA. Yet the Proposed Rule would examine the service provided by a carrier to determine whether the carrier has "fail[ed] to meet the performance standards" such that "it is in the public interest to allow access to an alternate rail carrier" pursuant to the "public interest prong of § 11102(c)." NPRM at 2. If the Board were to consider the performance of a carrier pursuant to a contract, it would purport to apply Section 11102(c)(1) to contract service, in contravention of Section 10709's prohibition on subjecting contract service to other provisions of ICCTA.

Applying the Proposed Rule to contract service is also bad policy. If the Board used contract performance to inform its decisions about forced switching, its process would overhang shippers' and carriers' negotiations—and their incentives to contract—artificially shrinking the range of mutually beneficial contract arrangements. That result would be directly contrary to Congress's desire to "encourage carriers and purchasers of rail service to make widespread use of [contractual] agreements." H.R. Rep. 96-1430, at 98–99 (1980) (Conf. Rep.). And shippers can bargain for their own remedies in their contracts, which can then be enforced in court. *See* 49 U.S.C. § 10709(c)(2).

Consider, for example, a rail transportation contract that provides for a flexible timeframe for deliveries: It provides for the railroad to report estimated arrival times, but allows a railroad to perform by delivering shipments within a "grace period" twice as long as that contemplated by the Proposed Rule. In exchange for the flexible timing of the deliveries, the shipper might pay a

lower rate than it otherwise would for similar service with a tighter delivery window. If the Board were to examine the carrier's performance under the criteria established by the Proposed Rule, however, it would likely conclude that the incumbent railroad had failed to meet the "service reliability" standard, and potentially go on to mandate switching upon termination of the contract. Accordingly, no carrier would agree to such a contract in the first place—or if it did, it would require additional terms from the shipper to offset the risk of facing mandated switching following the contract's termination. The Proposed Rule would effectively add or subtract contractual terms, despite the command of 49 U.S.C. § 10709(b) that "[a] party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract."

Or, consider a contract that requires a railroad to move shipments in half the time it had moved similar shipments over the same lane in the past. In exchange, the shipper pays a premium rate. When the contract ends, the railroad provides common carrier service and reverts to its historical average transit time. In this scenario, if the Board were to look to the carrier's performance under the contract as the baseline against which to compare service provided after the expiry of the contract, it would likely conclude that the carrier had failed to meet the "service consistency" metric. In order to avoid this result, the carrier would be forced to continue to provide this particular lane an especially high level of service, without the correspondingly higher level of compensation. Doing so would likely prevent *other* shippers from benefitting from those resources. And again, no carrier would enter into such a contract—or if it did, it would require additional terms from the shipper to account for the fact that the railroad would be under pressure to continue to provide an elevated level of service after contract expiration. In

effect, the Board would be enforcing the railroad's contractual performance commitment after the expiration of the contract.

The Board cannot mitigate those undesirable and unlawful outcomes by attempting to account in each case for the fact that the parties to these contracts had purposefully agreed to particular service terms. This is because the Board has been clear that it "cannot enforce, *interpret*, or disturb [rail transportation] contracts." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 976 (emphasis added). Accordingly, the Board is unable to assess whether the level of service provided under a contract was attributable to some other term in the contract—such as a particular rate—that no longer obtains. The way out of this thicket is never to enter it in the first place: The Board should avoid disrupting the parties' ability to freely contract and should decline to consider service provided under a contract in making determinations under proposed Section 1145.2.

b. The Board specifically seeks comment on whether it may "require a carrier to provide performance metrics to a rail customer during the term of a contract upon that customer's request." NPRM at 27. It may not. To require a carrier to provide information in a contract context would be to insert an additional duty into the contract, beyond those duties bargained for by the parties. Again, 49 U.S.C. § 10709(b) provides that the only duties under a transportation contract are "those duties specified by the terms of the contract." The Board has held that a "natural reading of this provision" prohibits the Board from imposing additional duties. *Ameropan Oil Corp. v. Canadian Nat'l Ry. Co.*, NOR 42161, 2019 WL 1723082, *3 (STB served Apr. 17, 2019). And because this is true "even where those duties are not specifically addressed by the contract," the same result applies even if a contract is silent about performance metrics. *Id.*

The Board has recognized this principle in other contexts as well. For example, when it removed a regulation requiring railroads to file contracts with the Board, it noted that it could no longer impose such a regulation on contract service because ICCTA "eliminates any regulation of non-agricultural contracts." *Removal of Obsolete Reguls. Concerning R.R. Conts.*, 1 S.T.B. 71, 72 (1996). Ultimately, if a shipper wishes to receive certain performance metrics related to service it receives under a contract, it can bargain for receipt of such metrics just as it would bargain for any other contractual term.

c. The Board cannot consider a petition for prescription of reciprocal switching with respect to service that remains under contract, even if switching would not go into effect until *after* expiration. Instead, the Board must wait until the contract has expired, and until sufficient additional time has passed such that the Board can assess the performance of service provided after expiration of the contract. The Board correctly notes that the D.C. Circuit has already held that the Board lacks authority to impose other requirements with respect to service currently provided under contract, even if those requirements would not take effect until after expiry of the contract. *Burlington N. R.R. Co. v. STB*, 75 F.3d 685, 687 (D.C. Cir. 1996).

FMC Wyoming Corp. v. Union Pacific R.R. Co., 2 S.T.B. 766 (1997), does not change matters. There, as in *Burlington Northern*, the Board dealt with the appropriate time for a railroad to establish a common carrier rate for traffic currently being moved under contract. It held that the general prohibition expressed in *Burlington Northern* was no impediment where the contract was set to expire "in a matter of weeks." *Id.* at 768 n.7. But there is a crucial distinction between the action ordered in *FMC Wyoming* and the action contemplated here: Ordering a carrier to establish a rate for common carrier service does not require any examination of the

service provided under the contract; ordering switching under the Proposed Rule plainly would, raising exactly the legal and policy problems discussed above.

Accordingly, the Proposed Rule cannot be applied to contract service in any respect. No petition may be initiated under the rule with respect to service that remains under contract, nor may the Board consider performance under a contract when assessing a petition filed after expiration of the contract. Instead, parties to a transportation contract are held to the terms of their contract when that contract is in effect, and to the Board's regulations when common carrier service is provided.

2. Application to traffic while it is exempt

The Board suggests that "some transportation that has been exempted from Board regulation pursuant to 49 U.S.C. § 10502 could be subject to an order providing reciprocal switching" under the proposed regulation, given that "[t]he Board retains full jurisdiction" over such traffic, "can revoke the exemption at any time . . . under § 10502(d)," and "would do so to the extent required." NPRM at 27. Although AAR agrees that the Board can revoke an exemption at any time, doing so requires a proper showing and cannot be done retroactively, to attach regulatory consequences to service that was exempt at the time it was performed. The Board should make clear that a shipper may not predicate a case on metrics applied to exempt traffic. Rather, a shipper should obtain revocation of the relevant exemption (under the standards and procedures applicable to a proceeding under 49 U.S.C. § 10502(d)), and then predicate a case under the Proposed Rule on any service inadequacy that may exist after revocation.

a. The Board's precedents are clear that it may not apply a statute or regulation to traffic that is exempt from that statute or regulation. The Board has held that "even if a carrier's conduct would constitute a statutory violation during a period of regulation, [an] exemption bars regulatory relief during the period when the exemption is in force." *Pejepscot Indus. Park, Inc.*,

FD 33989, 2003 WL 21108198, at *4 (STB served May 15, 2003). In *Pejepscot*, the petitioner sought relief for purported violations of respondents' common carrier obligation in transporting exempt commodities. The Board concluded that the common carrier obligation did not apply to service provided while the exemption was in place, because "exemption of a commodity . . . excuses carriers from virtually all aspects of regulation involving the transportation of that commodity." *Id.* The reasoning behind the exemption is that, rather than regulation, other forces (principally competition from other modes of transportation) will assure adequacy of service. *See* 49 U.S.C. § 10502(a)(2)(B).

The logic of *Pejepscot* applies here. Under the Proposed Rule's framework, the impetus for a proceeding would be the performance of traffic during a past period. If the traffic was exempt during that past period, then a proceeding under the Proposed Rule would be founded on the performance of exempt traffic. Although the Board would, of course, also need to examine present circumstances in evaluating the shipper's request for a switching order, the distinctive feature of the Proposed Rule is that it begins with a look at data about historical performance. If that performance was during a period of exemption, it was not—and is not—a proper basis for regulation.

b. The Board correctly notes that it retains jurisdiction over exempt traffic. NPRM at 27. But that does not change the fact that it lacks authority to commence a regulatory intervention based on the application of performance metrics to traffic that is not regulated. The Board's jurisdiction and its authority to regulate are distinct concepts. Indeed, Section 10502 expressly accounts for the former while making clear that exempted traffic is not subject to regulation. The Board confirmed this understanding in *Pejepscot*: After determining that it lacked authority to enforce the common carrier obligation with respect to service provided for

exempt traffic, the Board clarified that this result obtained notwithstanding the fact that "exemptions . . . do not extinguish the Board's subject matter jurisdiction over [exempt] transportation." 2003 WL 21108198, at *4 n.14. Indeed, one important facet of the Board's continued jurisdiction over exempt traffic is the Board's jurisdiction to revoke the traffic's exemption.[6]

But that power to revoke exemptions does not include retroactively regulating exempt traffic after issuing a revocation. And "retroactive regulation" is the only way to describe "considering whether service received by the petitioner prior to filing the petition meets the performance standards under this proposed part," NPRM at 27, if the service in question was provided to exempt traffic. Such substantive retroactive regulation would be contrary to the Board's precedents, basic administrative law principles, and even raise due process concerns.

To begin, the Board itself recently affirmed that this question was governed by "'the traditional presumption' against retroactive actions that would 'impair rights a party possessed when [it] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Sanimax USA LLC v. Union Pac. R.R. Co.*, NOR 42171, 2022 WL 577808, at *4 (STB served Feb. 25, 2022) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278–80 (1994)). The other, earlier authorities noted by the Board (NPRM at 27) are not to

[6] The Board made those same points about its jurisdiction and revocation powers in adopting Parts 1146 and 1147 in EP 628. *See Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 976 (The Board "retain[s] full jurisdiction to deal with exempted transportation" and "can revoke the exemption at any time."). The Board further stated that it was "clearly wrong" to suggest that the Board "lack[s] authority to provide any relief for transportation that has been exempted." *Id.* But the open-ended structure of those rules differed from the rule proposed here, and the Board concluded only that it could exercise its jurisdiction to "provide relief shown to be justified." *Id.* For the reasons discussed in the text, and particularly in light of the cited authorities that post-date EP 628, the Board's prior statement cannot be taken as resolving the distinct question here, of whether the Board can build a proceeding around a direct, quantitative measurement of the performance of exempt traffic.

the contrary. *See G&T Terminal Packaging Co. v. Consol. Rail Corp.*, 830 F.2d 1230, 1235–36 (3d Cir. 1987) (establishing that the Board retains exclusive jurisdiction over exemption decisions, but acknowledging that retroactive application might well be improper); *PYCO Indus., Inc.—Alt. Rail Serv.*, Fed. Carr. Cas. (CCH) ¶ 37222, 2006 WL 3368136, at *1 (STB served Nov. 21, 2006) (temporary alternative service could be ordered without revocation because traffic consisted of regulated and unregulated commodities, and ordering such service against the backdrop of carrier's disobedience of prior Board orders).

Prescribing switching in a proceeding that exists only because of the nature of service provided while that service was expressly exempt from regulation would unquestionably "impose new duties with respect to transactions already completed." *Sanimax*, 2022 WL 577808, at *4. Certainly, as in *Sanimax*, facts from the period during which service was exempt may be "relevant" to the ultimate determination. *Id.* But the structure of the Proposed Rule makes the past performance of service more than "relevant"—it is the central, gating question under the Proposed Rule.

Moreover, the Board has also already recognized that there is "no basis for overriding the presumption against retroactive relief" in this context. *Id.* Congress must "convey[] . . . in express terms" that an agency may promulgate regulations with retroactive application; otherwise, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass" this power. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Congress expressed no such intent in Sections 11102(c)(1) or 10502. Instead, Congress required the Board to "exempt a person, class of persons, or a transaction or service" "to the maximum extent consistent with this part." 49 U.S.C. § 10502(a).

For similar reasons, retroactive application of the Proposed Rule to exempt traffic would offend basic notions of fairness and due process. In applying this regulation to service that took place during a period of exemption, the Board would be departing from "the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place'"—a principle of "'timeless and universal appeal.'" *Landgraf*, 511 U.S. at 265–66 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Finally, retroactive application of the Proposed Rule to exempt traffic would not advance the goal of remedying service inadequacies, preferably without the Board's intervention. But retroactive application can *never* act to encourage self-cure. *Cf. Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Lab. Rels. Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006) (discountenancing agency action that is "illogical on its own terms"). Rather, railroads "should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265.

c. Accordingly, the proper path for a shipper whose traffic is exempt to invoke the Proposed Rule would be to (1) obtain a proper determination by the Board that the exemption should be revoked; and (2) then seek a determination that service provided *after* revocation is inadequate under the Proposed Rule's terms. That process would parallel what the Board contemplated in *Pejepscot*. There, after declining to apply regulations to exempt traffic, the Board noted that the petitioners were not "without an avenue of relief." *Pejepscot*, 2003 WL 21108198, at *4 n.15. Petitioners "could come to the agency and seek to have the exemptions revoked." *Id.* "*If granted*, respondents would *then* again" be subject to regulation. *Id.* (emphasis added). The same is true here.

C. The New Rule Should Not Apply to Class II or Class III Carriers

The Board seeks comment on whether the Proposed Rule "should be broadened to include Class II and Class III carriers who are providing inadequate service." NPRM at 24. It should not, for three distinct reasons. *First*, because those carriers "have not been submitting service-related data to the Board under performance metrics dockets," *id.*, the service-metric-based reasoning in the Proposed Rule does not extend to Class II and Class III carriers.

Second, the Proposed Rule would be an inapt tool as applied to smaller carriers. Replacement of the incumbent line-haul carrier is an irrelevant concept for the great majority of movements by Class II and Class III carriers. These smaller carriers, which generally operate over shorter distances, do not often serve as a line-haul carrier. And where a Class II or Class III carrier is the incumbent line-haul carrier, there often is no alternate Class I carrier; indeed, the absence of a Class I carrier option is commonly why a smaller carrier is operating a line-haul route in the first place.

Third, the consequences of removing from a smaller carrier one of its rare line-haul customers could be financially catastrophic and far outweigh any perceived benefit. The revenue from line-haul service for a single large customer may well comprise a material portion of a Class II or Class III carrier's total revenues, and certainly a much larger fraction of its revenues than the revenue from a single customer for a Class I railroad. By potentially cutting off entirely a critical revenue stream to a smaller carrier, the Proposed Rule could pose an existential threat to the continued financial viability of that railroad, in turn posing serious risks for service to other shippers reliant on that short-line carrier.

The Board should not expand the Proposed Rule to reach Class II or Class III carriers. The Board's other authorities would, of course, remain available as appropriate to address concerns with the service adequacy of a Class II or Class III carrier.

D. Service Metrics and the Shipper's Opening Case

A key component of the Proposed Rule's approach is focusing the Board's attention on service that fails to meet certain metrics. Although AAR comments in this part on those metrics, AAR emphasizes that its members strive to give their customers excellent, not just adequate, service—and excellent service is not limited to just metrics.

Railroads have every incentive to provide service across the network that attracts customers to the railroad's transportation service offerings. Service improvements allow railroads to increase utilization of their fixed investments and compete with other modes of transportation, ultimately promoting industry-wide growth. Railroads have been candid about the recent service challenges many have faced, and have publicly vowed to improve service for their customers. *See* NPRM at 8 (citing examples). As the Board well knows, there were service disruptions among AAR's members in the years following the arrival of the Covid-19 pandemic. That period brought together an unprecedented combination of labor force shifts, volatility in transportation demand, structural changes in supply chains, and economic uncertainty. It posed unique planning and execution challenges for businesses of all kinds, and the freight rail industry was fully exposed to those challenges. When the pandemic hit, traffic volume unexpectedly plummeted, and railroads furloughed employees. When traffic picked up sharply alongside a broader economic rebound, furloughed employees did not come back at the rates expected from historical experience, and the system struggled to handle the increased volume. The Board has acted to examine those and other issues through EP 770, including prescribing temporary reporting requirements. Railroads have provided substantial information throughout the course of that proceeding.

As the Board recognizes, "Class I carriers have taken steps that are intended to improve service" and "in some cases, service has improved." NPRM at 5. AAR appreciates that

recognition of its members' efforts, and it emphasizes that railroads have now been working to improve service for much longer than the "past several months," *id.* Indeed, the data show that service has been improving across the system since 2022. Improved service is a key component of the industry's growth strategy. Conversely, AAR is not aware of data to support the Board's statement that "persistent declines in service reliability are more clearly demonstrated now than when the Board adopted part 1147 in 1998." *Id.* at 7.

The Board's May 2023 report in EP 770 reflects the significance of these improvements. *See Urgent Issues in Freight Rail Service—Railroad Reporting*, EP 770 (STB served May 2, 2023). In an important reflection of the extent of lasting improvement, the Board exempted one railroad entirely from further biweekly progress reports, noting that its "performance generally has improved," *id.* at 5, and that the railroad had "been meeting most of its targets for service improvement on a consistent basis," *id.* at 7. The Board also noted that other carriers had "exceeded" targets on certain key performance indicators, *id.* at 4, 6, and were taking "positive steps towards reducing network congestion," *id.* at 6. Although the Board understandably identified other areas where improvement had been uneven, or less rapid, the overall trajectory remains indisputably positive.

It is against this backdrop that AAR offers the following observations about the proposed metrics and the shipper's opening case more broadly. Under the Proposed Rule, a petitioning shipper must demonstrate that it has practical physical access to only one Class I carrier and that the incumbent carrier has failed one of the service metrics. NPRM at 42 (proposed 49 C.F.R. 1145.6(a)). AAR agrees that those two requirements are appropriate threshold showings for any switching petition, although the industry spot/pull metric should not be a trigger under this rule because switching traffic to a different line-haul carrier cannot remedy a local service

inadequacy. In addition, some refinements to the OETA and transit time metrics that would trigger a proceeding are required to avoid confusion and to harmonize the Proposed Rule with existing regulations. For the rule to operate properly, however, the proposed service metrics should serve as a starting point, but not an ending point, for the Board's evaluation in any given case of whether a service is inadequate and a switching remedy is warranted. Finally, to prescribe a switch, the Board must affirmatively find that the switch is practicable, and that inquiry should start with an explanation in the petition of the alternative service design.

1. Practical physical access to a single Class I carrier

AAR agrees that a shipper seeking a switching remedy must demonstrate that it has practical physical access to only one Class I carrier for the lane of traffic that is the subject of the petition. *See* NPRM at 42 (proposed 49 C.F.R. 1145.6(a)). Where a shipper can obtain service from two or more competing Class I carriers on the relevant lane, no reason exists to believe that regulatory intervention could be beneficial, let alone a necessity. The Board correctly recognizes that this question is not merely a question of what carrier owns what tracks; contractual rights and obligations may bear on a shipper's access. Accordingly, AAR also supports the Board's commitment to "consider . . . on a case-by-case basis" the various arrangements that might provide access to multiple carriers. *Id.* at 23. The Board is also correct to identify the possibility that an existing switching agreement might apply to some but not all lanes at a shipper's facility, or have other limitations on its use. *Id.* at 23–24. Here too, AAR agrees with the Board that such circumstances need to be evaluated "on a case-by-case basis." *Id.* at 24.

2. Service metrics for on-time performance and service consistency can be appropriate starting points for evaluating a requested switch

AAR also agrees that using metrics to identify a potential service inadequacy can provide an appropriate starting point for a Board inquiry into whether a prescribed switch is warranted.

Congress intended for reciprocal switching to serve as a remedy for service inadequacies, subject to the "actual necessity or compelling reason" standard. Appropriately defined service metrics (set at appropriate levels) can assist the Board and stakeholders in efficiently identifying circumstances that could reflect a service inadequacy and therefore may warrant close scrutiny.

Where a lane is in consistent use, a railroad should normally be able to give an estimated time of arrival for a shipment (although those estimates are, in practice, updated as the traffic moves toward its destination, to take into account new and developing conditions). Similarly, transit time performance is important to many shippers, and a notable deterioration in transit time should prompt closer scrutiny, and a remedy if the circumstances warrant. As discussed below, AAR believes that local service performance is also very important, but it is misplaced in a rule (such as the Proposed Rule) that can offer only the remedy of alternative line-haul service.

With respect to each of the proposed service metrics, the Board has asked for comment on the appropriate regulatory thresholds. *See* NPRM at 16, 18, 20–21. The Board is right to ask those questions and to seek information about the appropriateness and effects of any particular numeric metric. As the Board recognizes, the existing data available to it are generally system or regional average figures. But the operation of the Proposed Rule's lane-based approach cannot be predicted based on those averages. *See* Orszag & Eilat V.S. ¶¶ 42–47. Absent more granular data and analysis, it is impossible to assess the variability of service quality across lanes or fluctuations in service quality over time, within the specific set of traffic to which the Proposed Rule would apply. *See id.* ¶¶ 44, 46. As the Board also recognizes, that more detailed information may be informative in refining the Proposed Rule. Information about factors that are associated with the variations from lane to lane in performance on the service metrics revealed in the underlying data may also be helpful. But as AAR previously informed the Board,

the limited time for comment in this proceeding has not allowed for a complete empirical analysis in response to the Board's questions.

3. Service reliability metric (Original Estimated Time of Arrival)

Delivering shipments according to plan can be an important aspect of the adequacy of any carrier's service. The Proposed Rule therefore reasonably provides that a railroad's failure to meet a prescribed threshold for reliable service can trigger the Board's review of whether a prescribed switch is appropriate. The Board's proposed service reliability standard is, of course, a generalization, and that will unavoidably mean that in particular cases, a broader inquiry beyond examining whether a carrier satisfied the OETA metric will be needed for the Board to determine whether a switching remedy is warranted for a carrier's failure to deliver according to plan. In addition, the definition of OETA in the Proposed Rule should be refined to track the Board's demurrage regulations and to enhance clarity for shippers and carriers alike.

(a) The Board should consider all relevant facts in a case triggered by the OETA standard

Under the Board's proposed service reliability standard, a shipper would be eligible for a switching order if a carrier fails to deliver 60% of shipments on a given lane within 24 hours of the original estimated time of arrival during a 12-week period. NPRM at 39 (proposed 49 C.F.R. 1145.2(a)). The original estimated time of arrival "means the estimated time of arrival that the incumbent rail carrier provides when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from an interline carrier." *Id.* at 37 (proposed 49 C.F.R. 1145.1).

i. As the Board recognizes, an OETA is not a guaranteed delivery time. NPRM at 14 n.19; *see also Demurrage Billing Requirements*, 86 Fed. Reg. 17735, 17741 (STB Apr. 6, 2021). Instead, it is a carrier's initial estimate of when a shipment will arrive if all goes

according to plan. As noted above, that estimate is updated as the traffic moves toward its destination to take into account new and developing conditions. Some fluctuation in a carrier's anticipated delivery time is thus a normal part of a rail movement.

In addition, delays in delivering shipments beyond the OETA may be the result of factors outside the carrier's control. As the Board itself has recognized, a carrier's ability to meet an original ETA is affected by many things, "including rail users' behavior, carrier-caused delays, or other variables." *Id.* at 17742. Accordingly, while a carrier's failure to place cars by the OETA (plus the applicable grace period) is an indicator of the level of a carrier's service, it may not establish a service inadequacy when other facts are considered. Nor does it show that regulatory intervention would be a successful remedy; when the incumbent carrier's service is disrupted by factors outside the incumbent's control, it may be just as likely that an alternate carrier's service would be disrupted for reasons outside the alternate's control.

The OETA metric may also not be informative under particular service designs. Consider, for example, a service in which a terminal railroad unaffiliated with the incumbent line-haul carrier picks up traffic at the origin, delivers it to the incumbent under the incumbent's bill of lading, and the destination is single-served by the incumbent in a terminal area also served by an alternate carrier. If the shipper shows a failure to meet the OETA metric and seeks a switching order at the destination, the case would appear to fall within the Proposed Rule. But the metric failure could trace to a delay in the terminal railroad's service at the origin—nothing that the incumbent carrier did at the destination—and switching could not remedy the situation, because the alternate carrier would still need to rely on the terminal railroad. The heart of the issue is that the incumbent carrier is not necessarily the only carrier that handles a shipment, but the OETA metric presumes that the entire movement is within its control. AAR believes that the

best way to address those considerations is to recognize that the Board will need to consider those circumstances in the cases where they arise. The incumbent railroad will be in the best position to explain those issues, so it is appropriate to retain the metric as constructed, but allow the incumbent railroad the freedom to reply with all relevant contextual information.

The use of the OETA metric may also encounter difficulty in low-volume lanes, where the relevant service data will be sparse. It is entirely possible (and, indeed, probable) that some lanes will fail or meet that metric based on relatively few observations within the relevant period. The Board will need to consider the specific circumstances of lanes under those circumstances.

ii. The Board has properly invited input on the appropriate success rate for the OETA standard, and there are open questions about what that level should be. *See* NPRM at 16. With respect to the OETA standard, the Board's starting point for developing the proposed 60% threshold was data reported in EP 770 (Sub-No. 1), *Urgent Issues in Freight Rail Service—Railroad Reporting*. NPRM at 14. Specifically, the Board tabulated four carriers' performance levels during one week in May 2022. *Id.* at 14–15.

Although AAR has had an insufficient opportunity to evaluate data that may shed light on whether the proposed 60% threshold is calibrated so that it will effectively serve the objectives of the proposed framework, the Board should nonetheless be aware that various features of the EP 770 reporting limit those data's usefulness for the Board's present purposes. Significantly, the reported data were not standardized across carriers, and they reflect system averages, as the Board itself acknowledges. *Id.* Likewise, the data include many types of traffic—non-exempt common carrier traffic, exempt commodities, and traffic moving under transportation contracts. As explained above, *see* Part IV.B, the Proposed Rule can only apply to non-exempt common carrier traffic. Not all traffic will necessarily have the same performance characteristics; for

example, with contract traffic, shippers may opt for different levels of service based on their individual business needs and price sensitivities and may have distinct contractual remedies for poor service performance.

In addition, the data reported in EP 770 (Sub-No. 1) are not lane-specific and provide no information about the distribution of service performance rates. They do not reveal, for example, whether a carrier's performance on groups of lanes was generally clustered closely around the mean value, broadly distributed, or even bimodal with a large majority of the traffic just below the average and a small fraction well above it. *See* Orszag & Eilat V.S. ¶ 44. The EP 770 data likewise do not indicate how a particular lane performed in different periods of time and, specifically, over any given 12-week period. Nor do the generalized EP 770 data provide any insight into the extent to which performance levels on individual lanes may correlate to exogenous events, such as weather in particular regions at particular times of year.[7]

Questions like these—relating to the distribution of outcomes relative to one another and over time—will bear heavily on whether the thresholds delineated in the Proposed Rule will accurately and effectively identify situations involving potential service inadequacies worthy of further investigation and how that further inquiry under the Proposed Rule will operate in practice. *See id.* ¶¶ 42, 44. If a carrier delivered service in a particular lane that consistently fell below the given threshold over extended periods of time, then the metric may indicate the sort of service failure that could warrant regulatory intervention. Conversely, if a carrier consistently

[7] In setting the OETA success rate, the Board also noted carriers' individual service targets and their acknowledgment of service shortcomings. *See* NPRM at 15. Like their weekly data reports, the targets set by the carriers reflected system averages, not a lane-by-lane analysis. Carriers' general statements about service issues in mid-2022 (*see id.* at 8, 15) demonstrate their commitment to recovering from unprecedented challenges facing the rail industry; the statements did not provide further data to support any given service threshold.

delivered service above the metric over sustained periods of time to a low-volume shipper, but missed the metric on a single train with a substantial number of cars within a twelve-week period, then it would be far more difficult to see a compelling need for a switching remedy. *See id.* ¶ 38. The level at which the Board sets the metric thresholds would affect how those cases—and every other case—will proceed under the Proposed Rule, and what additional case-specific information will be needed before the Board can reach a definitive conclusion in a particular case. As explained further below, the Board's framework for affirmative defenses and the railroad's reply case should allow the development and consideration of a complete record of relevant facts. *Infra*, Part IV.E.

iii. The need for a case-specific inquiry also bears on the appropriate grace period, on which the Board seeks comment. NPRM at 16. AAR agrees that 24 hours is reasonable. In light of the importance of considering facts and circumstances that may bear on a request for switching, however, it would be appropriate for the Board to acknowledge that there could be circumstances in which an OETA metric using a 24-hour grace period might not reveal a service inadequacy warranting relief.

(b) The definition of OETA in the Proposed Rule should be harmonized with the Board's demurrage regulation

To avoid confusion, the Board should harmonize the definition of OETA in the Proposed Rule with the Board's existing regulatory requirements. The Proposed Rule defines OETA to mean "the estimated time of arrival that the incumbent rail carrier provides when the shipper tenders the bill of lading or when the incumbent rail carrier receives the shipment from an interline carrier." NPRM at 37 (proposed 49 C.F.R. 1145.1). The Board also contemplates that carriers must provide that estimate to customers on request. *Id.* at 16. Under the Board's current demurrage rule, Class I carriers must provide shippers demurrage invoices with the date and time

of the OETA "as generated promptly following interchange or release of shipment to the invoicing carrier and as based on the first movement of the invoicing carrier." 49 C.F.R. 1333.4(d)(1). Thus, under the Proposed Rule, carriers must furnish customers with an OETA that is generated when the shipper tenders the bill of lading, but under the demurrage rule, carriers must provide OETAs that were generated promptly after the carrier receives the actual shipment. *See id.* Requiring carriers to provide two potentially different OETAs risks confusion and will lead to unnecessary duplication of effort. To avoid those results, the Board should modify the definition of OETA in the Proposed Rule to parallel the demurrage regulation.

4. Service consistency metric (Transit Time)

Much like performance to plan, a carrier's ability to maintain reasonable transit times across its network can be an important component of the service that railroads offer. The Proposed Rule therefore reasonably provides that substantially increased transit time can be a proper basis for initiating a switching proceeding. But as with the service reliability standard, various features of the proposed service consistency standard highlight that the Board needs to take a broader view in evaluating whether deterioration in a lane's transit time warrants a switching remedy. And certain elements of the proposed standard should be adjusted to ensure that the rule operates as intended and to align the proposal with the applicable legal standard.

(a) The Board should consider all relevant facts in applying the transit time standard

The proposed service consistency standard measures a carrier's ability to maintain transit times on a given lane from one year to the next. NPRM at 39 (proposed 49 C.F.R. 1145.2(b)). A carrier fails the standard if the average transit time for all shipments on a particular lane over a 12-week period is 20% or 25% longer than the average transit time for shipments on that lane during the same 12-week period in the prior year. *Id.*

i. A failure to satisfy this metric may warrant inquiry, but AAR has had an insufficient opportunity to evaluate data that may shed light on whether the proposed 20% or 25% threshold is calibrated to serve the objectives of the proposed framework. At the same time, wherever the threshold is set, the factual context for the identified failure may show that regulatory intervention is neither needed nor appropriate. Importantly, a large number of variables influence transit time. Surges in demand, shifts in demand, weather conditions, ambient temperatures, labor and operational conditions at ports and major customer facilities, congestion caused by intermodal customers' inability to pick up their shipments, temporary slowdowns from construction to add capacity, holidays, and periodic maintenance-of-way work are among the many factors that impact the velocity of the rail network. *See* Orszag & Eilat V.S. ¶ 32. These can affect the incumbent carrier and the alternate carrier equally at the same time, or affect them at different times, but no railroad is immune, and switching cannot solve every issue with transit time. Even without those specific factors, some amount of variability in transit time year over year—both upward and downward—is normal and unavoidable on a vast and diverse rail network. And many of the reasons for (and the timing of) that variability are difficult to predict in advance. Even seemingly small, random, hard-to-identify events can reverberate through a highly connected network. Accordingly, when the Board considers degradation in transit time as a basis for a possible switch, it will need to understand the circumstances leading to the decline to determine whether prescribed switching is an appropriate tool to remedy it. *See id.* ¶¶ 21–22, 37.

A range of other factors can underlie a change in transit time from one year to the next. For example, the increase in transit time may reflect a carrier's decision to shift resources to respond to acute customer needs, such as for an expedited shipment. That allocation decision

may affect transit time for shipments of one kind but reflect an overall superior use of the rail network. *Cf. Major Rail Consol. Procs.*, 5 S.T.B. 539, 578 (2001) (recognizing need for carriers to "have the flexibility to adjust the level of train traffic over particular line segments in response to changes in shipper demands and in other market conditions" (footnote omitted)). In cases like that, the Board should be willing to entertain a complete record of the reasons and context for the transit time declines, to avoid the risk of injecting resource-allocation inefficiencies into the rail network without adequate countervailing benefits.

If nothing else, the absence of concrete data supporting any particular numeric threshold in the transit time metric reinforces the need for the Board to look at all relevant circumstances.[8] AAR is working to understand how the transit time metric operates in the context of the observed data about shipments on the rail network, but that study could not be completed on the timeframe the Board allowed for opening comments. An initial attempt to apply the Board's proposed metric across a broad set of traffic (not limited to single-served terminal-area traffic) suggested that a substantial share of lanes do (at some point during any given year) have a transit time that is either 20% higher or 20% lower than the prior year's transit time. That result suggests that a number of factors can affect transit time, both positively and negatively, and many are not associated with inadequate service. Accordingly, AAR is working to properly complete that analysis and to understand the role of different factors in that overall result, so that it can offer useful input to the Board on how that metric will affect the operation of the Proposed Rule.

[8] In support of the proposed 20% or 25% transit time standard, the Notice cites testimony from the Board's April 2022 hearing in EP 770 (Sub-No. 1). NPRM at 18 n.26. That testimony discussed particular shippers' experiences, *see id.*, but it did not furnish the Board with lane-specific empirical data or information about the distribution of transit time declines.

AAR is working diligently, with the goal of completing that analysis before the deadline for reply comments.

ii. One point of particular concern is that an observed decline may be the product of comparing a prior year's new or exceptional service produced through enhanced investment, to a current year's solid (but less stellar) performance when the carrier's resources were spread to other shipments. Ordering a switch in this circumstance could disincentivize the carrier from making future investments in service improvements. *Cf. Savannah Port Terminal R.R., Inc.*, FD 34920, 2008 WL 2224904, at *6–7 (STB served May 30, 2008) (mandate to maintain certain level of service "would discourage railroads from providing additional service to customers, lest they be required to continue such service levels even when they are not reasonably able to do so"). Taking a broader historical look at the carrier's performance would mitigate those costs. *See* Orszag & Eilat V.S. ¶ 32 n.16. Among other things, it would provide vital information to the Board about the reasons for the changes in transit time and help the Board evaluate whether a switching intervention is appropriate.

Finally, several of the observations above about the benefits and limitations of the OETA metric apply to the transit time metric as well. For example, where the incumbent carrier is not necessarily the only carrier that handles a shipment, variations in transit time may be due to the conduct of another carrier over which the incumbent has no control, and whose performance would not be affected by switching the line haul to an alternate carrier. Likewise, low-volume lanes will yield sparse data that may produce anomalous metric measurements in particular cases.

(b) The Board should refine aspects of the service consistency standard

The Board should also clarify certain aspects of the service consistency metric to ensure that it operates as intended and to align the metric with the applicable legal standard.

First, under the Proposed Rule, the Board will compare "the average transit time for all shipments from the same location to the same designated destination over a period of 12 consecutive weeks" to "the average transit time for all shipments from the same location to the same designated destination over the same 12-week period during the previous year." NPRM at 39 (proposed 49 C.F.R. 1145.2(b)); *see also id.* at 18 (explaining that standard compares transit time "for the same shipment" during the same period of the previous year). Thus, the service consistency standard requires comparing transit time performance in a particular lane between two windows of time. To make this an apples-to-apples comparison, the Board should clarify that the selected windows must have seen reasonably equivalent volumes shipped, with shipments moving under non-exempt common carrier service in both windows. As to volume, shipment volumes during those 12-week periods could vary considerably. But volume can significantly affect transit time; for a variety of operational and economic reasons, large blocks of cars will often move through the network faster than single carloads. *See* Reply Comments of AAR, EP 768, Reply Verified Statement of John T. Gray (filed Sept. 8, 2022) at 21–31. Comparing disparate volumes of shipments will not capture the service inadequacies that the Proposed Rule is intended to address. As it finalizes the rule, the Board should clarify that, in applying the service consistency standard, it will compare non-exempt common carrier traffic of reasonably equivalent volumes.

Second, the Board should not enter a switching order for both loaded and empty cars on the basis of a carrier's failure to meet the service consistency standard for empty cars, as the

Notice currently proposes. NPRM at 40 (proposed 49 C.F.R. 1145.2(d)). As discussed above, forced switching is proper under the Proposed Rule only if the Board finds an "actual necessity or compelling reason" for such an order. Mandating a switch for loaded cars on the basis of the transit time for empty cars would be providing a remedy where no such need or inadequacy had been demonstrated.

Third, the Board should consider requiring comparisons to a prior-three-year average transit time, rather than to the single-immediately-prior year's transit time. *See* Orszag & Eilat V.S. ¶ 32 n.16; *cf. Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 978 n.11 (noting in EP 628 that the Board would look at longer time periods on a case-by-case basis). Doing so could tend to reduce unnecessary focus on natural fluctuations and put more attention on persistent declines. For example, a single year of especially good performance under favorable conditions could lead to an apparent degradation in transit time the following year, but such a case is very unlikely to merit a forced switching order. Looking back over a longer period would smooth out those fluctuations and give shippers and the Board greater confidence in identifying service inadequacies that are better potential candidates for relief under the Proposed Rule.

5. Industry Spot/Pull metric

a. Unlike the OETA and transit time metrics, the ISP metric is out of place in the Proposed Rule. That metric measures the performance of local service. But the remedy under the Proposed Rule is a change to line-haul service. As the Board recognizes, changing the line-haul carrier but keeping local service the same cannot remedy a local service failing. NPRM at 19 n.27. Ironically, the "remedy" of adding additional complexity to an already-deficient local service operation by requiring a switch could make local service even worse.

Moreover, as some of the Board's questions reflect, such an intervention into local service is likely to mire the Board deep in the details of carrier operations. *See id.* at 21–23

(posing questions about required local service levels, effect on crew scheduling windows, etc.). That sort of micromanagement is contrary to both statutory policy and Board precedent. *See, e.g.*, *Montana v. BNSF Ry. Co.*, NOR 42124, 2013 WL 1786427, at *4 n.28 (STB served Apr. 26, 2013) ("[T]he Board tries to avoid micromanaging a carrier's operational decisions."); 49 U.S.C. § 10101(2) (RTP preference for "minimiz[ing] the need for Federal regulatory control over the rail transportation system").

Because the ISP metric does not identify a failing that can be remedied by a switching order, that metric is not a useful trigger for initiating a proceeding for such an order. *See* Orszag & Eilat V.S. ¶ 20. It should be removed from the Proposed Rule. If the Board believes regulatory intervention to address local service may be warranted, then it has correctly noted that terminal trackage rights is a subject the Board could investigate. *See* NPRM at 19 n.27. Terminal trackage rights present a host of economic and operational issues that have never been examined in this proceeding, and go beyond the scope of this docket and comment.

b. If the Board nonetheless retains the ISP metric in the Proposed Rule, a number of the observations above about the OETA and transit time metrics would be relevant. For example, as with the OETA metric, the underlying EP 770 data have limitations. And as with the transit time metric, a service inadequacy limited to the handling of empty cars is not a logical basis for ordering switching of loaded cars. And in general, there will be numerous reasons that a carrier may "miss" a spot or pull move, but not all of them will signal a service inadequacy that can be remedied by a regulatory intervention, so the Board would need to remain attuned to the particular facts and circumstances of each case.

The Board's proposal to increase the ISP performance standard whenever there has been a reduction in local service levels is also problematic. *See* NPRM 22–23. The Board's approach

could have unfortunate unintended consequences. Railroads inevitably need to adjust local service levels as demand evolves over time within a given service area; these choices are generally intended to optimize the allocation of the railroad's resources to a range of shippers. This rule could operate to discourage flexibility and adaptation, to the detriment of shippers that could benefit from that flexibility. Despite the Board's assurances that it does not wish to discourage increased local service levels that set a higher baseline against which a future reduction in service levels might be measured (*id.* at 23), adoption of this metric would understandably make railroads more cautious to experiment with increased local service levels.

A further concern specific to the ISP metric is how it denominates success and failure. The standard as proposed appears to deny a carrier any credit for cars that are timely spotted or pulled if any single car in the shipment is delayed. The result may be to overstate the true impact of the service failure. This could be addressed by refining the metric to count performance based on the number of cars successfully spotted or pulled, rather than based on the number of work orders flawlessly executed. Alternatively, the Board could consider issues of this sort in the context of a closer evaluation of the particular circumstances of a case.

6. Additional issues the shipper's petition should address

As discussed above, a prescribed switching agreement can be ordered only upon an ultimate finding of actual necessity or compelling need to remedy a service inadequacy. *Supra*, Part III.A. The inquiry required under the statute looks broadly at the causes and context of the service problem, the effects of the inadequate service, impacts on other shippers and the public, and the available alternatives. Service metrics will assist the Board in undertaking that evaluation, and can give shippers and railroads clarity on the circumstances most likely to command the Board's attention. At the same time, those metrics cannot alone answer all of the ultimate questions before the Board when it considers a request for a prescribed switch. To

answer those questions, the Board must address several additional issues, many of which should be addressed in some fashion in the shipper's petition for relief.

First, the Board will need to consider whether the alternative service will actually be a solution to the potential service inadequacy. The service metrics proposed by the Board compare the incumbent carrier's performance against a set of fixed thresholds; they do not call for a comparison between the incumbent carrier's performance and the alternative service under a switching prescription. *See* NPRM at 39–40 (proposed 49 C.F.R. 1145.2). But the statute provides for a reciprocal switching agreement only if the Board finds that *the agreement itself* is practicable and in the public interest, which means that the agreement will provide service that improves the shipper's situation. A prescribed switching agreement that compels an incumbent to switch the shipper's traffic to an alternate carrier—where that switch will not yield more efficient or timely service for the shipper—will not solve any service issue, much less rise to the level of necessity.

The Board recognized in EP 628 that the alternate carrier's "ab[ility] to provide better service than the incumbent carrier is currently providing" is "implicit in the reason for providing relief under [the Part 1146 and Part 1147] rules, and we will deal with this matter on a case-by-case basis. We will authorize relief where the combination of the alternative carrier and the incumbent carrier will provide better service than the incumbent carrier is providing by itself." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 979; *see also Port Arthur Chamber of Com. & Shipping v. Texarkana & Fort Smith Ry. Co.*, 73 I.C.C. 361, 364 (1922) (rejecting switching application in part because "it is not clear that any better service could be had via the [proposed switching service] than via the [existing service]"). Thus, for example, the Board cannot reasonably expect that alternative service would remedy the incumbent's alleged inadequacy if

the alternate carrier's service to similarly situated shippers is much like the service the incumbent carrier provides the petitioning shipper. To the contrary, the alternate carrier's line-haul service must make up for the delays and inefficiencies introduced by the additional switching operations.

Second, the Board will need to consider how a failure to meet the given metric affects the petitioning shipper, and the shipper is plainly in the best position to inform the Board on that subject. As the Board observes, some shippers may experience negative impacts if a carrier fails to meet one of the performance metrics. *See* NPRM at 6, 20. But that will not invariably be the case. For example, some shippers have an adequate or even an over-supply of the raw material they are moving, so transit time would prove to be a poor gauge of their need for alternative service. For others, deviations from an original estimated time of arrival might have little or no consequence for their operations. A carrier's failure to satisfy the relevant service standard is cause for inquiry. But without knowing how the shipper is affected by the potential service inadequacy, that inquiry cannot meaningfully compare the effect on the shipper of withholding relief to the effect on other interested parties of granting relief, such as potentially complicating terminal operations for all shippers and passenger rail as well.[9] *See Jamestown*, 195 I.C.C. at

[9] *See, e.g.*, Comments of National Railroad Passenger Corp., EP 711 (Sub-No. 1) (filed Dec. 2, 2016) ("Amtrak is concerned that the new reciprocal switching policy may adversely impact the performance of our national network trains, particularly in congested terminal areas such as Chicago."); Comments of California's Intercity Rail Corridors Linking Everyone, EP 711 (Sub-No. 1) (filed Feb. 9, 2022) ("[Adoption of the Proposed Rule] would not only harm freight rail; increased network congestion and complexity would have impacts on intercity passenger operators and overseeing state agencies, who rely on freight railroad tracks to operate."); Comments of Metra, EP 711 (Sub-No. 1) (filed Feb. 11, 2022) ("Metra asks that the board carefully consider the potential impacts—both immediate and over the long term—that their ruling may have on passenger rail operations in the Chicago area."); Comments of Southern California Regional Rail Authority ("Metrolink"), EP 711 (Sub-No. 2) (filed Oct. 20, 2023) ("[G]iven the complex shared use rail network," the Board "should consider . . . [i]mpacts on the passenger railroads" of "requiring Class 1 railroads to enter into reciprocal switching arrangements.").

292 ("In determining what is 'in the public interest' we must take into consideration not only the interests of the particular shippers at or near the terminal considered, but also the interests of the carriers and of the general public.").[10]

Third, the Board should address whether the putative service inadequacy exists at the time the shipper files a petition (and, indeed, at the time the Board decides the case, *see infra*, Part IV.E.2). The Proposed Rule does not specify how far back in time a shipper can look to identify a 12-week period in which a carrier did not meet one of the metrics. But if the service problem during that period has been resolved and the shipper is receiving adequate service at the time it files a petition, no reason exists to conclude that the shipper still has an "actual necessity or compelling reason" for a switching remedy. For that reason, the shipper's petition should explain when the service issue occurred, and be based on the level of service the shipper is *currently* receiving.

7. Practicability

The Board is correct to require an evaluation of practicability as part of every switching petition. NPRM at 42–43 (proposed 49 C.F.R. 1145.6(b)). The Proposed Rule should be refined to ensure that practicability is properly assessed in each case.

[10] Understanding the harm to the shipper can also serve as an important check against unintended consequences that could come from misapplication of the Proposed Rule. For example, proceedings in EP 711 and EP 711 (Sub-No. 1) have at times shown that some shippers view orders under Section 11102(c) not as operational relief but as a bargaining chip to be exchanged for concessions by the incumbent carrier (principally, with respect to rates). Similarly, it would not be an appropriate use of the Proposed Rule for a shipper to obtain switching service that converted an interline haul using the incumbent carrier's network into a single-line haul via the alternate carrier. *See MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1106 (8th Cir. 1999) ("carrier generally may provide common carrier service in a manner that protects its 'long hauls'"). Those are inappropriate goals to begin with, and even if they were proper purposes, the Proposed Rule is not set up to evaluate the serious policy implications of backdoor rate or routing regulation.

a. The Proposed Rule states that the Board will not impose reciprocal switching if either the incumbent or alternate carrier demonstrates that switching "could not be provided without unduly impairing either rail carrier's operations; or the alternate rail carrier's provision of line-haul service to the petitioner would be infeasible or would unduly hamper the incumbent rail carrier or the alternate rail carrier's ability to serve its existing customers." *Id.* at 43 (proposed 49 C.F.R. 1145.6(b)). Under this proposal, the "objecting rail carrier would have the burden of proof of establishing infeasibility or undue impairment." *Id.* at 27. The Proposed Rule further provides that where the incumbent and alternate carriers have an existing reciprocal switching arrangement in a terminal area in which the petitioner's traffic is currently served, the proposed switching operation "is presumed to be operationally feasible, and the incumbent rail carrier will bear a heavy burden of establishing why the proposed operation should not qualify for a reciprocal switching agreement." *Id.* at 43 (proposed 49 C.F.R. 1145.6(b)).

The Board should revise the Proposed Rule to make practicability an issue that is addressed starting in the shipper's petition (although the issue would likely also be addressed in the carrier's reply). Under Section 11102, the Board may prescribe a reciprocal switching arrangement only if it makes an *affirmative* finding that the arrangement is "practicable." 49 U.S.C. § 11102(c)(1); *see supra*, Part III.A.2. And there may be limits on relieving the shipper of the burden of establishing practicability. *See supra*, note 2. The Board has recognized that shippers must affirmatively address feasibility concerns in other forced-access proceedings. Under Part 1147, a petition for alternative service must contain "an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service." 49 C.F.R. 1147.1(b)(1)(iii). Those issues naturally overlap

with the need for the petition to describe the alternative service. The Board should take a similar approach here and require the petition to address practicability.

b. The Board should also revise the Proposed Rule to judge practicability by existing standards; it should not create a wholly new standard. In assessing practicability, the Board has looked to, among other things, whether interchange and switching are feasible, whether the terminal facilities can accommodate the traffic of both carriers, and whether reciprocal switching unduly hampers the ability of either carrier to serve its shippers. *See Del. & Hudson*, 367 I.C.C. at 720–22. Using this existing standard rather than creating a new standard will avoid the inevitable confusion that would arise if the Board were to adopt a new regulatory definition here while existing standards remain in place in other forced-access proceedings.

The Board must retain its flexibility to address all relevant considerations bearing on whether a switch would be practicable. Added switching injects complexity to any movement and can have operational spillover effects. More touches of a railcar create higher risks of failure, and those risks can ripple throughout the large and interconnected rail network, affecting not only the parties to the switching proceeding but others as well. *Infra*, App. Part C. To safeguard against unintended and adverse effects on the network, the Board should be sensitive to these collateral effects when it evaluates the practicability of a proposed switching arrangement.

c. It is also essential that the Board consider safety. Forced switching increases the yard activity hours needed for a shipment, and that work entails relatively greater risk of worker injury or casualty than line-haul activity. AAR 711-1 Opening Comments, Verified Statement of William J. Rennicke (filed Oct. 26, 2016) ("Rennicke 711-1 Op. V.S.") at 4–16; *see also* Comments of SMART-TD, EP 711 (Sub-No. 1) (filed Oct. 26, 2016) ("SMART-TD 711-1

Comments") at 5 (noting concerns of the largest railroad operating union about the prior proposed rule's "potential to [a]ffect safety, allow crews to work in unfamiliar territories, and disrupt collective bargaining agreements"); *infra*, App. Part C.1. In considering a switching petition, the Board should have before it a proposed alternative service design, *supra*, Part IV.D.6; *infra*, Part IV.F.3(a), and the Board should evaluate that new design's safety risks.

Here too, the Board has taken such an approach in Part 1147 proceedings. Part 1147 expressly requires petitions for alternative rail service to contain an explanation of how the alternative service will be provided safely. 49 C.F.R. 1147.1(b). In promulgating that rule, the Board recognized that advance planning is "necessary to assure safe integration of the operations of the alternative carrier and the incumbent carrier." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 979 n.19. It also recognized that, although the incumbent would "undoubtedly wish to address [safety and operational] issues, the alternative carrier is expected to anticipate and address them as well." *Id.* at 979. The Board thus concluded that it was "appropriate to have the petition describe the alternative carrier's operational plans and discuss how the proposed operations can be conducted safely." *Id.*; *see also id.* at 979 n.19 ("appropriate . . . to require the respective carriers to demonstrate that they have undertaken the requisite planning"). A similar approach is also appropriate here. A switch that cannot be performed safely is not a switch that is feasible, and the Board's procedures should ensure that safety issues receive focused attention throughout the proceeding, starting with the petition.

d. Finally, the Board should not presume that a proposed switch is operationally feasible or impose on the incumbent carrier a "heavy burden of establishing why the proposed operation should not qualify for a reciprocal switching agreement" in cases where the incumbent and alternate carriers have an existing switching arrangement in a terminal area. *See* NPRM at

43 (proposed 49 C.F.R. 1145.6(b)). Although an existing voluntary switching arrangement is surely relevant evidence of how the proposed alternative service might operate, the existence of such an arrangement cannot create such a strong presumption that adding additional cars from additional shippers going to different destinations will be similarly feasible. For example, the yard where traffic is interchanged between the carriers may have capacity to accommodate a limited volume of cars, and would become congested and slow traffic if a greater volume of cars were subject to switching. *See, e.g.*, AAR 711-1 Further Supplemental Comments at 12 (describing the "real capacity limitations" of a switching yard in Decatur, Alabama, which "has only 4 short tracks, with a capacity of only 22 cars each"). Or the existing switching operation may be well-coordinated with the line-haul operation for the existing traffic, but may not be well-coordinated with the line-haul operation that would be required for the new traffic. In addition, shippers have different needs, and different products use different types of cars. The feasibility of each switching arrangement must be considered on its own terms before the Board can make a finding that a prescribed switch is "practicable" as required by the statute.

8. Multiple-lane switching

AAR is concerned that the Proposed Rule's provisions relating to multiple-lane switching are not well-suited to achieving the Board's goals of fostering regulatory certainty and assuring adequate service. The Proposed Rule provides that the Board "shall prescribe a reciprocal switching agreement" for multiple lanes to or from a petitioner's facility when the included lanes have practical physical access to only one Class I carrier, the incumbent carrier's "average success rate" for the lanes fails to satisfy the relevant performance standard, the prescription would be "practical and efficient only when the agreement govern[s] shipments to or from all of those lanes," and the petition satisfies the other prerequisites for a switch. NPRM at 36–40 (proposed 49 C.F.R. 1145.2(c)). A petitioner "could choose which lanes to/from its facility to

include in determining the incumbent rail carrier's average success rate," including lanes of different commodities and/or lanes with different origin-destination pairs. *Id.* at 17.

a. That approach is unlikely to satisfy the "actual necessity or compelling reason" standard. Most significantly, it would allow a shipper to secure switching on well-performing lanes, if another of its lanes is under-performing. The Board's own example of a permissible multiple-lane switch highlights this feature of the rule. *Id.* (allowing request for multiple-lane switching even though traffic moving on one of the lanes "is above the proposed service standard"). As explained above, a switching prescription may be ordered only when it is actually necessary. *See supra*, Part III.A. For lanes that are over-performing the metrics, the shipper would be seeking switching of traffic despite making no showing of necessity of any kind (metric-based or otherwise).

The Board appears to suggest that an indirect sort of necessity might exist because some lanes are under-performing and a prescription as to those lanes would be "practical and efficient only when the agreement govern[s] shipments" on other well-performing lanes too. NPRM at 40 (proposed 49 C.F.R. 1145.2(c)(2)(iii)). But in most such cases, the balance of considerations under the "actual necessity or compelling reason" standard is likely to be quite lopsided against forcing switching: There will be *less* benefit for the shipper because only some lanes would see a benefit, but those benefits will incur the *greater* burdens and disadvantages of a much larger switching operation.

b. The rule's provision for multiple-lane switching is also likely to undermine, rather than promote, the Board's goal of enhanced predictability, *see* NPRM at 2. Multiple-lane adjudications are likely to present significant challenges not present for single-lane requests. For example, the Proposed Rule does not define what it means for a prescribed agreement to be

"practical and efficient" only when it governs shipments on all the proposed lanes. And even if those terms were self-defining, the Board may not be well-positioned to address the relevant considerations. Multiple-lane switching requests are likely to implicate numerous operational questions that would be difficult for anyone to evaluate. For example, if multiple lanes of traffic are involved, then interline operations with multiple destination railroads may be involved, raising the prospect of an alternative service that is much more complicated than what would be required for switching a single lane. Although railroads are well-equipped to design those alternative services, it may be very difficult to determine if switching would actually improve the shipper's service.

It is also unclear how the Board could calculate an "average success rate" for multiple lanes under the service consistency metric, where that metric calls for a numerical comparison of transit times on a given lane from one year to the next. *See id.* at 18. Even if comparing this year's performance to last year's performance on a single lane is an apples-to-apples comparison, a request for multiple-lane switching would involve aggregating apples-to-apples comparisons on one lane with oranges-to-oranges comparisons on other lanes. And once again, figuring out whether the alternative services on those multiple lanes will improve upon the existing service would be more complicated still.

A further concern is that the Proposed Rule allows a shipper to decide which lanes of traffic to aggregate in its switching petition, including lanes that are well-performing, that move different commodities, or that have different origin-destination pairs. *See id.* at 17–18, 40 (proposed 49 C.F.R. 1145.2(c)(3)). Carriers would therefore not be able to reliably predict what well-performing lanes could become subject to a switching request. And if a multiple-lane switching order is entered, a shipper could elect to use the alternative service on some, but not

all, of the lanes subject to the prescription, only to later change the number or combination of lanes that use the alternate service. This will cause substantial uncertainty for carriers and undermine their ability to plan and invest. It will also lead to the contradictory result that the Board would find that a switching arrangement would be "practical and efficient" only if it governs shipments to or from *all* of the proposed lanes (*id*. at 40)—yet the shipper may use the switching arrangement to or from only *some* of the lanes.

c. In light of all of these concerns, the Board should limit proceedings under the Proposed Rule to lanes that do not meet the service metrics, each measured on its own. A shipper should be allowed to aggregate such lanes; it is unquestionably more efficient to consider a group of related lanes together if each individually may merit relief. At the same time, the Board should not categorically foreclose a shipper from making a case for switching irrespective of particular lanes, but such a case would properly be brought—and better evaluated—under the existing procedures of Part 1147.

9. The Board should gain experience with the new proposal before applying a new metric-based rule to interline traffic

The Board's proposal would apply the new service metrics not only to single-line movements but also to interline traffic. NPRM at 37–39 (proposed 49 C.F.R. 1145.1, 1145.2). Interline traffic presents distinctive challenges for metrics, as well as additional operational and economic issues that are not present in cases involving single-line traffic.

With interline traffic, at least two carriers are already involved in the movement. As the Board recognizes (*id*. at 13 nn.18–19), this means that the metrics need to measure the performance of one carrier from origin to interchange (or interchange to destination), rather than the performance from origin to destination. As an initial matter, applying the OETA metrics requires clear start-and-stop times for the measurement. The Board expresses its expectation that

the "time of interchange of a shipment" would establish a clear time when the originating carrier's clock would end and the destination carrier's clock would start. *Id*. at 17 n.25. That expectation may be unwarranted because the logical time for the destination carrier's clock to start is when that carrier *actually accepts* the cars, which is generally following that carrier's inspection. But that is not in the originating carrier's control—or more to the point, the originating carrier may not be able to reliably predict in issuing an OETA for interchange. Moreover, there is a significant disadvantage for the shipper in an approach that potentially requires resolving a dispute between the originating and destination carriers before the shipper knows if it can make a prima facie case under the OETA metric. These are not insurmountable problems, but they are present only for interline traffic and will require attention before a rule can be finalized. *See also infra*, Part IV.I.1 (proposing technical working group to address similar issues).

More fundamentally, a metric that looks at one leg of interline transportation arranged by a single carrier would not be measuring the actual end-to-end service that the shipper uses. If a shipper has purchased transportation from origin to destination, then when a shipment arrives at or departs from an intermediate interchange is likely relevant only insofar as it affects the overall origin-destination transportation service that the shipper has purchased. Although on-time interchange surely promotes on-time origin-to-destination service, the former is neither necessary nor sufficient to assure the latter. In other words, looking at the timeliness of one part of an overall trip is inherently a step removed from what typically matters most to both railroads and their customers: Is the origin-to-destination service adequate? Because there will often be a gap between what the metric means and what matters to the shipper, proceedings under the

Proposed Rule with respect to interline lanes will be different from those with respect to single-line lanes.

The Board should be aware that other complications are likely to arise in the interline context due to the presence of a third carrier (or even a fourth if a switch were ordered at both the origin and destination). Consider an existing service design that originates at a single-served location by incumbent Railroad *I*, and is interchanged to destination Railroad *D1*, for delivery to a location served by both Railroad *D1* and *D2*. A shipper might seek switching by Railroad *I* to alternate Railroad *A*. This scenario poses a number of service design and economic questions. Currently, the interchange is between *I* and *D1*. But *A* will need to interchange with *D1* at some other point—and how will the Board decide if the alternative service will improve the shipper's overall service situation, if the existing and new points of interchange are different? Will it factor in *D1*'s service to the destination? What if *A* can reach the destination more efficiently by interchanging with *D2*? Each of those operational questions has a companion economic question: *A* and *D1* (or *D2*) will need to negotiate a new interline price and a new division of revenue, entirely apart from the negotiation between *A* and *I* over the switch rate that *A* will pay *I*. All of those new complexities and operational challenges would fall not only on the incumbent carrier whose service inadequacies led to the switch, but also on the other carriers involved—carriers that have no responsibility for the conditions that resulted in a switching prescription. And because the shipper may ultimately choose not to use any prescribed switch, those other carriers may commit resources to design a new service that may never be used.

To be clear, those operational and economic complications are inherent to forced switching on interline traffic; they are inherent in this field, not unique to the Proposed Rule. But proceedings under the Proposed Rule will need to accommodate them all the same. In light

of all of these interline-specific complexities, prudence counsels the Board to proceed incrementally here—by evaluating and refining the Proposed Rule's performance in the context of single-line traffic and thereafter assessing that experience to determine the rule's proper sphere for interline movements. In the meantime, the existing procedures of 49 C.F.R. Parts 1146 and 1147 remain available for all traffic, including interline traffic. At the very least, the Board should recognize that proceedings regarding interline traffic under the Proposed Rule may demand additional time, require the participation of additional parties, and pose distinctive questions.

E. Affirmative Defenses and the Railroad's Reply Case

Once a shipper has established a metric failure (indicating a potential service inadequacy particularly worthy of closer examination) and addressed the other issues noted above (establishing a reason to believe that a switching order is a practicable and beneficial remedy), the Board's attention should shift to the incumbent carrier. Naturally, the incumbent carrier will reply with relevant information that might contest the showing made by the shipper in its petition. For example, the railroad might show (contrary to the shipper's submission) that the location proposed for switching is actually not within a terminal area, that the switching operation would not in fact be practicable or would otherwise harm other shippers, or that the alternative service proposed would actually be no better (or perhaps worse) than the existing service.

In addition to those—and under the heading the Board describes as "affirmative defenses"—the incumbent railroad must have the opportunity to put the metric-based showing into case-specific context, which may show that the shipper is not receiving inadequate service. That context is essential for reasoned and practical decision making. And the Proposed Rule

provides, correctly, that "[t]he Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section." NPRM at 41 (proposed 49 C.F.R. 1145.3).

In this part, AAR discusses the topic of affirmative defenses in general; then addresses some specific affirmative-defense issues that seem likely to recur, but that are not identified in the Proposed Rule; and finally turns to comments on the specific affirmative defenses described in the Proposed Rule.

1. Affirmative defenses in general

AAR agrees that in considering any petition for a forced switching order, the Board should consider a submission from the incumbent carrier, notwithstanding that the incumbent carrier failed to meet one of the service metrics. NPRM at 25.

As the Board has previously recognized in this very context, transportation needs and service difficulties can vary significantly. *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 978. The factors influencing service quality are varied and difficult to predict in advance. A wide range of factors can affect performance on a particular lane during any given 12-week window. For example, carrier construction projects like double-tracking or siding expansions improve service in the long run but may cause slower-than-average service or re-routings in the short term, even with reasonable efforts to minimize the disruption. Any of a number of varied circumstances could cause a railroad's performance in a given 12-week period to fall below one of the service thresholds—even while the railroad has otherwise provided high levels of service to its customer over extended periods of time. The same is true for anomalies in service provided to low-volume shippers. If a shipper's freight rail needs are low during a particular 12-week period, a very small number of late shipments or slower-than-normal trains could cause a railroad to dip below a given service metric, even while the carrier otherwise provides reliable and consistent service. All of those considerations are relevant to whether a switching remedy is

appropriate, but none can be answered by examination of the service metrics and certain enumerated defenses alone.

Similar uncertainty exists about many things outside of a railroad's control. Severe weather, a shipper's lack of investment in its facility, labor issues at ports, and a shipper's failure to work together with a railroad to plan are just a few of the reasons why traffic can be delayed. Such circumstances, which put the incumbent carrier's ability to meet a service metric beyond its control, should not be the basis for a switching order under this rule.[11] The Board's proposed affirmative defenses address some of these causes, but the list is far from complete, and no rule could comprehensively enumerate all of the relevant circumstances in advance.

When it previously addressed switching and other remedies to address service in EP 628, which addressed Parts 1146 and 1147, the Board did "not believe that it is possible or appropriate to attempt to delineate or define in the abstract what constitutes adequate service for all traffic under all circumstances at all times." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 975. The Board was "convinced that such issues are best addressed on a case-by-case basis, under flexible general rules, because transportation needs and service difficulties can vary substantially." *Id.* For all the reasons described above, that same wisdom applies today, and the Board should continue to follow it within the framework of the Proposed Rule.

For all those reasons as well, the Board can provide useful clarity by describing the contours of some recurring situations, but it should not confine applicable affirmative defenses to

[11] Of course, circumstances beyond the incumbent carrier's control might justify relief under a *different* rule or authority. For example, a natural disaster affecting the incumbent carrier's line might justify an emergency service order to route around that outage. AAR's point is simply that no purpose would be served by invoking the Proposed Rule in such a circumstance: It is more efficient to simply recognize the service emergency directly than to hinge a petition for relief on a carrier performance metric.

rigid categories. Instead, the Board should entertain any facts or circumstances that may bear on the reasons for the failure to satisfy the relevant performance standard. Accordingly, AAR supports the Proposed Rule's confirmation that "[t]he Board will also consider, on a case-by-case basis, affirmative defenses that are not specified in this section." NPRM at 41 (proposed 49 C.F.R. 1145.3).

2. Cured inadequacies

As discussed elsewhere, the best resolution of a service inadequacy will typically involve the incumbent carrier directly resolving the inadequacy. *See supra*, Part III.B.1; *infra*, Part IV.F.1. Accordingly, if the incumbent carrier has cured the potential service inadequacy during the course of the proceeding, then the Board's intervention is unnecessary. The particulars of this showing will depend on the particular circumstances of the case, but the Board should explicitly invite a cure by the incumbent carrier by recognizing such an affirmative defense.

3. Scheduled maintenance and capital improvement projects

Scheduled maintenance and capital improvement should also be a recognized affirmative defense. Practical and policy considerations arise when a service metric failing is due to such projects undertaken by the incumbent carrier. For example, a carrier might plan to add a siding to a main line to improve velocity on a corridor by enabling more efficient meet-and-pass operations. To complete that siding, it might need to temporarily slow traffic through the construction location for a few weeks, significantly depressing transit time for that traffic compared to the prior year and possibly leading to a missed transit time metric for that traffic. Although that carrier's project undoubtedly degrades service in the short run for a limited volume of traffic, it promises to improve service for all in the long run. The same is true of maintenance projects, which have the additional benefit of promoting safety.

Maintenance and capital improvement are thus both desirable activities that trade short-term degradation of service for much larger long-term benefits. The Board should not inadvertently discourage either. Recognizing them as affirmative defenses is unlikely to diminish the efficacy of the Proposed Rule. Both maintenance and improvement projects are likely to cause relatively temporary disruption. And where that disruption rises to a level demanding the Board's intervention, it can be better addressed through tools other than the Proposed Rule.

4. Conduct of third parties

It is possible that the conduct of a third party, including but not limited to another carrier, could cause an incumbent carrier to fail to meet a service metric. Under those circumstances, the failure to meet the service metric reveals nothing about the *incumbent's* service or the prospect that alternative service would improve service to the shipper, and a forced switching order would therefore be inappropriate. The Board should recognize that an incumbent carrier may raise as an affirmative defense that the metric failure was in fact caused by another carrier or some other third party.

Relatedly, the Board requests "comment as to whether its definition [of 'affiliated companies'] should also include third-party agents of a Class I carrier." NPRM at 11 n.9. The definition should not include third parties. AAR is concerned that the Board's reference to "third-party agents of a Class I carrier" may be intended to capture a Class II or Class III carrier that serves the customer location.[12] But the practical effect of expanding the definition to

[12] Such a Class II or Class III carrier is generally *not* the third-party agent of the Class I carrier with which it connects (regardless of whether the former carrier handles the traffic as a handling line carrier, haulage carrier, or under a reciprocal switching tariff). Rather, the arrangement is typically an arm's length contractual relationship.

include a Class II or Class III carrier that serves the customer location would be to assign responsibility to a Class I carrier for failures to meet a metric that were caused by a third party (in that instance, another railroad that handled the shipment). *See, e.g.*, *id*. at 17 ("The reliability standard in part 1145 would separately apply to a subsequent rail carrier as to its portion of the trip, when the subsequent carrier *or its affiliated company* moved the shipment to its final destination in a terminal area.") (emphasis added).

The simplest scenario of concern is one in which transportation is physically provided by both a Class I carrier and a handling carrier (such as a terminal railroad), all under the Class I carrier's bill of lading. Because the OETA and transit time metrics generally measure origin-to-destination performance, the conduct of the handling carrier affects both metrics and therefore could trigger a service metric failure. In that case, it would not make sense to respond to that failure by ordering the incumbent Class I carrier to switch traffic to an alternate Class I line-haul carrier; doing so would not improve service for the shipper. This situation is operationally analogous to interline traffic, where different railroads have operational responsibility for the shipment at different points in time. The Board itself has proposed that a carrier should not be responsible for the operational performance of its interline partner; it should follow the same principle with respect to responsibility for third-party handling carriers. For those reasons, the Board should not include third parties in the definition of "affiliated companies."

5. Embargoes

The Board mentions the role of embargoes in passing, and it suggests that an embargo would not itself be an affirmative defense. But the Board also notes that it could consider whether the circumstances giving rise to the embargo qualify as an affirmative defense (while the Board would not actually judge the validity of the embargo). *E.g.*, NPRM at 19–20 & 20 n.28.

AAR suggests a different approach to embargoes: A valid embargo should itself be an affirmative defense to a service metric failure associated with the embargoed lane. The Board has presumptively respected the carrier's judgment about the best way to restore full service on its network, rather than deciding for itself the relationship among underlying events, the embargo, and the shipper's traffic. *See, e.g.*, *Bar Ale, Inc. v. Cal. N. R.R. Co.*, FD 32821, 2001 WL 833717, at *4 (STB served July 20, 2001) ("It is well established that a carrier must decide in the first instance whether an unsafe condition exists that prevents it temporarily from providing service, and we typically defer to the operating carrier's opinion on this matter.").

More broadly, valid embargoes can be necessary tools for restoring service, and rapid service restoration should be *encouraged*. Conversely, a refusal to recognize embargoes as an affirmative defense would tend to discourage their use, potentially slowing the restoration of service for the petitioning shipper and other shippers as well. Recognizing embargoes as an affirmative defense also is unlikely to diminish the efficacy of the Proposed Rule. Embargoes are generally limited in duration. Even if one results in an incumbent railroad failing on a metric for a period of time, any resulting service inadequacy is likely to be temporary, and it may well be better addressed by tools other than the Proposed Rule.

Of course, in all instances, the shipper should have the opportunity to contest the validity of the embargo, through the usual approach of a complaint invoking 49 U.S.C. § 11101. Only a *valid* embargo could serve as an affirmative defense.

6. Effective competition from another mode

The Board should also consider facts bearing on whether the lane at issue is subject to effective competition from another mode of transportation. The Board describes the Proposed Rule as aimed at "provid[ing] appropriate regulatory incentives to Class I carriers." NPRM at 5. But where other forms of transportation such as trucks or barges are available and provide

effective competition, there is no reason to conclude that market forces are insufficient to provide the appropriate incentives to the incumbent carrier, even if the incumbent is the shipper's only rail option. Furthermore, where a shipper can access another mode of transportation that competes effectively, it is unclear how the shipper would have a compelling need for Board-prescribed alternative service. Rather, the situation would be analogous to one in which the shipper has access to multiple Class I railroads—which the Board has correctly recognized would not be an appropriate circumstance in which to grant relief under the Proposed Rule, *id*. at 23.

Consideration of competition from other forms of transportation is also consistent with the RTP. "A major impetus behind the deregulation of railroads in the Staggers Rail Act of 1980 was Congress' recognition that railroads generally had to compete with other modes of transportation." *Cent. Vermont Ry. v. ICC*, 711 F.2d 331, 336 (D.C. Cir. 1983). As relevant here, that principle suggests that before ordering a switch, the Board should consider whether competition from trucks or barges obviates the need for regulatory intervention.

7. Alternate carrier objections

The Proposed Rule recognizes a role for the alternate carrier in presenting facts related to the practicability of a proposed switch. NPRM at 42–43 (proposed 49 C.F.R. 1145.6(b)). That is appropriate and necessary because the alternate carrier will be well positioned to provide information regarding the feasibility and safety of the proposed switch as well as information about how the switch may affect its other customers. As discussed below, a proceeding under the Proposed Rule requires the involvement of the alternate carrier in a number of other respects. *See infra*, Part IV.F.3(a). Accordingly, the Board should consider any relevant information from the alternate carrier about the operations, economics, and safety of the proposed alternative service—anything that bears on whether a switch is appropriate in the particular case.

Importantly, because the shipper will not be obligated to use the alternative service, even after a switching agreement is in place, the Board should give due consideration to an objection from the alternate carrier about being required to commit resources to service that may never be used. That sort of information will help the Board evaluate the risk that a switch would impose unnecessary costs on the broader network without adequate, concrete countervailing benefits. As the Board recognized in EP 628, "even temporary access is a serious remedy, given the potentially significant operational, safety, and financial implications for the carriers involved," rendering the "cooperation of the alternative carrier [] essential." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 979.

8. Comments on specific affirmative defenses proposed by the Board

The four specific affirmative defenses enumerated in the Proposed Rule address important considerations for the Board to evaluate. Each of the proposed defenses should be refined to ensure they capture circumstances that are relevant to whether a proposed switch is warranted.

(a) Extraordinary circumstances

Under the first proposed defense, a carrier will not be deemed to fail a performance standard if it "experiences extraordinary circumstances beyond the carrier's control, including but not limited to unforeseen track outages stemming from natural disasters, severe weather events, flooding, accidents, derailments, and washouts." NPRM at 41 (proposed 49 C.F.R. 1145.3(a)). The Notice further explains that the Board will "consider extraordinary circumstances to be the type of events that permit a railroad to qualify for an emergency trackage rights exemption at 49 C.F.R. 1180.2(d)(9)." *Id.* at 25.

The Board is correct to identify situations beyond a carrier's control as an affirmative defense. The proposed "extraordinary circumstances" defense should embrace a broader range

of circumstances that the Board should consider case-by-case. The Board should make clear that the circumstances at issue need not specifically cause an unforeseen track outage. Events like severe weather or derailments can substantially impact service even if they do not cause a track outage. Because the question before the Board is whether a carrier's failure to satisfy a service metric is associated with circumstances warranting a switching remedy, the Board should not limit its consideration to a single category of incidents. For the same reason, the Board should clarify that the Proposed Rule's enumeration of specific events ("natural disasters, severe weather events, flooding, accidents, derailments, and washouts") does not represent an exclusive list of the circumstances that the Board will consider. Many other circumstances—including, for example, public health emergencies, labor issues at ports, or domestic unrest—are outside a carrier's control, and all can have effects on service similar to the others the Board lists.

AAR is also concerned that the modifier "extraordinary" may be a point of unnecessary contention. Certainly, railroads prepare for a variety of contingencies. But where a service issue has in fact been caused by events beyond the railroad's control, it is likely to be the sort of event that could have affected (and could in the future affect) *any* line-haul carrier—making it very unlikely that a situation exists that can be durably improved by alternative service under the Proposed Rule. Again, the possibility exists that a different rule would provide appropriate relief, such as in the case of an emergency affecting only one carrier. *See supra*, note 11. The Board should therefore make clear that the term "extraordinary circumstances" in the Proposed Rule generally encompasses all events that the carrier cannot control or reasonably prepare for.

In addition, the Board's proposed approach to workforce and equipment shortages will require nuanced application.[13] AAR understands the Board's concern that carriers maintain an adequate workforce and sufficient power and car supply to deliver quality service. Carriers have made—and continue to make—substantial investments in these areas. As the Board suggests, issues related to workforce reductions, car supply, and power, however, should not be categorically excluded from the Board's consideration. A range of circumstances affect carrier decisions related to the levels of workforce, power, and car supplies that they are able to maintain, and those carrier-specific circumstances form part of the context for considering whether a switch will be an effective tool to remedy an identified service inadequacy.

(b) Surprise surge

The second enumerated affirmative defense in the Proposed Rule addresses unexpected jumps in demand. The proposed "surprise surge" provision establishes a defense in situations in which the "petitioner's traffic increases by 20% or more during the 12-week period in question, as compared to the preceding 12 weeks (for non-seasonal traffic) or the same 12 weeks during the previous year (for seasonal traffic such as agricultural shipments), where the petitioner failed to notify the incumbent rail carrier at least 12 weeks prior to the increase." NPRM at 26, 41 (proposed 49 C.F.R. 1145.3(b)). The Board is correct to recognize that circumstances arising from increases in demand should be an affirmative defense. AAR agrees that the circumstances described should qualify, but the Proposed Rule does not capture a number of important

[13] The Board states: "A carrier's intentional reduction or maintenance of its workforce at a level that itself causes workforce shortage, or, in the event of a workforce shortage, failure to use reasonable efforts to increase its workforce, would not, on its own, be considered a defense for failure to meet any performance standard. Similarly, a carrier's intentional reduction or maintenance of its power or car supply, or failure to use reasonable efforts to maintain its power or car supply, that itself causes a failure of any performance standard would not, on its own, be considered a defense." NPRM at 25.

considerations in evaluating the effects of demand shifts on service levels. Accordingly, AAR urges the Board not to treat the "surprise surge" defense as exhaustive of demand-related circumstances that could qualify as an affirmative defense.

As the Board recognizes, demand fluctuations can have significant effects on service levels. When carriers face increases in shipper demand, they may need to commit new resources or reallocate existing ones to serve customers' needs. The sharper the swings in demand, the more challenging this process becomes, and in some cases, implementing the necessary changes takes some time. Critically, this is often not a question of addressing one shipper's service request; other shippers will have increasing or decreasing demand. Thus, how quickly a customer's additional demand can reliably be met will depend not only on the actions of that customer but also those of other shippers.

For these reasons, in evaluating increases in demand, the Board should be open to looking more broadly than the current elements of the "surprise surge" defense would suggest. At a minimum, the Board should at least make clear that the defense is non-exhaustive. The other considerations are numerous. For example, the Board should not be limited to examining only the petitioning shipper's increased traffic demands. A surge by one shipper may have upstream or downstream effects—for example, congestion in a serving yard caused by one shipper can impact service for other customers served by that yard. Accordingly, the defense should take into account spikes in demand by other shippers that may impact a carrier's service to the petitioning shipper during the relevant period.

In addition, it may not be appropriate in all circumstances to measure a surge only by a fixed percentage increase. In some contexts—such as with very high-volume shippers or where an increase in volume is accompanied by a change in the size of blocks of cars released by the

shipper—the percent increase in traffic, standing alone, may not reliably measure how the surge in demand affects operations.

Further, the bare fact that a shipper has given a carrier notice of a surge in traffic does not itself mean that a carrier's failure to meet the metrics for the increased traffic justifies a switching remedy. A carrier's ability to adjust to the increased demand at the time requested will depend on a range of factors, including other demands on rail resources, the ability to bring on new employees to support the increased volume, existing construction projects, and weather, among other factors that the Board should consider to put the change in shipper demand in full context.

Finally, the Board is right to seek input on the appropriate numeric thresholds for the surprise surge defense. *See id.* at 26. AAR has not performed a systemwide analysis that would enable it to comment specifically on those thresholds. But AAR shares the Board's uncertainty around the proper quantitative measures. Ultimately, that uncertainty underscores the need for caution in relying on rigidly defined defenses and the importance of looking broadly, beyond numeric measures, to assess whether a switching prescription is an appropriate response to a carrier's failure to meet a service metric in the face of a spike in demand.

(c) Highly unusual shipments

Under the Board's next proposed defense, a carrier would be deemed not to fail a performance standard if there are "highly unusual shipments by the shipper during any week of the 12-week period in question." NPRM at 41 (proposed 49 C.F.R. 1145.3(c)). AAR agrees that abnormal shipments are an appropriate affirmative defense. The text of the Proposed Rule sets forth one specific example of a shipping pattern that might be regarded as "highly unusual," *id.*, but myriad variations in shipment volumes and frequency can have an effect on service. The Board is thus correct to confirm that "[w]hat constitutes 'highly unusual' would vary from case

to case depending upon the characteristics of the traffic" and that a pattern could qualify as highly unusual "even in the absence of a surprise surge." *Id.* at 26. As with the surprise surge defense, the Board should consider all relevant circumstances in evaluating the effects of unusual shipment patterns on a carrier's service.

(d) Dispatching choices of a third party

The Proposed Rule's final affirmative defense provides that the Board will not enter a switching order if the carrier's failure to satisfy the relevant service metric was "due to the dispatching choices of a third party." NPRM at 41 (proposed 49 C.F.R. 1145.3(d)). That affirmative defense confirms that the Board should recognize more generally that third-party actions can affect service. As discussed above, actions of other carriers—such as handling carriers—may affect an incumbent's ability to meet a service metric. *See supra*, Part IV.E.4. When third parties, rather than the incumbent, are the underlying cause of the incumbent's failure to meet a service metric, it is unlikely that shifting the line-haul to an alternate carrier will improve service to the shipper. Accordingly, the Board should, under this affirmative defense or otherwise, more broadly consider the actions of third parties.

F. Pre-Petition and Petition Procedures and Timeline, Including Ability for Incumbent Railroad to Cure

Because the goal of the Proposed Rule is to remedy inadequate service, the best outcome is one in which the incumbent railroad cures any service inadequacy and continues to serve the shipper in the most efficient manner possible. That outcome resolves the shipper's problem while avoiding the complexities and risks of added switching as well as the burdens of a proceeding before the Board. Failing that, the next-best outcome is an efficient and well-informed proceeding before the Board leading to a reasoned resolution of the shipper's petition.

The Board can adopt rules for both pre-petition and post-petition proceedings that will promote those goals.

1. Timeline before petition is filed and incumbent railroad's ability to cure

a. Because the Board's ultimate objective is to remedy any service inadequacy experienced by the shipper, the fastest, most efficient way to do so is for the incumbent carrier to provide adequate service. The Board should therefore build in time for the possibility of a cure and consider whether any service inadequacies have been cured. Orszag & Eilat V.S. ¶ 39. As the Board explained in EP 628, "[a]dvance discussions between the parties are indispensable. They may help solve or ameliorate the service problems; narrow the issues in dispute; or, at a minimum, enable a more complete and informative record to be developed upon which we can assess the situation and the proposal for relief. Thus, it is in all parties' interests to engage in full, good faith discussions." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 977.

Ensuring a meaningful opportunity exists for the incumbent railroad to cure any service inadequacy—before the Board entertains a petition—thus has numerous benefits if it succeeds. It will actually give relief to the shipper, which is the Proposed Rule's animating concern. It will provide that relief more quickly than setting up alternative service possibly could. It will avoid all the operational complications that typically make forced switching costly and inefficient. *See infra*, App. Part C. It will alleviate concerns about adverse effects on investment and certainty. *See infra*, App. Part B. It avoids any number of difficult questions about the design, terms, and compensation for alternative service. And it would meet the Board's oft-stated preference for parties to resolve their differences prior to litigating before the Board, reducing both party costs and the need to draw on the Board's resources to adjudicate proceedings. *See, e.g.*, *Bos. & Me.*

Corp.—Appl. for Adverse Discontinuance of Operating Auth., AB 1256, 2018 WL 4951945, at *9 (STB served Oct. 12, 2018).

b. The Board has proposed that the shipper give the incumbent carrier at least five days' notice before filing a petition under the Proposed Rule. NPRM at 41 (proposed 49 C.F.R. 1145.4).[14] That is a brief period—too brief a period—in which to accomplish a number of important things, quite apart from curing any service inadequacy.

To begin, unless the shipper has previously approached the incumbent carrier about the service issue, the subject is likely to be new, and the carrier and the shipper may each lack information and understanding about the other's concerns. Presumably, the shipper will base its petition on a recent service metric failing; although the Board does not say so, there can be no value in bringing a petition to the Board based on stale data, when no current failure exists under any metric. There may be much for the shipper and the incumbent carrier to discuss, and the Board should not encourage a rush to invoke its processes. At the very least, pre-petition discussions will lead to a better-informed proceeding before the Board. *See* 49 C.F.R. 1147.1(b)(1)(ii) (requiring a petition to contain "[a] summary of the petitioner's discussions with the incumbent carrier of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time").

In addition, the shipper will need time to make arrangements for an alternative service design with the proposed alternate carrier. *See infra*, Part IV.F.3 (discussing importance of involvement of the alternate carrier in proceedings). Again here, the basis for a proceeding

[14] Whatever period the Board adopts, it should clarify whether it is measured in business days or calendar days.

under the Proposed Rule will have only just become apparent—in the form of a failure to meet a metric during the preceding 12-week period. Accordingly, it is reasonable to expect the shipper to give the incumbent carrier notice of its intent to proceed under the Proposed Rule, while the shipper takes additional time to work with the alternate carrier to explore whether the alternate carrier would be able to provide service that is safe and practicable and will remedy the service inadequacy, through switching using the incumbent carrier.

c. There is an important overlap among the preceding considerations (*viz.*, the need for shipper-incumbent discussions, the need for shipper-alternate discussions, and the desirability of the incumbent carrier curing any service inadequacy). All three promise to make progress toward remedying the shipper's service issue, all three may take a modest amount of time, and all three can proceed in parallel.

Accordingly, AAR suggests that the Board refine the Proposed Rule's pre-petition timeline to provide the following: (1) A shipper that intends to seek relief under the Proposed Rule must approach the incumbent carrier with its concerns as soon as practicable after a 12-week metric failing. (2) The shipper, incumbent, and alternate must then engage in appropriate discussions for a reasonable period of time (presumptively 4 weeks). (3) During that period, the incumbent carrier is encouraged to remedy any service inadequacy. (4) At the end of that period, if the shipper wishes to proceed with a petition, then the Board will be able to consider the case on the basis of service levels over at least the 16 weeks prior to filing the petition (*i.e.*, at least the original 12 weeks, plus at least 4 weeks while remediation discussions and petition preparation were underway). The result would be an improved chance of a cure by the incumbent railroad—leading to improved service, reduced party costs, and reduced use of Board resources—or, alternatively, a better-informed proceeding before the Board.

2. Timeline after petition is filed

The Board proposes to allow 20 days for a reply to a petition and 20 days for a rebuttal. NPRM at 42 (proposed 49 C.F.R. 1145.5(d), (e)). The reply period is shorter than the 30-day period provided in 49 C.F.R. 1147.1(b)(2), and the Board does not explain the reasoning behind the difference. A 30-day period would be appropriate here too. The default period of time depends in part on whether the Board adopts the pre-petition timeline described immediately above. If the shipper and incumbent carrier have not been able to engage in substantial discussions prior to the shipper's petition, it will be especially important to afford more time for reply if the Board is to receive a well-informed submission by the incumbent railroad. That submission is likely to be the best (or only) insight the Board receives into the effects of a switching order on all other shippers, because shippers that would be collaterally affected by the switching order are unlikely in practice to participate in an individual proceeding under the Proposed Rule.

In all events, the Board should reserve complete discretion to extend deadlines based on the circumstances presented in a particular case.

3. Parties

Having the right parties participating before the Board in individual cases will promote reasoned decisions that take full account of the tradeoffs from a switching order.

(a) Alternate carrier

The Proposed Rule makes the alternate carrier a party to the proceeding, NPRM at 42 (proposed 49 C.F.R. 1145.5(c)), and it should be able to participate fully before the Board. The most basic reason is that the alternate carrier's engagement will be necessary for the shipper to propose how the alternate carrier's service would operate and to explain why it would remedy the service inadequacy. Identifying a potential problem without proposing a reasonably specific

solution would frustrate the Board's ability to evaluate whether the proposed switch would be beneficial and to apply the "actual necessity or compelling reason" standard. Moreover, the Board should be especially attentive to the practicability and operational downsides of the shipper's proposed alternative service design if it is not supported by the alternate carrier. Any number of other issues can arise in an individual case, and the alternate carrier's participation or information will be important for addressing them.[15]

The Proposed Rule correctly provides for service of the petition on the proposed alternate carrier. *Id.* at 42 (proposed 49 C.F.R. 1145.5(c)). The Board should further provide, similar to the provision at 49 C.F.R. 1147(b)(1)(iii), that the petition should include a commitment from the alternate carrier and a description of the alternative service design.

(b) The "shipper"

The Proposed Rule generally speaks in terms of shippers (and receivers), and generally suggests that either a shipper or receiver might bring a proceeding under the Proposed Rule. Those are common shorthands for railroad customers (and indeed, these comments often use the shorthand "shipper"). But the Board should clarify that the essential non-carrier parties to a proceeding are, more precisely, (1) the party that has the economic relationship with the incumbent carrier and that would have the economic relationship with the alternate carrier (*i.e.*, the payor of freight), and (2) the party with the operational relationship to the switching (*i.e.*, the

[15] For example, depending on the nature of the switching operation in the context of the shipper's larger operation, deciding how car supply responsibilities will be met as between the incumbent carrier and the alternate carrier may raise a number of complex issues that cannot be predicted in advance. Additional questions may also be raised about the facilities of the alternate carrier. The Board suggests in passing that the alternate carrier might make investments to handle the new traffic. NPRM at 29 n.36. Although a decision to invest in facilities could be made by the alternate carrier, the Board should make clear that any *obligation* on the alternate carrier's part cannot exceed the obligation to provide facilities for interchange of traffic under 49 U.S.C. § 10742.

party whose facility is single-served by the incumbent carrier). The shipper at the origin might be in both roles. The shipper at the origin might be in one role, and the receiver at the destination might be in the other. Or in unusual circumstances, the receiver at the destination might be in both roles. In other words, the Board should make clear that, if the party with the economic relationship to the carriers is not the same as the party with the operational relationship to the switching operation, then *both* need to be before the Board, because the interests of both will be affected.

4. Discovery

The Proposed Rule does not discuss or adopt any special provisions for discovery. Some amount of discovery may be needed, because each party to the proceeding may have relevant information that no other party has. For example, if the incumbent carrier raises issues outside of specifically enumerated affirmative defenses, it may be necessary for the shipper to obtain information about those issues (whether from the incumbent railroad or a third party). Often, the information in question could concern other shippers' shipments, which raises significant confidentiality concerns. Accordingly, the Board would need to invoke a process for production of that information under a protective order.

G. Terms of the Switching Agreement

The culmination of a proceeding granting forced switching relief is to "require rail carriers to enter into [a] reciprocal switching agreement[]." 49 U.S.C. § 11102(c)(1). AAR comments in this part on several aspects of the terms of that agreement, whether agreed to by the incumbent carrier and alternate carrier or established by the Board.

1. Conditions and compensation

By statute, "[t]he rail carriers entering 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." 49 U.S.C. § 11102(c)(1). The Proposed Rule provides that, "[u]pon the Board's prescription of a reciprocal switching agreement . . . , the affected rail carriers must: set the terms of the agreement." NPRM at 43 (proposed 49 C.F.R. 1145.6(d)). As the Board recognizes in soliciting comments, compensation to the incumbent carrier is likely to be an important question. *Id.* at 28–29.

AAR does not have a definitive view on the appropriate compensation rule in the context of the Proposed Rule. The statute commits the questions of compensation and terms to the carriers involved, and disputes may be rare. In adopting Part 1147, the Board took a case-by-case approach to compensation questions, and doing so may be the appropriate course here. That said, the Board would need to bear in mind a number of principles in any instance where it establishes compensation for a switch—whether by general rule here or in the context of a particular proceeding.

First, because the basis for a switching order under the Proposed Rule is inadequate service, the goal of the Board's actions under the Proposed Rule must be remedying inadequate service, not altering the price paid by the shipper.

Second, any consideration of compensation must recognize the central role of differential pricing in rail markets and the statutory directive for the Board to promote rail carriers' revenue adequacy and their ability to make investments necessary to meet demand. "[D]ifferential pricing is crucial to the viability of the industry." *Intramodal Rail Competition—Proportional Rates*, EP 445 (Sub-No. 2), 1990 WL 287993, at *2 (ICC April 17, 1990); *see also* AAR 711-1 Opening Comments at 47–49. "[T]here is a large amount of common (unattributable) costs inherent in the railroad industry cost structure, and the mix of competitive and captive traffic

handled by railroads prevents a carrier from being able to recover a pro rata portion of those common costs from all traffic. Therefore, railroads must be able to price their services differentially so as to recover a greater percentage of their common costs from traffic with a greater degree of captivity (i.e., less demand elasticity)." *Amstar Corp. v. ATSF*, No. 37478, 1995 WL 569701, at *4 (STB served Sept. 28, 1995) (internal citation omitted). "[T]he core regulatory principle in the rail industry is that a railroad must be able to engage in some form of demand-based differential pricing to have the opportunity to earn adequate revenues." *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), 2006 WL 3087168, at *15 (STB served Oct. 30, 2006). The Board has not evaluated the likely effects of the Proposed Rule on revenue adequacy, and doing so would depend on assumptions about pricing. If the Board wishes to make a definitive a pronouncement in this proceeding about compensation, the Board may need to conduct such an analysis. *See infra*, App. Part D.

Third, "[t]he Board seeks comments on two methodologies for setting fees under a prescribed reciprocal switching agreement under part 1145." NPRM at 28. The Board first refers to a cost-of-service approach using ICC Terminal Form F (from 1964) or its current Uniform Rail Costing System to establish cost-based measures for compensation. That approach would depart from nearly half a century of agency precedent recognizing that fully-distributed-cost approaches are economically unsound. *See Switching Charges on Iron or Steel Scrap at Stockton, Ca.*, 356 I.C.C. 634, 638 (1977) ("[T]he fact that a proposed rate . . . exceeds the fully allocated cost level[] does not, in itself, justify a finding that the charge is in excess of a maximum reasonable rate."); *Kansas City Power & Light Co. v. Kansas City Southern Ry. Co.*, 361 I.C.C. 308, 323 (1978) ("we have recognized that the mere circumstance of a switching rate exceeding fully allocated cost does not by itself justify a finding of unreasonableness") (citing

Switching Charges at Stockton, *supra*); *Intramodal Rail Competition*, 1 I.C.C.2d 822, 835 (1985) (rejecting fully-allocated-cost approach as compensation for forced switching as "arbitrary and economically unsound"). The Board second refers to the "SSW Compensation" methodology, which is (as the Board notes) "primarily used in trackage rights cases." NPRM at 29. AAR has commented on that methodology previously. *See* AAR 711-1 Opening Comments at 47. The Proposed Rule does not explain how either would work in practice.

2. Minimum performance

The Board seeks comment on whether a prescription for switching "should include a minimum level of switching service and, if so, whether the Board should establish a separate and specific penalty structure to be imposed on carriers that do not meet that level of service." NPRM at 12 n.15. No such requirement or "penalty structure" is appropriate. The prescribed service will be subject to the common carrier obligation under 49 U.S.C. § 11101, and the usual remedies for a failure to provide adequate service upon reasonable request will be available.

3. Labor protections

"The Board may require reciprocal switching agreements entered into by rail carriers . . . to contain provisions for the protection of the interests of employees affected thereby." 49 U.S.C. § 11102(c)(2). The Proposed Rule does not describe how those employee interests will be accounted for in the Board's process or the agreement between carriers. As AAR has previously explained, this is an important subject, because switching orders can entail significant disruption in work assignments within and across yards as well as changed volumes of line-haul traffic, thereby affecting crew requirements on line-haul movements. These changes both affect railroad employees and raise questions of responsibility for any required labor protection costs. *See* AAR 711-1 Opening Comments at 44.

In existing rules, the Board has not directly addressed those subjects. *See generally* 49 C.F.R. Parts 1146, 1147; *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 976. If the Board does not do so here, then it should make clear that it will address such issues on a case-by-case basis, considering both the costs involved and how protections will be implemented.

4. Disclosure under Part 1300

The Proposed Rule states that "the affected rail carriers must . . . include, in the appropriate disclosure under 49 C.F.R. Part 1300, the location of the petitioner's facility, indicating that the location is open to reciprocal switching, and the applicable terms and price." NPRM at 43 (proposed 49 C.F.R. 1145.6(d)). This phrasing is ambiguous, and it could result in confusion about the proper disclosure.

To be clear, information about a switching agreement is not itself subject to disclosure under 49 C.F.R. Part 1300. No provision in Part 1300 describes such carrier-to-carrier agreements, and the terms of carriers' switching agreements are generally not disclosed to the public. It is also possible that agreements entered into pursuant to a Board order would include information about a shipper's specific lanes, which could raise confidentiality concerns for the shipper.

Rather, in this context, the relevant disclosure under Part 1300 would be the alternate carrier's common carrier line-haul rate and terms for a movement that utilizes the switching services of the incumbent carrier. The alternate carrier would provide that information to a shipper requesting common carrier service. In addition, the shipper's station would, in the normal course, be reflected as open for switching in various information systems, although those are not themselves Part 1300 disclosures.

The Board may wish to refine the proposed language of 49 C.F.R. 1145.6(d) to avoid confusion on this subject.

H. Duration, Renewal, and Termination of the Switching Prescription

The Proposed Rule also contains various provisions relating to the duration, renewal, and termination of switching orders. NPRM at 43–44 (proposed 49 C.F.R. 1145.6(c), 1145.7). AAR understands that the Board's rationale for setting a minimum term for switching prescriptions is to allow for "more effective planning and investment both by rail customers and by alternate carriers, thereby encouraging their voluntary participation in providing service and promoting more workable opportunities for shippers." *Id.* at 10. AAR agrees that it is appropriate for the Proposed Rule to establish procedures for renewal and termination of switching orders. AAR is concerned, however, that the specific provisions as proposed would lead to switching prescriptions that are not commensurate with the identified service inadequacy and thus would exceed their proper remedial purpose. In addition, some aspects of the proposed procedures could be helpfully clarified. The Board should refine the Proposed Rule to align the term of the switching prescription to the service inadequacy the prescription seeks to remedy, which, among other things, means not providing for automatic renewal of switching prescriptions. And the Board should clarify the standards that it will apply when considering a request to terminate a switching order.

1. Duration of the initial switching prescription

The Proposed Rule provides that the Board "shall prescribe a term of service of two years, provided that the Board may prescribe a longer term of service of up to four years if the petitioner demonstrates that the longer minimum term is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs." NPRM at 43 (proposed 49 C.F.R. 1145.6(c)). Because a metric failing of twelve weeks is sufficient to initiate a proceeding, in many cases, a two-year term is likely to substantially exceed the duration of the service inadequacy that the switching prescription was intended to remedy. As the Board

explained in EP 628, establishing a minimum term would be inappropriate where, as here, the "nature and . . . purpose" of the actions taken is meant to be "non-punitive" and "restorative." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 976 n.26. Instead of establishing a mandatory two-year minimum term, the Board should determine the initial duration of a switching prescription on a case-by-case basis and set a term that is needed to remedy the service inadequacy. *See* Orszag & Eilat V.S. ¶ 40. As explained below, that term is very likely to be less than two years, and only in very unusual cases would it approach the four-year maximum in the Proposed Rule.

As explained above, the Board may prescribe a switching agreement only upon a showing of actual necessity or a compelling reason, and that standard is fundamentally remedial. *Supra*, Parts III.A.1, III.B.1. A switching order that continues substantially beyond the identified inadequacy would cease to be remedial; instead, it would more closely resemble a punitive sanction for past failings. Considering the length of any forced switching order on a case-by-case basis would allow the Board to tailor the remedy to the service problem and ensure that the order's term corresponds to the actual need that the shipper has shown.

In proposing a two-year minimum term, the Board's stated concern is that "the duration of a reciprocal switching order [be] sufficiently long to make alternative service feasible and reasonably attractive to potential alternate carriers." NPRM at 29. Generally, a term on the order of one year should be sufficient for that purpose. Transportation contracts, for example, often have one-year terms, demonstrating that carriers are willing to establish new service arrangements that may last for only twelve months. By contrast, the Board's concern associated with investment and the opportunity for the alternate carrier to recover its costs (*id.* at 29 n.36) is unlikely to arise in the ordinary case where a switching order is merited. Normally, where an

identifiable alternative service design exists that will be safe and practicable and that will remedy the service inadequacy, that will be because an attractive opportunity exists for the alternate carrier to integrate the shipper's lane into the alternate carrier's existing traffic, using existing assets. Although the Board should not foreclose the possibility of other circumstances, it should not set a default duration based on considerations that are present for at most a small share of cases under the Proposed Rule.

In addition, the involvement of the alternate carrier in the switching proceeding should significantly mitigate the Board's concern that the alternative service be feasible and attractive to potential alternate carriers. As noted above, the feasibility of a proposed switch must be addressed as part of the shipper's initial case, and the Board's consideration of that issue can and should be informed by the alternate carrier's participation at that stage. *Supra*, Parts IV.D.7, IV.F.3(a). The alternate carrier's participation will also provide the Board with case-specific information about the alternate carrier's ability to provide new long-haul service for the petitioning shipper. The Board can react to that information, as well as relevant information presented by the incumbent carrier and the shipper, in determining whether a switching order is appropriate at all and, if so, its proper term.

Finally, the Board should revise the provision of the Proposed Rule authorizing a minimum term of longer than two years. That provision states that the Board is permitted to prescribe a term of service of up to four years "if the petitioner demonstrates that the longer minimum term is necessary for the prescription to be practical given the petitioner's or alternate carrier's legitimate business needs." NPRM at 43 (proposed 49 C.F.R. 1145.6(c)). As explained above, the guiding principle for any prescription should be that it is commensurate with the service inadequacy it seeks to remedy. A prescription lasting for a longer period should thus be

reserved for situations involving a particularly persistent service failure that would be expected to last for a long time. The language in the Proposed Rule—"necessary for the prescription to be practical given the petitioner's or the alternate carrier's legitimate business needs," *id.*—is broad and would invite requests for long-term switching orders in cases involving far less serious service inadequacies. The Board should modify this provision to make clear that longer terms will apply only in cases where such a term is absolutely necessary to remedy the service inadequacy shown.

2. Renewal of switching prescription

The Board should not provide for presumptive automatic renewal of a switching prescription. *Contra* NPRM at 43 (proposed 49 C.F.R. 1145.7(a)). Automatic renewal poses serious concerns under the statutory standard.

As explained above, the Board can order a switching remedy only upon a showing of "actual necessity or compelling reason." *See supra*, Part III.A. Automatically renewing a switching prescription, without a finding of a present compelling need, is inconsistent with that standard. Whatever conditions may have led the Board to enter an initial switching order, if the conditions at the conclusion of that order do not show an "actual necessity or compelling reason" for a switching order, no such order can be continued or imposed. Automatically renewing a switching order would also be in tension with the RTP's preference for regulatory minimalism. That policy supports a bias in favor of removing a regulatory intervention. It also counsels in favor of the expectation that the incumbent carrier itself will address the conditions that led to the service inadequacy and the resulting switching order. Yet under the Proposed Rule, Board-ordered switching prescriptions would continuously accumulate, potentially in perpetuity, even in cases where they are not used. Allowing a prescribed switch to expire according to its terms is more consistent with Congress's goal of "minimiz[ing] the need for Federal regulatory control

over the rail transportation system." 49 U.S.C. § 10101(2). Accordingly, rather than automatic renewal, the Board should provide for an orderly opportunity for the shipper to show that the term of the switching order should be extended, with no break in service. Any such proceeding would be governed, like the initial proceeding, by the "actual necessity or compelling reason" standard.

If the shipper does not obtain an extension of the switching order, and the incumbent nonetheless fails to provide adequate service following the expiration of the initial switching order, a shipper would be free to file a new petition with the Board. In those cases, the Board is likely to have robust information about the practicability of the proposed switch and the shipper's need for alternative service—all based on the parties' actual experience operating under the original prescription. For that reason, modifying the Proposed Rule (to require shippers to affirmatively seek a new prescription in cases where the incumbent has not successfully resolved the original service issue) would be unlikely to impose undue burdens on the Board or the parties to the switching arrangement. The Board may wish to reserve discretion to accelerate such proceedings in appropriate circumstances.

The Board specifically requests "comment on whether a subsequent failure by the incumbent railroad within a specified time period, such as one year, following the termination of a prescribed reciprocal switching arrangement should result in a permanent reciprocal switching order." NPRM at 30. As explained above, forced switching orders under the Proposed Rule should be remedial in nature and must in all cases be based on an "actual necessity or compelling reason." A permanent switching order based on a single subsequent failure by a carrier generally would go well beyond what is necessary to remedy the identified inadequacy. The Board should retain flexibility to renew switching prescriptions if necessary based on current conditions, but it

should not craft a rule that would prejudge the need for such a far-reaching order in a whole category of cases.

Finally, the Board seeks comment on whether, instead of an automatic renewal for the same period as the initial order, the renewal should be for only one additional year. *Id.* If the Board declines to remove the automatic renewal provision, it should limit the automatic renewal to the period of the initial prescription or a single additional year, whichever is shorter. A shorter automatic renewal term would give the incumbent carrier more frequent opportunities to seek to terminate the prescription, which in turn would allow the Board to determine at more regular intervals whether a compelling need continues to support the switching prescription.

3. Process for termination of the switching prescription

The Proposed Rule provides that an incumbent may seek to terminate a switching prescription in the period between 180 and 120 days before the end of the prescription. NPRM at 43–44 (proposed 49 C.F.R. 1145.7(c)). AAR agrees that carriers should have the opportunity to request termination of a prescribed switching arrangement. The framework for that request depends on whether the Board provides for termination of switching orders pursuant to their terms (as AAR suggests above, *supra*, Part IV.H.2) or instead for automatic renewal (as in the Proposed Rule).

a. If switching orders terminate according to their terms unless renewed, then there is relatively less need to give structure to a termination petition. Rather, the incumbent carrier should simply be allowed to seek termination at any time there are materially changed circumstances, a standard generally consistent with agency and court practice that allows reopening of prior decisions. As noted above, a wide range of factors can affect an incumbent's service performance. If the incumbent has durably addressed the circumstances that led to the imposition of a switching order, and done so significantly earlier than anticipated at the time of

the original order, then it is appropriate for the Board to consider those changed facts and evaluate whether its intervention continues to be necessary. That is consistent with the principles of regulatory minimalism discussed above and consistent with the Board's objective in this proceeding to remedy service inadequacies.

In EP 628, involving Parts 1146 and 1147, the Board cautioned carriers against filing termination petitions "too hastily or prematurely." *Expedited Relief for Serv. Inadequacies*, 3 S.T.B. at 982. Within the framework of the Proposed Rule, that concern can be addressed by placing the burden of early termination squarely on the incumbent carrier. An incumbent that has not reliably resolved the issues causing its prior service shortcoming would face little prospect of carrying that burden and would thus have little incentive to prepare and file an early termination petition.

b. If, instead, the Board adopts a framework within which switching orders continue in perpetuity unless terminated, then the termination process is considerably more consequential. The Proposed Rule provides that the Board will grant a petition to terminate if the incumbent "demonstrates that, for a consecutive 24-week period prior to the filing of the petition to terminate, [its] service for similar traffic on average met the performance standard that provided the basis for the prescription." NPRM at 43 (proposed 49 C.F.R. 1145.7(b)). "This requirement includes a demonstration by the incumbent carrier that it consistently has been able to meet, over the most recent 24-week period, the performance standards for similar traffic to or from the relevant terminal area." *Id.* AAR agrees that a carrier should be able to obtain termination based on a showing that it is able to satisfy the relevant performance metric, but certain terms of the provision should be clarified or modified.

First, the 24-week term of improved performance is disproportionate to the 12-week period measured by the performance metrics. Particularly because a switch should be maintained only if the shipper continues to have a compelling need for it, it would be appropriate for the Board to harmonize the two periods of time and to order termination when the carrier demonstrates its performance for the same period of time as the shipper focused on in the original petition. (Under the refinement proposed above, *supra*, Part IV.F.1, the appropriate period for demonstrating improved performance would be at least 16 weeks.)

Second, confusion may arise over what constitutes "similar traffic" of the incumbent to be used for comparison. The Board explains that "'[s]imilar' traffic is defined as the broad category type (e.g., manifest traffic) to or from the terminal area that is affected by the prescription." NPRM at 30 (footnote omitted). "If a carrier has no such similar traffic, it may submit a comparison group of the same broad traffic type in the same geographic region." *Id.* at 30 n.38. The Board is correct to allow carriers to submit comparisons to broadly analogous traffic if they have no traffic that qualifies as "similar" under the rule. Rather than referring to "similar" traffic in the rule, the Board's intent may be better captured by simply making clear that the Board would consider the incumbent carrier's performance on any traffic that would cast light on the relevant question before the Board—*viz.*, whether the carrier has addressed the causes of the prior service shortcoming in such a way to assure adequate service for the traffic then subject to the switching prescription.

Third, the Proposed Rule is ambiguous about how the carrier's improved performance will be measured. The text of the rule says first that a termination petition will be granted if the carrier demonstrates that, "for a consecutive 24-week period *prior to the filing of the petition to terminate*," its service for similar traffic "*on average*" met "the performance *standard* [singular]

that provided the basis for the prescription." *Id.* at 43 (proposed 49 C.F.R. 1145.7(b)) (emphasis added). The Proposed Rule then says that this requirement "includes a demonstration" that the carrier "*consistently* has been able to meet, over *the most recent* 24-week period, the performance *standards* [plural] for similar traffic to or from the relevant terminal area." *Id.* (emphasis added).

Reading these two sentences together, three things are ambiguous: (1) what 24-week periods prior to the filing of a termination provision qualify under the rule—any 24-week period before the petition is filed or only the 24 weeks immediately preceding that filing; (2) whether the carrier's service performance is measured "on average" or whether the Board's assessment looks at whether the service was "consistently" adequate; and (3) whether the Board will look at the carrier's performance only with respect to the service metric that formed the basis for the switching prescription or instead with respect to multiple metrics. The Board should clarify that it will grant a termination petition if the carrier's performance for similar traffic, on average, satisfies the specific service metric that triggered the initial switching prescription during the 24-week period immediately prior to filing the petition.

c. The Proposed Rule contains various procedural provisions for considering termination provisions. AAR suggests two modifications that should assist the Board in ensuring full consideration of the issues and that will clarify the rule for parties to a termination proceeding. *First*, the period for filing a rebuttal to the shipper's reply is unnecessarily short—only seven days after the reply is filed. *Id.* at 44 (proposed 49 C.F.R. 1145.7(e)). The Board should allow carriers additional time so that they can adequately respond to a shipper's objections to termination. Certainly, such an extension of time could delay the Board's decision on termination. But in the meantime, the switching prescription will remain in effect, and an

incumbent carrier seeking a more prompt decision could choose to file early. *Second*, the Proposed Rule does not describe what would constitute "extraordinary circumstances" that could justify a 30-day automatic renewal while the Board considers a termination petition. *See id.* (proposed 49 C.F.R. 1145.7(f)). To promote greater certainty for parties, the Board should explain the circumstances under which it would extend its timeframe for deciding a pending request for termination.

I. Data Collection and Reporting

The Board's proposal outlines an extensive data collection, reporting, and response regime to accompany the Proposed Rule. NPRM at 31–32. The Board also invites parties to comment on a number of distinct issues related to this aspect of the proposal. At this stage, AAR is unable to offer detailed proposals or recommendations on many of those issues. AAR's comments on those subjects are necessarily preliminary, because the details of the Board's data-collection proposal are sparse, many of the issues are highly technical in nature, and AAR has not had sufficient time to understand the types of data and particular carrier practices implicated by the Proposed Rule. Given those considerations, and the special importance of clarity and precision when these data will be used in formal proceedings, AAR believes that it would be beneficial for the Board to promptly convene one or more technical working groups with representatives from all stakeholder groups to work through detailed issues regarding the data collection and reporting regime. A successful technical working group process would improve the usefulness of the data to the Board and to shippers, while reducing the associated burdens on individual carriers. AAR also provides comments below on the Board's Paperwork Reduction Act statement.

1. The Board should convene a technical working group and clarify the data collection and reporting provisions

In some respects, the Board's data collection and reporting proposal resembles an outgrowth of the reporting the Board adopted in EP 770 (Sub-No. 1), which was temporarily ordered on an emergency basis. AAR agrees with the Board that reporting of service data by individual carriers is "helpful to understanding conditions on the rail network." NPRM at 31. As the Board recognizes, however, those data are not standardized across carriers and do not necessarily align with the service metrics specifically defined by the Board in the Proposed Rule. *See, e.g.*, *id.* at 14 (recognizing that "the carriers refer to the TPC indicator by different names and measure performance in different ways"). Thus, the Proposed Rule is not merely an extension of existing reporting by individual carriers—and, in any event, the reporting requirements of EP 770 were themselves never subject to notice-and-comment rulemaking. AAR understands the Board's desire to move expeditiously. But as the Board itself recognizes, the new "data access and standardization provisions . . . have no equivalent in the previous proposal," and the Board has not proposed to afford the same level of process that informed prior similar orders concerning *permanent* reporting regimes, such as in EP 724. *Id.* at 5.[16]

The Proposed Rule's data requirement is contained in one paragraph (proposed 49 C.F.R. 1145.8(b)) and the Board devotes less than two pages to describing the new requirements. That

[16] *See U.S. Rail Serv. Issues—Data Collection*, EP 724 (Sub-No. 3) (STB served Oct. 8, 2014) (ordering interim data reporting); *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Dec. 30, 2014) (proposing permanent data reporting); *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Nov. 9, 2015) (waiving ex parte rules to allow Board staff to hold meetings to develop a more complete record with regard to technical issues in the proceeding); *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Apr. 29, 2016), corrected, (STB served May 13, 2016) (proposing revisions to proposed rule based on comments and technical meetings); *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Nov. 30, 2016) (adopting final rule).

level of detail contrasts with other, detailed reporting proposals and regulations that the Board has issued in the past, such as in EP 724. Here, for example, the Board has not provided specifics for public comment, stating instead that reporting will be "in a manner and form determined by the Board." *Id.* at 44 (proposed 49 C.F.R. 1145.8(b)). The Board should not wait until after adopting a rule to provide carriers with details on how it will operate. Rather, it should explain now—as it did in EP 724—the details of the reporting and how it proposes for reporting to function in practice. What will the reporting period be? How will the carriers perform their reporting? What will the Board do with the reported data? Such details (mundane as they may seem) were provided in EP 724, the public provided comment on them, and the Board modified its original proposal.

Because the Board's proposed data collection and reporting regime is different from (and not merely an extension of) the temporary reporting by carriers under EP 770, there are a number of technical details and considerations that need to be worked through in order for the Board to order permanent data collection and reporting that is effective, robust, and targeted toward the appropriate criteria. As noted, reporting by individual carriers under EP 770 is not standardized. Not only do individual carriers refer to the relevant service metrics by different names, they also measure performance in different ways. And many or all of these are distinct from how the Board has proposed to define the relevant service metrics in the Proposed Rule. Such heterogeneity may be acceptable for an emergent, temporary reporting regime, but it should be rationalized into something uniform if the Board is to adopt a permanent reporting obligation and rely on data for triggering a right to petition for relief under the Proposed Rule.

With respect to OETA, for example, AAR recommends that the Board harmonize the definition of OETA with that used in the Board's demurrage regulations. *See supra*,

Part IV.D.3(b). Likewise, there are other relevant technical considerations for precisely how OETA should be defined and measured: The Proposed Rule does not explain how certain types of trips or situations, such as cross-border moves, should be addressed. Similarly, although AAR recommends that the Board gain experience with the new proposal before extending the metric-based rule to interline traffic, if the Board does not proceed incrementally, then it would need to consider whether the relevant measuring points may be different for the delivering and receiving carriers in light of the detailed mechanics, including inspections and acknowledgments of receipt, that necessarily go into an interchange of traffic between two carriers. It would be an undesirable and unintended outcome, for example, for the Board to adopt a service metric definition that disrupts efficient industry practices for interchange of traffic.

There also are unanswered questions about applying the Proposed Rule to unit trains. The Board correctly recognizes that important differences exist between unit trains and manifest traffic with respect to the appropriate metrics for measuring service. NPRM at 16 & n.24. This is particularly true in light of the significant role played by an individual customer for unit train service. Moreover, not all carriers include unit train traffic for certain EP 770 metrics, making the existing data for that type of traffic less robust.

The Board proposes to apply some of the metrics to empty private and shipper-leased railcars. *Id.* at 17, 18–19. In addition to broader policy issues about how to evaluate a service inadequacy involving empty cars, *see supra*, Part IV.D.4(b), there are technical issues with respect to how service metrics would apply to empty cars. For example, consistent with the industry standard for disposition of private equipment, the individual owner or lessee of a car can provide specific disposition instructions; and those instructions may impact performance reported under the proposed service metrics. Similarly, reported performance may be affected if

an empty car is bad-ordered and subject to mechanical disposition. Those and other such considerations would benefit from technical consideration by a working group to inform the Board.

Finally, the Board requests comment on the proposed ISP metric as a measure of first-mile/last-mile service, similar to what the Board sought comment on in EP 767. NPRM at 32. As discussed above, the Board should remove the ISP metric from the Proposed Rule. *See supra*, Part IV.D.5. But if the Board retains it, then this metric presents significant technical complexity related to how carriers provide local service, and it would benefit from further consideration and study in a technical working group setting.

To work through all of the foregoing issues (and many others), the Board should convene one or more technical working groups. Doing so will allow Board staff and interested parties to better understand the issues, work out necessary details, and build a more complete record of the technical issues for the Board to consider as it finalizes a rule. A thoughtful technical process would also avoid the unintended consequences of adopting a regulation that freezes data reporting formats at one point in time, in a manner that is static and inflexible, with the potential to stifle innovation in the industry.

2. Paperwork Reduction Act

Under the Paperwork Reduction Act, the "Board seeks comments about the impact of the proposed rules regarding: (1) whether the collection of information, as set forth in the proposed rule and further described in Appendix C, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of

information technology, when appropriate." NPRM at 33. The Board estimates that this "would require an initial hourly burden for the initial programing as well as the weekly report output and submission," initially "an estimated cumulative total one-time hour burden of 480 hours across all six Class I railroads," together with "an annual hour burden of approximately 2,564 hours" for generating weekly reports and "approximately 800 hours" for petitions to initiate and terminate. *Id.* The Board also estimates that requests by individual shippers or receivers would "require approximately 36 hours." *Id.*

The Board does not specify the basis for these estimates or their underlying assumptions. Individual carriers likely have the best information about the recordkeeping, reporting, and response burdens in light of their own systems. But at a broad level, AAR respectfully submits that these estimates *significantly* underestimate the considerable burden of implementing the Proposed Rule, perhaps by orders of magnitude. For example, it seems implausible that all requests for data, by all shippers, for an entire year, to all Class I carriers in the United States would require only 36 hours of work.

Much of the initial burden of making the technical modifications to the carriers' individual systems for collecting, processing, and making available the required information is unavoidable. But AAR's suggestion above of convening a technical working group has considerable potential to ease the initial and ongoing burden.

J. Timing, Implementation, Phase-In, and Effective Dates

The Proposed Rule does not propose a specific effective date for the Proposed Rule's requirements. The Board should carefully consider timing issues before finalizing any rule. The Proposed Rule creates a new structure for considering requests for switching prescriptions, with new service metrics, affirmative defenses, and extensive data requirements. The Board should have due regard for carriers' need for time to adapt to a new rule and to implement its provisions.

For carriers, a few issues are of particular note. *First*, because the Proposed Rule's service metrics are new, railroads need time to modify their systems to conform to the new standards and to build new systems to support their obligations. The appropriate amount of time will depend on the Board's final decisions on issues discussed above. For example, carriers have experience measuring OETAs under the demurrage rule, but lack similar experience with the definition of OETA in the Proposed Rule. Similarly, applying the Proposed Rule to interline traffic would raise significant complications that would not arise if the Board decided to proceed incrementally, starting first with single-line traffic. However the Board resolves those and other issues, some amount of time will be needed for carriers to effectively and efficiently implement a new rule of this scope.

Second, in light of policy and fairness concerns, the Board should not enter a switching order based on a carrier's performance before the date on which any final rule is promulgated.

Third, as discussed above, the Board's proposed data collection and reporting requirements differ materially from EP 770. Carriers will need time to develop the necessary systems and processes for complying with the data provisions. The Board should take those needs into account in determining the timing of those provisions' implementation. The technical working group proposed above may be able to provide insight on an appropriate timeline.

V. CONCLUSION

AAR appreciates the opportunity to provide comments on this important matter, and it looks forward to continuing to support the Board's process as the Board evaluates input from all stakeholders. If the Board decides to proceed to a final rule, AAR urges that the final rule conform with the changes discussed above.

Dated: November 7, 2023

Respectfully Submitted,

/s/ *Benjamin J. Horwich*

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APPENDIX — RECURRING PRACTICAL AND POLICY CONSIDERATIONS

Forced switching ultimately poses questions about tradeoffs between costs and benefits because it may often be considered in circumstances that could benefit a specific shipper but threaten greater harm to a broader set of interests, including other shippers. This Appendix summarizes some of those tradeoffs, with references to comments in prior proceedings that have discussed these issues in greater detail.

* * *

Switches are complex and involve direct costs such as crew time, locomotive time, track time, fuel usage, and planning costs, as well as safety risks. Indirect costs of forced switching can include inefficient routing, increased congestion, and environmental costs such as increased use of fuel and emissions. And forced switching can *create* service issues: Congestion means train delays, and more touches of railcars mean a higher risk of service failure. Such impacts typically reverberate through the network, creating new service issues where none may have existed. It can be nearly impossible to trace the impact through the network or predict it in advance. Forced switching also can depress incentives for future investment, which in turn negatively impacts consumers through decreased service quality, operational inefficiencies, and safety risks. Expanding the availability of forced switching options for shippers can also undermine the ability of the incumbent railroad to engage in differential pricing, which the agency has recognized is essential for railroads to recover the costs of their entire networks and maintain financial viability.

A. Forced-Access Proceedings Require Attentiveness to Tradeoffs Between Costs and Benefits

"[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan v. EPA*, 576 U.S. 743, 753 (2015). This follows

from the bedrock principle that "administrative agencies are required to engage in reasoned decisionmaking." *Id.* at 750 (quotation marks omitted). Doing so requires considering each "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency "must consider costs because reasoned decisionmaking requires assessing whether a proposed action would do more good than harm." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). Every agency choice "requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009).

In the context of forced switching, the Board itself has acknowledged its general responsibility to evaluate the benefits and burdens of proposed regulations, as well as the need for data-driven analysis to inform its rulemaking. In 2012, in response to NITL's petition, the Board determined that it lacked sufficient information to evaluate the impact that an increase in forced switching would have on industry stakeholders. As the Board explained, it was not able to "fully gauge [the] potential impact" of the NITL proposal. *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, EP 711 (STB served July 25, 2012) ("EP 711 Notice") at 2. According to the Board, "additional information is needed before we can determine how to proceed." *Id.*; *see* Opening Comments of AAR, EP 711 (Sub-No. 1) (filed Oct. 26, 2016) ("AAR 711-1 Opening Comments") at 29–30. The advantages and disadvantages of a contemplated regulation may sometimes be "difficult to quantify"—but even so, there should at least be "a reasoned determination that the benefits of the intended regulation justify its costs," all of which requires a fair assessment of a proposed rule's impact. Exec. Order No. 12866 § 1(b)(6); *see*

Supplemental Comments of AAR, EP 711 (Sub-No. 1) (filed Feb. 14, 2022) ("AAR 711-1 Supplemental Comments") at 33.

The need for reasoned evaluation of costs and benefits cannot be fully answered by the prospect of "case-by-case" decisions whether to impose a forced switching order. The Supreme Court in *Michigan* rejected such an approach: "EPA argues that it need not consider cost when first considering *whether* to regulate power plants because it can consider cost later when deciding *how much* to regulate them. . . . Cost may become relevant again at a later stage of the regulatory process, but that possibility does not establish its irrelevance at *this* stage." *Michigan*, 576 U.S. at 756. Accordingly, the Board cannot take a case-by-case approach to considering the cumulative effect of a rule that will influence not only the Board's own decisions but also informal negotiation among carriers and shippers outside of formal Board proceedings.

B. Forced Switching Discourages Investment

The railroad industry is a mature industry in which stakeholders have had decades to establish working commercial arrangements, including voluntary reciprocal switching arrangements and other modes of multi-carrier access where such mechanisms are economically and operationally rational. AAR 711-1 Opening Comments at 20–24. Railroads and shippers alike have relied—to an extraordinary degree—on the existing principles governing forced switching. From 1980 to 2022, freight railroads invested approximately $780 billion in their networks. That massive deployment of private capital was made on an understanding of the projected returns that could be made on those investments, under the current stable and predictable regulatory framework. A significant departure from the principles that have guided railroads' past investment jeopardizes railroads' future investment.

The Board is bound by statutory policy to examine how any proposed forced switching rule will support the willingness and ability of railroads to make necessary investments. *See* 49

U.S.C. § 10704(a)(2) (defining "adequate" revenues as those sufficient "to support prudent capital outlays," "permit the raising of needed equity capital," and cover "the infrastructure and investment needed to meet the present and future demand for rail services"); *cf. Ass'n of Am. R.Rs. v. STB*, 237 F.3d 676 (D.C. Cir. 2001) (remanding rulemaking to the Board because it had failed to consider statutory policy). Against this backdrop is the commonsense observation that "[c]ompelling . . . firms to share [access to the assets that are] the source of their advantage . . . may lessen the incentive . . . to invest in those economically beneficial facilities." *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004). A sweeping forced switching regime that diverged significantly from the current stable regulatory framework would seriously dampen future railroad investment in at least three distinct ways—to the detriment of everyone who relies on those investments, including shippers, passenger railroads, and freight railroads themselves. *See* AAR 711-1 Supplemental Comments at 51–52.

First, uncertainty about when and how a new regulation will be applied will deter potential investors, which will increase the industry's cost of capital and limit prospective investment. AAR 711-1 Supplemental Comments, Verified Statement and Written Testimony of Robert Shapiro & Luke Stuttgen (filed Feb. 14, 2022) ("Shapiro & Stuttgen 711-1 V.S.") at 3–4; AAR 711-1 Supplemental Comments, Verified Statement and Written Testimony of Jonathan M. Orszag & Yair Eilat (filed Feb. 14, 2022) ("Orszag & Eilat 711-1 V.S.") ¶¶ 55, 62.

Second, expansion of forced switching beyond the circumstances where it is currently authorized would directly reduce investment by depressing returns on equipment, facilities, and operations subject to forced access. In high fixed-cost industries, higher prices are often necessary to incentivize market participants to invest in ways that ultimately benefit consumers through increased service quality, operational efficiencies, and reduction in safety risks. *See*

Orszag & Eilat 711-1 V.S. ¶¶ 9, 19, 48–49. If widespread forced switching is accompanied by reduction of rates below market for shippers using certain facilities, then railroads will not be able to reliably recoup their investments and justify new or upgraded infrastructure for underserved locations. *Id.* ¶¶ 12–17, 49, 54. If the Board were to fundamentally depart from existing policy, the predictable result, over time, would be that the rail network would suffer because railroads facing reduced returns on investment have weaker incentives and capacity to build out and improve their facilities. Shapiro & Stuttgen 711-1 V.S. at 4–5; AAR 711-1 Supplemental Comments, Verified Statement and Written Testimony of Mark Fagan (filed Feb. 14, 2022) ("Fagan 711-1 V.S.") at 10–11.

Third, the congestion and inefficient use of resources that will result from forced access at lower rates will slow railroad operations, increase costs, and erode profits across the network. Orszag & Eilat 711-1 V.S. ¶¶ 54–65. If those effects were widespread, they would harm the industry as a whole and undermine its ability to compete with other modes of transportation, such as trucking. Shapiro & Stuttgen 711-1 V.S. at 5.

C. Forced Switching Has Operational Disadvantages, Risks, and Inefficiencies

Single-line railroad operations are complex to begin with. Layering on switching operations adds complexity, requiring more touches of railcars and in turn creating a higher risk of service failure. That reflects the basic principle that every additional link in a supply chain increases the risk that the entire interconnected supply chain will fail. In the railroad industry, such a failure can affect other parts of the network in the form of increased congestion, transit time, and inefficient routing. Forced switching orders can thus have a range of operational spillover effects. Those spillover effects may or may not be felt by the particular shippers that may benefit from switching—but they would certainly be felt by other shippers that rely on the network and by passenger rail users as well.

1. Forced switching increases touches of railcars, thus increasing operational burdens

AAR has previously explained that the rail industry has made service and productivity improvements since the 1980s through rationalization of rail networks and reduction of interchanges, switches, and car handlings. *See* Comments of AAR, EP 711, Verified Statement of William J. Rennicke (filed Mar. 1, 2013) ("Rennicke 711 Op. V.S."); AAR 711-1 Opening Comments, Verified Statement of William J. Rennicke (filed Oct. 26, 2016) ("Rennicke 711-1 Op. V.S."); AAR 711-1 Opening Comments at 34–37; *see also id.* at 35 (summarizing member railroad comments to the same effect). Forced switching requires abandoning a relatively streamlined on-line switching operation, and replacing it with two, three, or even more discrete series of movements. Rennicke 711-1 Op. V.S. at 4–12; *see generally* AAR 711-1 Supplemental Comments at 38–39. Diagrams of these complicated movements appear in the cited materials, and an animation of those operations is available at https://youtu.be/watch?v=pH0oafZKiDY.

Each touchpoint of a forced switch comes with operational costs and risks of a service failure. Rennicke 711-1 Op. V.S. at 4–16. And the harms are greater than they might appear at first: Although safety is every railroad's first priority, it is impossible to eliminate all risks of accidents and worker casualties. *See* Comments of SMART-TD, EP 711 (Sub-No. 1) (filed Oct. 26, 2016) ("SMART-TD 711-1 Comments") at 5 (noting concerns of the largest railroad operating union about the prior proposed rule's "potential to [a]ffect safety, allow crews to work in unfamiliar territories, and disrupt collective bargaining agreements"). Forced switching will increase the yard activity hours needed for a shipment, and that work entails relatively greater risk of worker injury or casualty than line-haul activity. Orszag & Eilat 711-1 V.S. ¶ 54 & n.29.

The environment will also be harmed by increased operational complexity resulting from forced switching: Decreased efficiency is almost certain to increase fuel consumption and greenhouse gas emissions. *Id.* ¶¶ 54, 60–65.

2. Switching adds complexity, risk, and cost to an already-complicated network

The increased operational costs and risk of a service failure in a single forced switch have far-reaching implications for a network industry like the railroad industry. *See generally* AAR 711-1 Supplemental Comments at 39–40, 48–50. Because railroads are a coordinated network, they are effectively a supply chain operating within other supply chains linking raw materials and finished goods. That means that the impact of any disruption or inefficiency in service on rail compounds and reverberates throughout other supply chains. Fagan 711-1 V.S. at 8–9. An individual shipper's benefits gained through forced access can generate widespread, but dispersed, negative externalities throughout the network borne by all users of the network. Orszag & Eilat 711-1 V.S. ¶¶ 52, 65; Fagan 711-1 V.S. at 6–11.

Forced switching creates many challenges. *First*, a forced switch creates a new node and link to be managed, introducing complexity and risk not only for the railroads, but also for the entirety of any interconnected supply chain. The added complexity manifests in the needed coordination of people, equipment, infrastructure, and information. Adding processes introduces an additional degree of potential failure for the entire supply chain. Fagan 711-1 V.S. at 8–9.

Second, by creating a greater need for coordination, any time switching is imposed where the participants have not already voluntarily undertaken a switch increases managerial and operational costs. To mitigate the downside risk of less-than-perfect coordination, managers create "safety stock"—which for railroads means spare crews, power, terminal, and line of road

capacity. But all of that adds cost, which must be accounted for in considering whether forced switching is actually desirable in a particular instance. *Id.* at 9–10.

Third, increasing forced switching reduces resiliency and agility. Resiliency requires redundancies—*e.g.,* the "safety stock" mentioned above, collaboration of all supply chain participants, rapid response and recovery, and end-to-end data-driven control systems. All those things require investment in infrastructure and operations to accommodate unexpected shocks, yet a forced switching order reduces the incentive for such investment. Agility requires the ability to respond and adapt quickly to unexpected events, achieved through collaboration. But there is little incentive for the railroads to engage in that behavior due to differences in priority for servicing a particular customer's traffic on any given day. Fagan 711-1 V.S. at 10–11.

3. Operational complexity adds costs, which can produce further undesirable outcomes

The complexities of switching demand expenditures in the form of crew time, locomotive time, track time, and fuel usage, as well as technical costs and planning costs—all of which are triggered by a shipper's decision to enforce a switching option. *See, e.g.*, Orszag & Eilat 711-1 V.S. ¶¶ 51–68. These costs are real, but it will be difficult or impossible to identify who bears the true burdens of forced switching. *See* AAR 711-1 Supplemental Comments at 52–53. It may or may not be that railroads absorb most of these costs; railroads may be forced to focus rate increases on other shippers who do not benefit from forced switching in order to defray the shortfall. The precise burden on workers is uncertain, but increases in forced switching seem likely to disadvantage them. *See* Comments of Brotherhood of Maintenance of Way Employees, EP 711 (Sub-No. 1) (filed Oct. 26, 2016) at 3 ("[I]t is the experience of the Unions that structural and regulatory changes to the industry and financial losses for the railroads have adverse consequences for their members."); SMART-TD 711-1 Comments at 5 (explaining that the prior

proposed rule "could have a chilling ripple effect on areas affecting labor, including the wages, rules and working conditions of employees" because "[a]ny reduction to railroads' revenue will directly impact employees' wages and benefits"). And to the extent increased costs put upward pressure on rail rates, forced switching can potentially divert traffic to trucking, resulting in highway congestion and still more greenhouse gas emissions. Orszag & Eilat 711-1 V.S. ¶¶ 54, 60–65.

D. Overly Broad Imposition of Forced Switching Can Undermine the Railroad Industry's Long-Run Economic Health by Limiting Demand-Based Differential Pricing

The Board must remain attentive to the large-scale economic implications of any forced switching proposal. Those implications vary depending on the scope and implementation of any particular proposal, but they cannot be ignored.

In particular, the ICC and the Board "have consistently recognized that differential pricing is crucial to the viability of the industry." *Intramodal Rail Competition—Proportional Rates*, 1990 WL 287993, at *2 (ICC April 17, 1990); *see also* AAR 711-1 Opening Comments at 47–49. The agency has explained time and again why this is so:

> We start with the basic principle that rail carriers must differentially price their services. As explained more fully in *Coal Rate Guidelines*, there is a large amount of common (unattributable) costs inherent in the railroad industry cost structure, and the mix of competitive and captive traffic handled by railroads prevents a carrier from being able to recover a pro rata portion of those common costs from all traffic. Therefore, railroads must be able to price their services differentially so as to recover a greater percentage of their common costs from traffic with a greater degree of captivity (i.e., less demand elasticity).

Amstar Corp. v. ATSF, No. 37478, 1995 WL 569701, at *4 (ICC Sept. 15, 1995) (internal citation omitted). "[T]he core regulatory principle in the rail industry is that a railroad must be able to engage in some form of demand-based differential pricing to have the opportunity to earn

adequate revenues." *See Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), 2006 WL 3087168, at *15 (STB served Oct. 30, 2006).

The federal courts agree. *See, e.g.*, *Union Pac. R.R. Co. v. United States*, 637 F.2d 764, 767 n.2 (10th Cir. 1981) (Pursuant to the 4-R Act, "the railroads may propose a rate which includes a price increment over and above fully allocated costs in order to assist them [sic] attain adequate revenue levels. This method of 'differential pricing' has been judicially approved as a valid means of achieving the ultimate goal of the 4 R Act which is to financially regenerate the nation's railroads."); *Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124–125 (2d Cir. 1983) (explaining that "Congress in the Staggers Act recognized that railroads must engage in 'differential pricing'"); *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1106 (8th Cir. 1999) (explaining that the "Board has recognized that an important part of achieving revenue adequacy is differential pricing"); *Union Pac. R.R. Co. v. STB*, 628 F.3d 597, 600 (D.C. Cir. 2010) (by "statute, rail carriers are authorized to engage in a certain amount of demand-based differential pricing in order to earn 'adequate revenues'").

When initiating EP 711, the Board recognized that a significant expansion of forced switching would reduce or eliminate the ability of the incumbent railroad to engage in differential pricing, which would hinder its ability to sustain financial viability:

> [T]his Board must consider the impact of the proposal on the financial health of the railroad industry. To remain financially sound, carriers must be allowed to engage in "demand-based differential pricing"—that is, in order to recover the substantial joint and common costs of its network, a railroad must be able and permitted to charge different customers different prices based on their different levels of demand for transportation services. If a railroad is unable to recover these joint and common costs, it will not be able to earn adequate revenues.

EP 711 Notice at 7; *cf.* Joint Brief for Respondents Interstate Commerce Commission and United States of America, *Midtec Paper Corp. v. ICC*, No. 87-1032, at 17 n.11 (D.C. Cir.) (filed Mar. 14, 1988) ("The repercussions of an open-ended use of forced switching . . . should not be

underestimated. The majority of the shippers in this country that receive rail service are served directly by a single rail carrier.").

Basic economic principles suggest that where an efficient reciprocal switching arrangement can exist, the carriers involved are very likely to have voluntarily established one already. Orszag & Eilat 711-1 V.S. ¶ 31. Thus, the operations affected by a forced switching rule are ones where a commercially advantageous agreement is relatively *unlikely* to exist. AAR 711-1 Supplemental Comments at 70–71.

BEFORE THE

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 711 (Sub-No. 2)

Reciprocal Switching for Inadequate Service

Verified Statement of

Jonathan M. Orszag and Yair Eilat

November 7, 2023

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I. QUALIFICATIONS AND ASSIGNMENT

A. QUALIFICATIONS

1. Jonathan M. Orszag

1. Jonathan Orszag is a Senior Managing Director and member of the Executive Committee of Compass Lexecon, LLC, an economic consulting firm. His services have been retained by a variety of public-sector entities and private-sector firms ranging from small businesses to Fortune 500 companies. These engagements have involved a wide array of industries, from entertainment to the transportation and telecommunications sectors. He has provided testimony to the U.S. Congress, U.S. courts, the European Court of First Instance, the Federal Communications Commission, and other domestic and foreign regulatory bodies on a range of issues, including competition policy, industry structure, and fiscal policy.

2. Previously, he served as the Assistant to the U.S. Secretary of Commerce and Director of the Office of Policy and Strategic Planning and as an Economic Policy Advisor on President Clinton's National Economic Council. For his work at the White House, he was presented the Corporation for Enterprise Development's 1999 leadership award for "forging innovative public policies to expand economic opportunity in America." He has taught at both the University of Southern California and UCLA; most recently, Mr. Orszag taught a class on antitrust and merger analysis at UCLA Law School. He received an M.Sc. in economic and social history from Oxford University, which he attended as a Marshall Scholar. He graduated *summa cum laude* in economics from Princeton University, was elected to Phi Beta Kappa, and was named to the *USA Today* All-USA College Academic Team. In 2004, he was named by the Global Competition Review as one of "the world's 40 brightest young antitrust lawyers and economists" in its "40 under 40" survey. In 2006, the Global Competition Review named Mr. Orszag as one of the

world's "Best Young Competition Economists." More recently, in multiple years, he has been named as one of the most highly regarded competition economists in the world by *Who's Who Legal*. Mr. Orszag has testified or consulted on matters of antitrust and competition policy, liability, and damages in many cases covering a range of industries, including construction, entertainment, computer hardware, airlines, pay television, tobacco, medical devices, healthcare, and credit cards. Mr. Orszag's curriculum vitae is attached as Exhibit A.

2. Yair Eilat

3. Dr. Yair Eilat is a Senior Consultant with Compass Lexecon and has worked for a decade and a half as an economic consultant. He has consulted for many Fortune 500 companies and government agencies, in the U.S. and worldwide, on various antitrust, competition, and policy matters. He specializes in applying theoretical modeling and econometric analysis to markets in many industries, such as high-technology, finance, media, energy, telecommunications, and transportation. He submitted expert testimony to several government agencies, including the DOJ, FTC, SEC, and the EC. Dr. Eilat served as the Chief Economist and Deputy Director General of the Israel Antitrust Authority.

4. Dr. Eilat also worked as a researcher at the Harvard Institute for International Development and the Kennedy School of Government at Harvard University, and as an economic advisor to the Economics Committee and State Audit Committee of the Israeli parliament. Dr. Eilat has written policy reports and published in academic journals in the fields of industrial organization and economic development and has taught at several academic institutes. He holds a PhD in economics from Harvard University and a B.A. in Law and Economics from the Hebrew University, Jerusalem. Yair Eilat's curriculum vitae is attached as Exhibit B.

B. ASSIGNMENT

5. We were previously asked by counsel for the Association of American Railroads (AAR) to comment, from an economic policy perspective, on the Surface Transportation Board's (Board) *Petition for Rulemaking to Adopt Revised Competitive Switching Rules—Notice of Proposed Rulemaking* (July 27, 2016) and *Reciprocal Switching—Notice of Proposed Hearing* (Dec. 28, 2021). In particular, we were asked to opine on the question of whether the reciprocal switching rule under consideration at that time properly addressed an identified market deficiency and whether it was likely to enhance efficiency and benefit the public interest. On February 14, 2022, we submitted testimony to the Board in which we explained that the regulatory intervention proposed at that time did not identify a market failure and therefore could not properly address such a failing ("Orszag Eilat Proposed Rulemaking Testimony"). We also explained that forced switching is complicated and costly and could at best create the illusion of unleashing competitive forces. A copy of the Orszag Eilat Proposed Rulemaking Testimony is attached as Exhibit C.

6. We understand that the Board has determined to close the prior proceeding in which we submitted testimony and not proceed with that proposed rule. We also understand that the Board has proposed a new rule for consideration (the "Proposed Rule").[1] We have been asked by counsel for the AAR to offer our views on certain economic issues raised by the Proposed Rule.

7. Consistent with our prior testimony, we believe the Board was correct not to proceed with the prior proposal. As for the new Proposed Rule, our overall conclusion is that it avoids some of the deficiencies of the prior proposal, in particular, by pointing to service-quality issues

[1] *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (STB served Sept. 7, 2023).

that the Board wants to address and by suggesting a specific intervention that may address service quality. The Proposed Rule still suffers from important flaws from an economic perspective, although we make several suggestions regarding implementation that could reduce the uncertainties and inefficiencies that could arise under the Proposed Rule.

8. We address aspects of the Proposed Rule from an economic perspective, focusing on the issues we understand the Board wants to address, and we discuss how to identify if those issues exist, and how appropriately to remedy them. We focus on the need for good regulation to balance the problem to be addressed against the appropriateness of the remedy and any unintended consequences that might flow from the remedy.

II. SUMMARY OF CONCLUSIONS

9. Our main conclusions are the following:

- The first step in any regulatory process is identifying and diagnosing a problem that needs to be addressed. This is necessary for determining that government intervention should replace market forces and for tailoring the proper remedy. In the railroad industry, in which demand predictions are crucial for planning future capacity, market signals are especially important for planning and investment decisions, as well as for entry and exit decisions. The potential risks associated with any regulation are further exacerbated because railways are a network industry and a misplaced effort to benefit one customer may create inefficiencies and reduce investment that would negatively affect all customers. When market forces fail, regulatory intervention may be necessary, but those should be done only when the benefits of the regulation exceed its costs and if the issue is not already addressed by current regulation. The design of any regulatory intervention

must put substantial weight on minimizing distortions and avoiding unintended consequences. (Section III.)

- The Proposed Rule suggests that the recent quality of railroad services has been inadequate and suggests a form of quality regulation. That premise is difficult for us to evaluate on the data provided by the Board, and the Board does not explain which market factors give rise to this situation. Regardless of the answers to those threshold questions, if switching is forced in cases where a railroad was not interested in it, then this is a type of regulatory intervention. Regulatory interventions that affect service level choices have downsides and create risks of unintended consequences, because such interventions change the tradeoffs between price and quality that would otherwise exist in the free market. This may be inefficient if it moves some shippers away from rail to other modes of transportation. Such regulation also creates uncertainty, which depresses investment. In addition, we observe that even if some shippers prefer higher quality service at higher prices, these shippers appear to have the option to enter contracts that guarantee higher quality and provide remedies. (Section IV.A.)

- Of the three quality measures that could lead to forced switching according to the proposed policy—original estimated time of arrival, transit time, and industry spot-and-pull—a connection between the "violation" and the regulatory intervention is clearly lacking for industry spot-and-pull: We fail to see how forcing a railroad to hand over the line haul to another railroad relates to a performance measure that is not at the line-haul portion of the service. Even for the other measures, the Proposed Rule's current structure, without modification, may lead to imposing a sanction that is not purely a corrective measure. The Board should therefore ask in particular proceedings under the

Proposed Rule whether and how the proposed relief would actually improve the quality of the service to the shipper; cases in which switching has not happened by voluntary agreement require an explanation for why switching is indeed the operationally and economically efficient outcome. The Board should also be mindful that even under its policy, actual switching may not occur in practice, and shippers could engage in inefficient rent-seeking behavior under the Proposed Rule. (Section IV.B.)

- Forced access is very rare in any industry. Forced switching is more complicated than forced access in other industries, as it not only requires a firm to allow access to its assets, but it also requires the asset owner to physically participate in an ongoing complex operation in which it has not otherwise volunteered to participate. Switching involves direct expenses such as crew time, locomotive time, track time, and fuel usage, as well as technical costs and planning costs. Switching entails safety risks and may also entail environmental costs. These costs are not necessarily isolated to particular locations or experienced by the shipper that requests switching. Without careful planning, a change at one location can have consequences in multiple other locations and lead to compounding effects that create risk of widespread service failures. (Section V.A.)

- An efficient regulatory intervention should correspond closely to the violation, and the degree of the intervention should generally increase with the degree of the violation. The framework of the Proposed Rule presents challenges for following those principles, because the intervention proposed is essentially all-or-none. These issues are especially problematic if the metrics are based on a "noisy" measure that fluctuates over time for exogenous reasons beyond the railroad's control. That situation could prompt extreme and inefficient cautiousness by the regulated party. We therefore recommend that the

Board leave itself more latitude to consider all the circumstances of a particular case before finding a violation and fashioning a remedy and should come up with the least intrusive intervention that would be sufficient to address the magnitude of the service inadequacy. The Board should approach remedies incrementally, it should allow time for self-correction, and the initial switching order should be relatively brief in duration. (Section V.B.)

- The Board's approach to setting proposed metric thresholds is to calculate systemwide averages of performance metrics and then set service thresholds for individual lanes based on these averages. But the Proposed Rule's operation will depend on the distribution behind those averages. Formulating rules without such information creates a risk that those rules will not be optimal. The Board should consider obtaining information on the full distribution of performance metrics across lanes as it refines the Proposed Rule. And the Board should in any case be especially attentive to the facts and circumstances of each case brought under the Proposed Rule. (Section VI.A.)

- Fluctuations over time in the lane may also be informative. If fairly wide fluctuations are common, the fact that a lane's performance temporarily drops below the metric may reflect natural variation and this may lead to "false positives." The Board should therefore consider information regarding the performance metrics for each lane over time. This is another reason for the Board to be attentive to the circumstances of each case brought under the Proposed Rule. (Section VI.B.)

III. REGULATORY OVERVIEW

10. The first step in any regulatory process is identifying and diagnosing a problem that needs to be addressed.[2] From an economic perspective, this is necessary for two reasons. **First**, identifying and diagnosing the problem is necessary to determine that government intervention is needed in the first place. It is widely accepted that well-functioning market forces are the best way to ensure the most efficient allocation of an economy's resources and that intervention in market operation is warranted only when it assists rather than hinders market forces.[3]

11. In the railroad industry, in which demand predictions are crucial for planning future capacity, market signals are especially important for planning and investment decisions, as well as for entry and exit decisions. The potential risks associated with any regulation are further exacerbated because railways are a network industry. In such industries, service to one customer affects service to other customers, with the result that a misplaced effort to benefit one customer may create inefficiencies and reduce investment that would negatively affect all customers, in a manner that the losses to all customers could far exceed the benefit to the one customer.[4]

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2 *See* Supplemental Comments of AAR, *Reciprocal Switching*, EP 711 (Sub-No. 1), Verified Statement and Written Testimony of Jonathan M. Orszag & Yair Eilat, at 8–17 (filed Feb. 14, 2022) ("Orszag & Eilat 711-1 V.S."). Carlton and Perloff (2004) identify certain cases where regulation is unnecessary or harmful. One is that "firms have an incentive to develop a new product, make a new discovery, or obtain a more efficient technology . . . . Regulation that removes this incentive to innovate without replacing it with other incentives may be harmful"; another is "if a market is competitive or *contestable* . . . —entry and exit are costless and instantaneous—there is little or no need to regulate because market pressures eliminate monopoly power." Carlton, Dennis W., and Jeffrey M. Perloff, *Modern Industrial Organization*, Pearson (4th ed.), at 691.

3 *See* Orszag & Eilat 711-1 V.S. at 8.

4 *See* Orszag & Eilat 711-1 V.S. at 21–22.

12. In some cases, when market forces fail, regulatory intervention may be necessary. But such intervention should be done only when the benefits of the regulation exceed the costs.[5] A regulator should always be concerned that, by distorting market signals, regulation can actually do more harm than good—*e.g.*, by causing systematic problems that harm current and future customers. The design of any regulatory intervention, therefore, must put substantial weight on minimizing such distortions and avoiding unintended consequences.[6]

13. **Second**, identifying and diagnosing the problem is necessary to tailor the proper remedy.[7]

14. After the type of market failure has been diagnosed, if the issue is not already addressed by current regulation, then a regulatory solution should be crafted. But this should be done with appropriate caution and care. Any kind of new regulation entails uncertainty risks due to the potential of unforeseen consequences. Accordingly, new regulations should replace existing

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5 That regulation may entail costs that outweigh its benefits is widely recognized in the academic literature. For example, Rose (2014) observes that "even where regulation might be intended to restore imperfect markets to a competitive ideal, outcomes frequently are associated with higher production costs and, in some cases, higher prices, distorted product offerings, and significant rent redistribution. Responding to market imperfections with government regulation may trade one set of costs for another, perhaps even greater, set of costs, as recognized by generations of regulatory economists . . . . Choices are squarely in the economists' world of 'second-best,' which dictates careful consideration of the cost and benefit trade-offs." Rose, Nancy L., "Learning from the Past: Insights for the Regulation of Economic Activity," in Nancy L. Rose, ed., *Economic Regulation and Its Reform: What Have We Learned?*, University of Chicago Press, at 18–19. Viscusi *et al.* (2005) remark that "[c]ertainly the most dominant criteria that have been used in the oversight process over the last decade have been those pertaining to ensuring the cost-effectiveness of the regulation and, more specifically, ascertaining that the benefits of the regulation exceed its costs." Viscusi, W. Kip, Joseph E. Harrington, Jr., and John M. Vernon, *Economics of Regulation and Antitrust*, MIT Press, fourth edition, at 36. Carlton and Perloff (2004) also identify regulation as unnecessary or harmful where "the cost of regulation may be so high . . . that society is harmed by regulations." Carlton and Perloff, *supra* note 2, at 691.

6 *See* Orszag & Eilat 711-1 V.S. at 17.

7 *See id.* at 17–19.

ones only if the new regulations are better suited than the old regulations to deal with the identified problem.[8]

IV. THE PROPOSED RULE AS A FORM OF QUALITY REGULATION

A. QUALITY REGULATION

15. The Proposed Rule suggests that the recent quality of railroad services has been inadequate. We cannot ourselves evaluate that premise based on the information the Board has provided, and the Board does not explain which market factors give rise to this situation. Yet the Proposed Rule suggests a form of regulation if a certain quality threshold is not maintained: forcing railways to engage in reciprocal switching in certain situations.

16. If switching is forced in cases where a railroad was not interested in it (*i.e.*, when such switching does not arise naturally), then this is a type of regulatory intervention. Regulatory interventions that affect service level choices have downsides and create risks of unintended consequences. That is because such interventions change the tradeoffs between price and quality that would otherwise exist in the free market. As an analogy, some convenience stores provide better quality of service than others, but that by itself does not suggest that the government should intervene and regulate convenience store quality. It may be that these quality levels simply reflect price-quality tradeoffs preferred by different customer groups.

17. The Proposed Rule suggests that the Board would potentially intervene when quality metrics dip below a certain threshold level. Doing so could create market distortions. This is obvious from considering other contexts in which regulatory intervention is uncommon. For example, if convenience stores were subject to a regulatory intervention when the average

[8] *See id.* at 20.

waiting time at the register exceeded a certain threshold, the convenience store may respond in different ways. It might shrink the range of products it sells so as to focus on a core group of customers (and shrink its need for extra resources at the register). Or it might raise prices—either to decrease the number of shoppers (thus reducing the waiting time) or because of the costs of adding cashiers. Those reduced offerings or higher prices could lead some customers to consider other stores, and it may force stores in less affluent areas (where customers may have stronger preferences for lower prices even when accompanied by longer waiting times) to shut down or not open in the first place. All of those outcomes may reduce efficiency.[9]

18. Although all analogies are imperfect, there are important similarities between the hypothetical convenience store example and railroads: Quality regulation may force railroads to change whether and where they invest (to avoid the risk of taking on traffic that might sometimes fall short of quality standards) or may force them to raise prices (either to lower traffic volumes, thus making it easier to meet the quality standards, or because of the additional costs of increasing quality). Such shifts, in turn, may move some shippers away from rail to other modes of transportation, which may be inefficient.[10] That regulation-induced inefficiency will be especially acute if the Board intervenes (or threatens to intervene) in a particular situation where

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[9] Even if the convenience store does not face much competition, this does not mean the quality-price tradeoff is at an inefficient level: Even a firm with less competition has an incentive to optimize this trade-off, as this will allow it to extract more profit from its market position. Moreover, lack of substantial competition does not mean there are supra-competitive profits; areas with less competition may reflect the large investment and risk needed for market entry relative to market size, all of which need to be compensated for to encourage entry and investments in such areas. On the latter point, *see* Orszag & Eilat 711-1 V.S., at 25–27.

[10] Brannon and Gorman (2022) argue that mandatory reciprocal switching "would slow traffic on the incumbent's rail network, reducing its capacity" and "would also effectively reduce the total quantity of goods that can be shipped over rail, which would push some freight onto trucks and impose costs on the rest of society via increased road congestion, smog, and greenhouse gas emissions." Brannon, Ike, and Michael F. Gorman, "Switching to the Wrong Track?" *Regulation* Vol. 45, No. 1 (Spring 2022), at 10–14.

the current quality level is not inefficient to begin with. And this inefficiency may adversely affect both railroads and their customers, and specifically those shippers who prefer lower prices to higher quality: For example, a shipper and receiver that simply need to continuously move a large quantity of a commodity from one place to another (*e.g.*, from a quarry to a construction supply site) may be more concerned with a low price than with the exact transit time or on-time performance of their shipments. Of course, other shippers will prefer higher quality service at higher prices, but these shippers generally appear to already have the option to enter transportation contracts that guarantee higher quality and provide agreed-upon remedies if the railroad's performance does not meet an agreed-upon level.

19. Moreover, a regulation that forces a change in behavior is very likely to reduce profitability. And as we further discuss below, it also creates uncertainty. A standard principle in financial economics is that, all else equal, reduced ability to make profits and increased uncertainty depress irreversible investment.[11] This problem is especially acute for railroads: A rail carrier will not want to invest in developing assets to serve customers if, instead of profiting from the assets and recouping its investment, the risk of forced switching (and the costs and operational complications associated with it) may make those assets a liability.[12] The Board also needs to account for this cost where appropriate.

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[11] *See* Orszag & Eilat 711-1 V.S. at 32; *see also* Eberly, Janice C., "Irreversible Investment," in *The New Palgrave Dictionary of Economics*, Palgrave McMillan (2018), pp. 7028–7033, at 7028 ("The cost of an irreversible investment cannot be recovered once it is installed. This restriction not only truncates negative investments, but also raises the threshold for positive investment. The threshold return that justifies an irreversible investment increases with uncertainty, or more precisely, with the probability mass in the lower tail of outcomes. Irreversibility constrains the ability to redeploy capital in 'bad' states, so the agent is particularly sensitive to these states when investing *ex ante*.").

[12] Hausman (2001) identifies several ways in which open access and bottleneck rate regulation would discourage future investment, including: (1) they "would drive down railroad revenues

B. THE CHOICE OF QUALITY METRICS

20. Of the three quality measures that could lead to forced switching according to the proposed policy—original estimated time of arrival, transit time, and industry spot-and-pull—the connection between the "violation" and the regulatory intervention seems distinctly lacking for the last. We fail to see how forcing a railroad to hand over the line haul to another railroad relates to a performance measure that is not at the line-haul portion of the service. Using the convenience store example, this is like forcing a convenience store with non-sanitary food storage to extend opening hours or hire more cashiers: Even if the food storage problem demands a regulatory intervention, ordering more cashiers or extending opening hours will not solve that problem. Such a purely punitive sanction that forces a behavior that is clearly unrelated to the quality measure does not make a good policy because the outcome is very unlikely to be efficient.

21. In the case of the original estimated time of arrival and the transit time metrics, we can envision a connection between the metric and the potential regulatory intervention. At least in some particular cases, assigning the line-haul portion of a movement to a competitor could remedy poor performance of the incumbent on that segment. But that intervention may not be successful if the source of the problem lies elsewhere (for example, the delay is due to the incumbent's local service, or due to a labor dispute at the customer's facility). This is akin to

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towards variable costs. But this outcome fails to cover the very large fixed and common costs incurred by railroads, such as laying track or digging tunnels. No railroad will make these investments unless it can expect to recover its investment," and (2) open access "will discourage railroads from making investments in their own networks if they are forced to permit competing railroads to free-ride on those investments" and "would discourage railroads from expanding into new markets so long as they can obtain forced access to a competitor's tracks." Hausman, Jerry A., "Will New Regulation Derail the Railroads?" Competitive Enterprise Institute, *https://www.cei.org/wp-content/uploads/2010/10/Jerry-Hausman-Will-New-Regulation-Derail-the-Railroads.pdf* (October 2001), at 1.

forcing a convenience store with long waiting lines to outsource the operation of its registers: It might reduce congestion if the problem is a lack of skill in operating registers, but it would have no impact on congestion if the problem is that waves of customers arrive in large groups during mealtimes.

22. Therefore, another straightforward and basic question that the Board should ask in each particular case, before granting relief, is whether the proposed relief would actually improve the quality of the service to the shipper, in that the alternate carrier can be expected to provide service that the incumbent carrier is not. Although that showing alone is insufficient to establish that a switching order is the efficient outcome, without that showing, the regulatory intervention would seem to be clearly unwarranted.

23. We must emphasize that even for the original estimated time of arrival and the transit time quality metrics, the Proposed Rule envisions a potential regulatory intervention that may not be purely a corrective measure, depending on the particular circumstances presented. If there is another railroad that could operate the line haul more efficiently (after considering the costs of switching), one would expect a switching arrangement to arise organically, just as a convenience store could decide on its own to extend its opening hours in order to make the shopping experience better for its customers or could outsource the operation of its registers to someone who could operate them better. Cases in which switching has not happened by voluntary agreement require an explanation for why that is the case if switching is indeed the operationally and economically efficient outcome. Accordingly, any intervention should be approached with great care; it will be important for the Board to verify in each particular case that its intervention is actually needed (*i.e.*, that there is deviation from efficient market outcomes) and it should be implemented cautiously as to minimize potential distortions.

24. The Board should be mindful that, even if the Board makes a switching order under this policy, actual switching may not occur in practice. Rational shippers may simply use the threat of forcing switching as negotiation leverage to get a lower price from the incumbent railroad, with no resulting improvement in quality. If that occurs, the Proposed Rule will not operate as quality regulation but instead as a form of rate regulation. Any regulation should try to reduce rent-seeking behavior of this type, because it could be an impediment to the operation of market forces and could create distortions and uncertainty that would be hard for the regulator to predict or control. There is no reason to believe such rent seeking will increase efficiency.

25. For these reasons, the Board should focus its efforts on identifying, understanding, and remedying identified quality deficiencies found in particular cases based on the circumstances of the case.

V. IMPLEMENTATION OF THE FORCED SWITCHING POLICY

A. THE RISKS AND COSTS OF FORCED SWITCHING[13]

26. Like the proposals the Board has previously considered, the Proposed Rule seeks to impose forced access. Forced access is very rare in any industry, as the basic principle in any regulatory regime is that firms should not be forced to share their assets with their competitors except in highly specific circumstances. In important respects, forced switching is more complicated than forced access in other industries, as it not only requires a firm to allow access to its assets, but it also requires the asset owner to physically participate in an ongoing complex operation in which it has not otherwise volunteered to participate. Switching involves direct expenses such as crew time, locomotive time, track time, and fuel usage, as well as technical

[13] We expanded on these issues in sections III.A. and IV of Orszag & Eilat 711-1 V.S. We only provide here a short summary and the conclusion.

costs and planning costs. Switching entails safety risks, and may also entail environmental costs, as switching arrangements tend to increase the use of fuel and carbon emissions.[14]

27. Switching also risks unintended consequences that arise from the fact that a railroad is an interconnected network. As explained in more detail in our previous statement, railroads are not a collection of isolated yards that can be analyzed independently, but rather a highly interconnected network. Without careful planning, a change at one location can have consequences in multiple other locations, and lead to compounding effects that create risk of widespread service failures. This means that switching, even if it benefits the shipper requesting switching, can impose negative externalities on other shippers, *e.g.*, cause train delays due to congestion, lower railcar utilization, longer trip times, reduced car velocity, and increased track occupancy. It could lead to inefficient routing and increased risk of service failure.

28. Forced sharing regimes also create inefficiencies related to arranging the terms of sharing. Uncertainty over those terms can create uncertainty regarding returns to investment. As mentioned above, uncertainty depresses the types of irreversible investments made in the railroad industry,[15] and any such reduction in investments will primarily harm shippers.

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[14] Brannon and Gorman (2022) identify seven drawbacks of mandating reciprocal switching: (1) worse service (*i.e.*, costly and time-consuming operations for the railroad), (2) complexity, (3) productivity losses, (4) crew safety, (5) environmental harm, (6) suboptimal investment, and (7) bureaucratic and litigious processes. Brannon and Gorman, *supra* note 10, at 10–14.

[15] *See, e.g.*, Bloom, Nick, Bond, Stephen and John van Reenen, "Uncertainty and Investment Dynamics," *The Review of Economic Studies* Vol. 74, No. 2 (Apr. 2007), at 391–415 ("Recent theoretical analyses of investment under uncertainty have highlighted the effects of irreversibility in generating real options (*e.g.*, Dixit and Pindyck (1994)). In these models uncertainty increases the separation between the marginal product of capital which justifies investment and the marginal product of capital which justifies disinvestment. This increases the range of inaction where investment is zero as the firm prefers to wait and see rather than undertaking a costly action with uncertain consequences. In short, investment behaviour becomes more cautious.").

29. To conclude, implementation of any forced switching regulatory regime will likely be associated with a host of direct, indirect, and likely unexpected costs. These should be weighed against any positive upside of switching. Such an upside will only exist if, in fact, quality is currently at a sub-optimal level. Here, the least risky course for the Board would be to retain full flexibility in future proceedings under the rule to consider impacts on other shippers and the incumbent railroad, and balance those against the benefits to the complaining shipper.

B. CONTEXT, INCREMENTAL RESPONSES, AND SELF-CORRECTION

30. It is generally true that efficient regulatory interventions (and decisions whether to intervene at all) should be sensitive to the context of the asserted violation. For example, the intensity of a remedy should generally increase with the degree of the violation, and it may be inefficient to sanction a minor violation. The same is true for the remedial aspect of the Proposed Rule (that is, the approach of having a different railroad perform the line haul).

31. The framework of the Proposed Rule presents challenges for following those principles, because the regulatory intervention proposed is essentially all-or-none: Based on the Board's evaluation, it will either force switching or it will not. If the Board attaches too much significance to the metrics it has proposed and too little significance to other facts and circumstances, it runs a large risk of three kinds of outcomes that may not be optimal from an efficiency perspective. First, very dissimilar cases will be treated the same. For example, a case of just barely missing a metric will have the same remedy as a total service failure. Second, nearly identical cases may be treated very differently. For example, a case of just barely satisfying a metric will lead to no switching, but a case of just barely missing a metric will lead to switching. Third, there is no particular link between the gravity of the underlying problem and

the severity of the remedy. For example, a relatively brief service failing (as little as a few weeks) could in theory turn into a switching mandate that lasts for many years.

32. The foregoing issues are especially problematic if the metrics are based on a "noisy" measure. In the current case, the performance measures are particularly prone to noise, because they are likely to fluctuate over time for exogenous reasons beyond the railroad's control (*e.g.*, demand surges, weather, unexpected maintenance, pandemics, the natural fluctuations of a large network system, and so on).[16]

33. Returning to the convenience store analogy, imagine a regulation under which a convenience store is forced to extend its opening hours by a fixed duration if average waiting time of customers in the register lines exceeds five minutes (on the theory that customers can come at less busy times during the extended hours). It is easy to see why this cannot be optimal: a store with a four-minute wait time will be treated like a store with a one-minute wait time, while a store with a six-minute wait time would be treated the same as a store with a 30-minute wait time. But two stores that are almost similar, with one just below the five-minute threshold and the other just above it, would face very difference consequences. This is inconsistent with the intervention being corrective or remedial. Mild interventions will not solve the problem with the 30-minute wait time, while draconian sanctions are necessarily excessive for the six-minute wait time.

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[16] On a closely related note, the proposed policy regarding transit time is based on comparing transit time in each year to the parallel period the year before for the same lane. This runs the risk of a railroad being penalized for good performance in the previous year and could even lead to adverse incentives not to perform extraordinarily well in any given year. We suggest the Board consider looking at longer-term historical performance in measuring the metric (for example, comparing current-year performance to the average of the three prior years). Alternatively, the Board could consider the details of that historical performance in evaluating particular cases in which the transit-time metric was triggered.

34. The convenience store analogy also demonstrates the problem with noisy metrics measured over short periods of time. A store cannot predict with certainty how many customers will walk in. Over a relatively short period of time there may be a surge in the number of customers or in how much they buy, *e.g.*, due to macroeconomic fluctuations, if a competing store is shut down for renovations, or just due to randomness. It is also possible that the store may be short on staff for a temporary period of time due to unpredictable but inevitable circumstances (*e.g.*, employee sickness). If temporary events have the potential to trigger regulatory intervention, we would have significant concerns about false positives—regulatory interventions that are not needed because the market could self-correct. In the convenience store example, the waiting time may revert back to its long-term average due to the unusual circumstances ending on their own, due to corrections made by the store itself, or due to increased competition from new stores.

35. Importantly, the combination of a substantial non-gradual intervention triggered by measuring a quantity that naturally fluctuates could lead to extreme (and inefficient) cautiousness on the part of the regulated party. In the convenience store example, because customer levels are not entirely predictable, a store might respond to regulation by overinvesting in shortening wait times just so it does not accidently breach the threshold and suffer a more substantial intervention into its operations. This will increase costs and therefore prices, and it may deter entry in the first place.

36. It is easy to see the analogy with railroads: If a railroad is wary of being sanctioned under the Proposed Rule, a natural response would be to overinvest in avoiding falling below the metric thresholds. Although that would artificially lift the performance of the activity subject to the regulation above the threshold triggering a potential intervention, it could have a variety of

downsides that make it damaging on the whole, specifically showing up in the form of increased prices and reduced output. And the railroad may shift resources away from service that is not subject to the regulation, in order to provide more resources for service that is subject to the regulation—thus creating inefficiencies.

37. For these reasons, we recommend that the Board leave itself full latitude to consider all the circumstances of a particular case before finding a violation and fashioning a remedy. If the Board finds that service levels are inefficient and that this could be fixed by regulatory intervention, the Board should come up with the least intrusive intervention that would be sufficient to address the magnitude of the service inadequacy.

38. This has three main implications. First, the Board should not impose forced switching (or otherwise intervene) unless the quality measures deviate from thresholds for relatively lengthy time periods. Although we do not currently have a well-informed view on what the appropriate period should be, clearly longer observations of performance will reduce the risk of erroneously imposing sanctions due to random fluctuations (as further explained below) and will reduce the risk of extreme cautiousness by railroads.

39. Second, the Board should provide enough time for a railroad to self-correct any deviations in its performance (and for external factors to resolve themselves), in a way that is more consistent with market forces. Self-correction may be the best possible outcome because it achieves the desired service level without the risks and downsides of a regulatory intervention.

40. Third, the Board should approach remedies incrementally. For example, an initial switching order should be relatively brief in duration, so that the Board can revisit within a relatively short period whether the order is effective and continues to be necessary.

41. In all these respects, as previously noted, the Board should be careful not to press service standards higher than it is certain is necessary given the various tradeoffs in play; a service standard that is set too high is likely to be as damaging—and perhaps more damaging—than a service standard that is not set high enough. It is also important to remember that different customers will place different values on different aspects of quality. Although we do not currently have a well-informed view on precisely what level of service standards would be appropriate (or too high), we would strongly discourage the Board from setting service standards that are higher than it is certain are necessary.

VI. THE BOARD'S RELIANCE ON SYSTEM AVERAGES TO SET METRICS

A. THE DISTRIBUTION OF PERFORMANCE ACROSS LANES

42. The Board's approach to setting proposed metric thresholds in the Proposed Rule is to review systemwide averages of performance metrics and then set service thresholds that would apply to individual lanes. That approach presents certain challenges. The Proposed Rule's practical operation is likely to depend greatly on the distribution behind those averages. In other words, the observed overall averages could be consistent with different states of traffic on the network, with different states having different implications for how the Proposed Rule would operate in practice. But we understand that the distribution of performance by lane is unknown to the Board.

43. Returning again to the store analogy, consider that a regulator knows that the average waiting time across a chain's stores is four minutes, and decides to impose regulations (that impose costs and reduce profits) for any particular store if the waiting time in that store exceeds the chain-wide average by 25 percent, *i.e.*, exceeds five minutes. The implications of such a policy may be very different depending on the distribution of waiting times across stores. If all

stores have a waiting time of around four minutes, then a trigger of this kind may be appropriate and could provide the proper deterrent against deteriorating the service (assuming one believes such deterrent is needed). But the situation would be different if there is a wide distribution of waiting times across stores, or a small group of stores with virtually no waiting time and a large group of stores with a just-over-five-minute waiting time, or a large number of stores just below the threshold and a small number far above the threshold. Each scenario has different implications for sanctioning those stores that are above the thresholds. Therefore, the circumstances of each store should be examined closely.

44. Similarly, railroads' average performance across lanes may mask variation across lanes. If, for example, most lanes are just better than the average and a few are much worse than it, then a threshold set just off the average will prompt an inquiry for the few lanes that are worse than the average. Such a rule might or might not function well, depending on whether such outliers are amenable to resolution through a switching order. On the other hand, if the average is influenced by a small number of very high-performing lanes while a large number are only slightly worse than the average, then the Board's processes may be triggered for a large number of lanes that would be merely average performers if it weren't for the few high-performers.

45. We do not currently have the information necessary to offer an opinion on how particular distributions should lead to particular refinements to the Proposed Rule. Rather, our recommendation is for the Board to consider information on the full distribution of performance metrics across lanes as it refines the Proposed Rule. In any case, the Board should be especially attentive to the facts and circumstances of each case brought under the Proposed Rule.

B. DISTRIBUTION OVER TIME

46. Even looking at the average performance metric of each lane separately may not tell the full story: Fluctuations over time in the lane may also be important for determining the appropriate policy. If fairly wide fluctuations are common, the fact that a lane's performance temporarily drops below the metric may reflect natural variation: As a statistical matter, the higher the variance, the more likely it is that such a dip will occur outside of the railroad's control and the harder it is to predict it. For example, in the railroad industry some degree of natural variation may be the product of nothing more than the tendency of complex networks to exhibit performance that is highly sensitive to small and essentially random events that reverberate through the network. Such a scenario is a strong indication that factors outside the railroad's control are the cause of the dip. Moreover, if such fluctuations are common across the industry, it may be that a switching order will not aid the shipper, because the alternate carrier will be equally subject to such fluctuations. In such a situation, the Proposed Rule may lead the Board to encounter a large number of "false positives," which in turn will lead to extra cautiousness, at a potentially steep cost to efficiency and to the shippers themselves. By contrast, a sustained drop in performance might be a more meaningful signal.

47. Therefore, our recommendations here are similar to those above: The Board should consider information regarding the performance metrics for each lane and in any case should be especially attentive to the circumstances of each case brought under the Proposed Rule.

VERIFICATION

I, Jonathan M. Orszag, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement.

Executed on November 7, 2023.

Jonathan M. Orszag

VERIFICATION

I, Yair Eilat, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this verified statement.

Executed on November 7, 2023.

Yair Eilat

EXHIBIT A

CURRICULUM VITAE

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PROFESSIONAL EXPERIENCE:

- **Senior Managing Director**, Compass Lexecon (previously Competition Policy Associates, Inc. ("COMPASS") and before that, Sebago Associates, Inc.), March 2000-Present. Manage economic consulting firm specializing in antitrust, economic policy, and litigation matters. Member of the firm's Executive Committee. Conduct economic and financial analysis on a wide range of complex issues involving mergers, litigation, public policy, and regulations for corporations and public-sector entities. Serve as expert witness in proceedings before U.S. and international courts and administrative agencies and the European Court of First Instance on competition policy issues, including industry structure, vertical relationships, valuation matters, and intellectual property rights.
- **Assistant to the Secretary and Director of the Office of Policy and Strategic Planning,** U.S. Department of Commerce (Washington, D.C.), March 1999-March 2000. Served as the Secretary of Commerce's chief policy adviser. Responsible for coordinating the development and implementation of policy initiatives within the Department. Worked on a wide range of issues, from implementing the steel loan guarantee program to telecommunications and e-commerce issues. Represented the Secretary of Commerce in meetings with other government officials and outside organizations, and testified before Congress on behalf of the Department on budget and Native American economic development issues.
- **Economic Policy Advisor**, National Economic Council, The White House (Washington, D.C.), August 1997-March 1999; Assistant Director, January 1996-November 1996.

Coordinated policy processes on a wide range of issues, from Social Security reform to job training reform, unemployment insurance reform, homeownership and low-income housing issues, the minimum wage, and Individual Development Accounts. Responsible for helping to coordinate the Administration's daily economic message and to promote (and defend) President Clinton's economic record.

- **Economics Teacher,** Phillips Exeter Academy Summer School (Exeter, New Hampshire), June 1997-August 1997. Taught introductory economics at Phillips Exeter Academy Summer School.
- **Economic Consultant,** James Carville (Washington, D.C.), August 1995-January 1996. Helped James Carville, President Clinton's 1992 campaign strategist, research and write his *New York Times* #1 best-selling book, *We're Right, They're Wrong: A Handbook for Spirited Progressives*.
- **Special Assistant to the Chief Economist**, U.S. Department of Labor, (Washington, D.C.), August 1994-August 1995. Served as an economic aide to the Chief Economist (Alan B. Krueger) and the Secretary of Labor (Robert B. Reich).

Volunteer Positions

- **Director of Policy Preparations for Vice Presidential Debate,** Gore-Lieberman Presidential Campaign, September 2000-October 2000. Oversaw policy preparations for Democratic Vice Presidential candidate before his debate with the Republican Vice Presidential candidate.
- **Weekly Commentator,** *Wall Street Journal Online,* September 2004-November 2004. Commented on economic issues during the 2004 presidential campaign. Topics of weekly commentary included jobs, health care, energy, trade, taxes, tort reform, appointments, and fiscal policy.

EDUCATION:

- Oxford University, M.Sc. in Economic and Social History, 1997.
- Princeton University, A.B. *summa cum laude* in Economics, 1996.
- Phillips Exeter Academy, graduate with High Honors, 1991.

HONORS, PROFESSIONAL ASSOCIATIONS, AND APPOINTMENTS:

- Phi Beta Kappa, inducted June 1996.
- Marshall Scholar, 1996.
- *USA Today* All-USA College Academic Team, 1996.
- Corporation for Enterprise Development Leadership Award for "Forging Innovative Public Policies to Expand Economic Opportunity in America," 1999.
- *Who's Who in America*, 2001-Present; Also, *Who's Who in the World*; *Who's Who in Science and Engineering*; *Who's Who in Finance and Business*; and *Who's Who of Emerging Leaders.*
- California Workforce Investment Board, 2000-2003.

- California Governor's Technology Advisory Group, 2000-2003.
- Adjunct Lecturer, University of Southern California (Los Angeles, CA), January 2002-June 2002.
- *Global Competition Review*'s "40 under 40: The World's 40 Brightest Young Antitrust Lawyers and Economists," 2004.
- *Global Competition Review*'s "Best Young Competition Economists," 2006.
- *The International Who's Who of Competition Economists*, 2007-Present.
- LawDay Leading Competition Economics Experts, 2009-Present.
- Expert Guides, Best of the Best USA, 2011-Present.
- Fellow, University of Southern California's Center for Communication Law & Policy, 2007-2015.
- FTI Consulting Inc., Founders Award, 2008.
- Senior Fellow, Center for American Progress, 2009-2016.
- Lecturer, University of California at Los Angeles (UCLA), School of Law, 2018.
- Board of Directors, Sebago Associates, Inc., 2000-2007; Competition Policy Associates, Inc., 2003-2006; The First Tee of Washington, DC, 2005-2011; Ibrix, Inc. (Sold to Hewlett-Packard), 2006-2007; JMP Securities, Inc. (NYSE: JMP) (Sold to Citizens Bank Group), 2011-2021; TGR Foundation (formerly Tiger Woods Foundation), Board of Governors, 2012-Present; Children's Golf Foundation, 2013-2017; Friends of the Global Fight Against AIDS, Tuberculosis, and Malaria, 2013-Present; Board of Governors, The First Tee, 2019-Present; Member, One River Asset Management Academic and Regulatory Advisory Council (sold to Coinbase), 2021-2023; Member, Coinbase Asset Management Academic and Regulatory Advisory Council, 2023-Present.
- Clinton Global Initiative, Member, 2008-2016; Grassroot Soccer, Ambassadors Council, 2010-2019; The First Tee, Trustee, 2013-Present; Good+ Foundation, Fatherhood Leadership Council, 2017-Present.
- Member of the American Economic Association, the Econometric Society, the American Finance Association, and the United States Golf Association.

REPORTS, PAPERS, AND NOTES:

- "New Merger Guidelines Should Keep The Consumer Welfare Standard," with Mark Israel and Jeremy Sandford, *Competition Policy International*, November 9, 2022.
- "Understanding Recent Antitrust Bills: How They Risk Harming Rather than Helping Consumers," with Matt Schmitt and Nathan Wilson, *US Chamber of Commerce*, March 2022.
- "The Role of the Circle Principle in Market Definition," with Bryan Keating and Robert Willig, *Antitrust Source*, April 2018.
- "Toward a More Complete Treatment of Efficiencies in Merger Analysis: Lessons from Recent Challenges," with Loren Smith, *Antitrust Source*, October 2016.

- "State Involvement in a Market Economy: Principles to Guide Interventions and a Discussion about Network Industries," in *Antitrust in Emerging and Developing Countries,* edited by Eleanor Fox, Harry First, Nicolas Charbit, and Elisa Ramundo, *Concurrences Review,* 2016.
- "Tax Reform in The Bahamas: An Evaluation of Proposed Options," with David Kamin, Commissioned by the Commonwealth of The Bahamas, May 27, 2014.
- "The Impact of Federal Revenues from Limiting Participation in the FCC 600 MHz Spectrum Auction," with Philip Haile and Maya Meidan, Commissioned by AT&T, October 30, 2013.
- "The Definition of Small Business in the Marketplace Fairness Act of 2013," Commissioned by eBay, Inc., October 8, 2013.
- "The Benefits of Patent Settlements: New Survey Evidence on Factors Affecting Generic Drug Investment," with Bret Dickey, Commissioned by the Generic Pharmaceutical Association, July 23, 2013.
- "The Liftoff of Consumer Benefits from the Broadband Revolution," with Mark Dutz and Robert D. Willig, *Review of Network Economics,* Volume 11, Issue 4, Article 2, 2012.
- "Antitrust Guidelines for Private Purchasers Engaged in Value Purchasing of Health Care," with Tim Muris and Bilal Sayyed, Commissioned by Buying Value, July 2012.
- "The Economic Benefits of Pharmacy Benefit Managers," with Kevin Green, Commissioned by Express Scripts and Medco, December 5, 2011.
- "An Analysis of the Benefits of Allowing Satellite Broadband Providers to Participate Directly in the Proposed CAF Reverse Auctions," with Bryan Keating, Commissioned by ViaSat, Inc., April 18, 2011.
- "A Preliminary Economic Analysis of the Budgetary Effects of the Proposed Restrictions on 'Reverse Payment' Settlements," with Bret Dickey and Robert D. Willig, August 10, 2010.
- "An Economic Assessment of Patent Settlements in the Pharmaceutical Industry," with Bret Dickey and Laura Tyson, Volume 10, Issue 2, *Annals of Health Law*, Winter 2010.
- "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," with Michael Katz and Theresa Sullivan, Commissioned by the National Cable & Telecommunications Association, DIRECTV, and DISH Network, November 12, 2009.
- "Intellectual Property and Innovation: New Evidence on the Relationship Between Patent Protection, Technology Transfer, and Innovation in Developing Countries," with Mark Dutz and Antara Dutta, October 2009.
- "Intellectual Property and Innovation: A Literature Review of the Value of Patent Protection for Developing Countries," with Mark Dutz and Antara Dutta, October 2009.
- "An Economic Perspective on the Antitrust Case Against Intel," with Robert D. Willig and Gilad Levin, October 2009.
- "The Substantial Consumer Benefits of Broadband Connectivity for U.S. Households," with Mark Dutz and Robert D. Willig, July 2009.
- "An Economic Assessment of the Homeowners' Defense Act of 2009," with Doug Fontaine, July 2009.
- "A Preliminary Economic Analysis of FTC Chairman Leibowitz's June 23rd Speech," with Robert D. Willig, June 24, 2009.

- "Assessment of Microsoft's Behaviour in the Browser Market," with Assaf Eilat, Gilad Levin, Andrea Lofaro, and Jan Peter van der Veer, Submitted to the Commission of the European Communities, COMP/C-3/39.530, May 27, 2009.
- "An Economic Perspective on the Microsoft Internet Explorer Tying Case," with Assaf Eilat, Gilad Levin, Andrea Lofaro, and Jan Peter van der Veer, Submitted to the Commission of the European Communities, COMP/C-3/39.530, April 24, 2009.
- "The Empirical Effects of Collegiate Athletics: An Update Based on 2004-2007 Data," with Mark Israel, February 2009.
- "An Econometric Analysis of the Matching Between Football Student Athletes and Colleges," with Yair Eilat, Bryan Keating, and Robert D. Willig, January 2009.
- "An Economic Assessment of Regulating Credit Card Fees and Interest Rates," with Susan H. Manning, October 2007.
- "An Assessment of the Competitive Effects of the SKY-Prime Merger: Lessons from the Recent News Corp.-DIRECTV Merger," with Cristian Santesteban, Submitted to New Zealand Commerce Commission, January 23, 2006.
- "Closing the College Savings Gap," with Peter R. Orszag and Jason Bordoff, November 2005.
- "Putting in Place An Effective Media Player and Media Server Remedy," with Joseph E. Stiglitz, Submitted to the Korean Fair Trade Commission, October 10, 2005.
- "An Economic Analysis of Microsoft's Tying of the Windows Media Player to the Windows Operating System and Its Impact on Consumers, Competition, and Innovation," with Joseph E. Stiglitz, Submitted to the Korean Fair Trade Commission, September 12, 2005.
- "Economic Analyses of Microsoft's Abusive Tie and Its Impact on Consumers, Competition, and Innovation," with Joseph E. Stiglitz and Sangin Park, Submitted to the Korean Fair Trade Commission, September 12, 2005.
- "The Empirical Effects of Division II Intercollegiate Athletics," with Peter R. Orszag, June 2005.
- "An Economic Analysis of Microsoft's Abusive Tie and Its Impact on Consumers, Competition, and Innovation," with Joseph E. Stiglitz and Jason Furman, Submitted to the European Court of First Instance, Case T-201/04 R, May 12, 2005.
- "The Physical Capital Stock Used in College Athletics," with Peter R. Orszag, April 2005.
- "The Empirical Effects of Collegiate Athletic Spending: An Update," with Peter R. Orszag, April 2005.
- "Putting in Place An Effective Media Player Remedy," with Joseph E. Stiglitz, Submitted to the Commission of the European Communities, April 27, 2005.
- "The Empirical Effects of Collegiate Athletic Spending: An Interim Report," with Robert E. Litan and Peter R. Orszag, the National Collegiate Athletic Association and Sebago Associates, Inc., August 2003 (reprinted in *The Business of Sports*, edited by Scott Rosner and Kenneth Shropshire (Jones and Bartlett Publishes, 2004)).
- "Learning and Earning: Working in College," with Peter R. Orszag and Diane M. Whitmore, *Journal of Student Employment*, Volume IX, Number 1, June 2003.

- "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," with Joseph E. Stiglitz and Peter R. Orszag, *Journal of Bankruptcy Law and Practice*, Volume 12, Issue No. 1, February 2003.
- "The Process of Economic Policy-Making During the Clinton Administration," with Peter R. Orszag and Laura D. Tyson, in *American Economic Policy in the 1990s*, edited by Jeffrey Frankel and Peter R. Orszag (Cambridge, Massachusetts: MIT Press, 2002).
- "The Implications of the New Fannie Mae and Freddie Mac Risk-Based Capital Standard," with Joseph E. Stiglitz and Peter R. Orszag, *Fannie Mae Papers*, Volume I, Issue 2, March 2002 (reprinted in *Housing Matters: Issues in American Housing Policy*).
- "Hispanics and the Current Economic Downturn: Will the Receding Tide Sink Hispanics?" with Alan B. Krueger, Pew Hispanic Center, January 2002.
- "Aging in America: A Policy Perspective," with Jonathan Gruber and Peter R. Orszag, The Pew Charitable Trusts and Sebago Associates, Inc., January 2002.
- "An Economic Analysis of Spectrum Allocation and Advanced Wireless Services," with Martin N. Baily, Peter R. Orszag, and Robert D. Willig, Cellular Telecommunications and Internet Association and Sebago Associates, Inc., October 2001.
- "A New Look at Incentive Effects and Golf Tournaments," in *The Economics of Sports*, edited by Andrew Zimbalist (London: Edward Elgar Publishing, 2001). Original version in *Economics Letters*, 46, March 1994, p. 77-88.
- "Learning and Earning: Working in College," with Peter R. Orszag and Diane M. Whitmore, UPromise, Inc. and Sebago Associates, Inc., August 2001.
- "The Impact of Potential Movie and Television Industry Strikes on the Los Angeles Economy," with Ross C. DeVol, Joel Kotkin, Peter R. Orszag, Robert F. Wescott, and Perry Wong, The Milken Institute and Sebago Associates, Inc., April 19, 2001.
- "Would Raising IRA Contribution Limits Bolster Retirement Security for Lower- and Middle-Income Families?" with Peter R. Orszag, Center on Budget and Policy Priorities, April 2, 2001.
- "Computers in Schools: Domestic and International Perspectives," California Technology, Trade, and Commerce Agency and Sebago Associates, Inc., March 2001.
- "The Impact of Paying for College on Family Finances," with Laura D. Tyson, Joseph E. Stiglitz, and Peter R. Orszag, UPromise, Inc. and Sebago Associates, Inc., November 2000.
- "A Simple Analysis of Discarded Votes by Precinct in Palm Beach," with Peter R. Orszag, Sebago Associates, Inc., November 10, 2000.
- "Analysis of Votes for Buchanan by Precinct within Palm Beach and Broward Counties," with Peter R. Orszag, Sebago Associates, Inc., November 9, 2000.
- "A Statistical Analysis of the Palm Beach Vote," with Peter R. Orszag, Sebago Associates, Inc., November 8, 2000.
- "The Role of Government in a Digital Age," with Joseph E. Stiglitz and Peter R. Orszag, Computer and Communications Industry Association and Sebago Associates, Inc., October 2000.
- "Quantifying the Benefits of More Stringent Aircraft Noise Regulations," with Peter R. Orszag, Northwest Airlines and Sebago Associates, Inc., October 2000.

- "All That Glitters Is Not Gold: The Feldstein-Liebman Analysis of Reforming Social Security with Individual Accounts," with Peter R. Orszag, Center on Budget and Policy Priorities, April 26, 2000.
- "Would Raising IRA Contribution Limits Bolster Retirement Security For Lower- and Middle-Income Families or Is There a Better Way?" with Peter R. Orszag, Center on Budget and Policy Priorities, April 12, 2000.
- "The Economics of the U.S.-China Air Services Decision," with Peter R. Orszag, and Diane M. Whitmore, United Parcel Service and Sebago Associates, Inc., March 2000.

OP-EDS/LETTERS TO THE EDITOR:

- "Hitting Budget Numbers May Be Up for Auction," *Roll Call*, December 19, 2013.
- "Jack Welch Could Help Improve U.S. Jobs Data," with Peter R. Orszag, *Bloomberg,* October 9, 2012.
- "Giving Credit Where Credit Is Due," *The Hill*, December 2, 2011.
- "PBMs Save Us Billions," *The Hill*, November 28, 2011.
- "Drug Patent Settlements," with Robert D. Willig, *New York Times*, July 19, 2010.
- "Homeowners Defense Act Could Lower Insurance Premiums," *Treasure Coast Palm*, September 24, 2009.
- "Katrina Teaches Us To Financially Prepare Today for the Catastrophe of Tomorrow," *San Angelo Standard-Times,* September 23, 2009.
- "A Catastrophe Waiting To Happen," *The Daily Citizen*, September 15, 2009.
- "Broadband: Now A 'Necessity'," *Multichannel News*, August 10, 2009.
- "Forget the Estate Tax: America Needs An Inheritance Tax," *Ideas Primary*, January 23, 2008, available at http://www.ideasprimary.com/?p=442
- "Credit Where It's Due," *Wall Street Journal*, October 25, 2007.
- "Congress Grounds Delivery Competition," Sebago Associates, Inc., April 17, 2003.
- "Paul O'Neill Doesn't Cry for Argentina," Sebago Associates, Inc., August 3, 2001.
- "Do You Recognize The Clinton West Wing in *The West Wing*?" *The Atlantic Monthly* Online, March 2001.

SPEECHES AND PRESENTATIONS:

- "Lessons from the DE&I Battlefield: What Lawyers and Economists Can Learn From Each Other," Panelist at American Bar Association Session, July 8, 2021.
- Keynote, Investment Education Symposium in connection with the Louisana Trustee Education Council (LATEC), New Orleans, Louisiana, February 28, 2019.
- "Challenges in the Negotiation of Remedies in Mergers & Acquisitions," Panelist at IBRAC's 24th Annual International Seminar on Competition Law," Sao Paulo, Brazil, October 24, 2018.

- "Industry Professional Panel," Panelist at Music Industry Research Association, Los Angeles, CA, June 26, 2018.
- "The Amex Decision: Turning the Tables?" Panelist at Concurrences Review and Fordham University School of Law, "Antitrust in the Financial Sector: Hot Issues & Global Perspectives," New York, NY, May 3, 2018.
- "Views from the Trenches: Anthem/Cigna and Aetna/Humana," Panelist at the 66th American Bar Association Section of Antitrust Law Spring Meeting, Washington, DC, April 11, 2018.
- "Consolidation Craze," Moderator at UCLA Law Entertainment Symposium, "Progress is Paramount — Why Hollywood Will Always Matter," Los Angeles, CA, March 24, 2018.
- "Setting the Stage: State Involvement in A Market Economy," Panelist at Concurrences Review and New York University School of Law Conference on "Antitrust in Emerging and Developing Economies: Africa, Brazil, China, India, Mexico…," New York, NY, October 23, 2015.
- "Office Superstores: What Changed in 15 Years?" Panelist on ABA Section of Antitrust Law, Economics and Mergers & Acquisitions Committees, Washington, DC, January 6, 2014.
- "Five Bars: Spectrum Policy and the Future of the Digital Economy," Panelist at Third Way Briefing, House of Representatives, Washington, DC, December 11, 2013.
- "An Economic Perspective on Reverse Payment Settlements in the Pharmaceutical Sector," Speech to the Generic Pharmaceutical Association 2013 Annual Meeting, Orlando, Florida, February 21, 2013.
- "Navigating Our Economic Challenges and the Role of Public Policy," Speech to the South Carolina Manufacturers Alliance Fourth Annual Textile Summit, Spartanburg, South Carolina, January 10, 2013.
- "Upward Price Pressure and Merger Analysis: What Is UPP's Proper Role and How Can UPP Deal With Real-World Issues?" Presentation to Gilbert + Tobin, Sydney, Australia, December 4, 2012.
- "Obama's Second Term: What It Means for the U.S. and World Economies," FTI Consulting, Inc., Brisbane, Australia, December 3, 2012.
- "Merger Substance: How to Conduct a Proper Analysis of a Merger's Competitive Effects, and How to Frame Related Legal Standards?" Panelist at Antitrust in Asia, American Bar Association, New Delhi, India, December 1, 2012
- "Financial Issues in College Sports," Panelist at the Third Annual Sports Law Symposium: What is the Proper Role of Sports in Higher Education?, Institute of Sports Law and Ethics, Santa Clara University, September 6, 2012.
- "Pricing and Bundling of IT Products: Drawing The Line Between Lawful and Unlawful Behaviour," Panelist on GCR Live's Antitrust and Technology 2012, London, England, March 14, 2012.
- "The Role of Economic Evidence in Cartel Enforcement," Speaker on ABA Section of International Law Teleconference, February 28, 2012.
- "Reverse Payment Settlements in the Pharmaceutical Industry," Presentation to the House Energy and Commerce Committee Staff, July 15, 2011.

- "Increased Government Intervention: The Good, The Bad, and the Ugly," Panelist, Association of Management Consulting Firms, New York, NY, December 2, 2010.
- "The Economic Challenges and Trade-Offs Facing the Obama Administration," Remarks to RBS Citizens, Boston, MA, June 8, 2010.
- "Competition Policy As Innovation Policy," Panelist, Computer & Communications Industry Association, Washington DC, October 27, 2009.
- "State of the Market: Regulatory Evolution and Policy," Moderator, Youth, I.N.C. and Piper Jaffray, New York, NY, September 29, 2009.
- "The Empirical Effects of Collegiate Athletics," Presentation to the NCAA Leadership Advisory Board, Detroit, Michigan, April 4, 2009.
- "The Economic Challenges and Trade-Offs Facing the Obama Administration," Remarks to the Junior Capital Group, Proskauer Rose, LLP, New York, NY, February 10, 2009.
- "Managing Communications During Unprecedented Economic Times," Panelist, The California Club, Los Angeles, CA, January 27, 2009.
- Presentation to the Computer & Communications Industry Association's Antitrust Summit on Innovation and Competition Policy in High-Tech Markets, Washington DC, October 24, 2008.
- Presentation to the Center for American Progress Action Fund Session on the "Avoiding the Pitfalls of Credit Card Debt," Washington, DC, February 25, 2008.
- "Distribution Fund Planning and Management: Lessons Learned from the Global Research Analyst Settlement," with Francis McGovern, Presentation to the Securities and Exchange Commission, Washington, DC, January 31, 2006.
- "The Empirical Effects of Division II Intercollegiate Athletics," Presentation to the National Collegiate Athletic Association 2006 Annual Convention, Indianapolis, Indiana, January 8, 2006.
- "Rules of the Game: Defining Antitrust Markets in Cases Involving Sports," Presentation to the Wilmer, Cutler, Pickering, Hale & Dorr Antitrust Lunch, Washington, DC, December 8, 2005.
- "Competition Policy, Antitrust, and The High-Tech Economy," Keynote Address to the Computer & Communications Industry Association TechSummit 2005, Laguna Beach, CA, October 26, 2005.
- "The Empirical Effects of Division II Intercollegiate Athletics," Presentation to the Division II Chancellors and Presidents Summit, Orlando, FL, June 25, 2005.
- "The Empirical Effects of Collegiate Athletic Spending: An Update and Extension," Presentation to the President's Task Force on the Future of Intercollegiate Athletics, Tucson, AZ, June 9-10, 2005.
- "The Empirical Effects of Collegiate Athletic Spending: An Update and Extension," Presentation to the NCAA Division I Board of Directors, Indianapolis, IN, April 28, 2005.
- "An Analysis of Division II Athletic Expenditures: Preliminary Findings," Presentation to the NCAA Division II Board of Directors, Indianapolis, IN, April 28, 2005.
- "An Analysis of Division II Athletic Expenditures: An Overview of Study Design," Presentation to the National Collegiate Athletic Association 2005 Annual Convention, Grapevine, Texas, January 8, 2005.

- "The Empirical Effects of Collegiate Athletic Spending: An Interim Report," Presentation to the National Association of State Universities and Land Grant Colleges Annual Conference, November 17, 2003.
- "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," *South Texas Law Review,* "Symposium: Asbestos Litigation," Fall 2003.
- "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," Presentation to the Conference on "Understanding Asbestos Litigation: The Genesis, Scope, and Impact," U.S. Chamber of Commerce, Washington, DC, January 23, 2003.
- "The Process of Economic Policy-Making During the Clinton Administration," Presentation to the Conference on "American Economic Policy in the 1990s," Center for Business and Government, John F. Kennedy School of Government, and Harvard University, Cambridge, MA, June 29, 2001.
- "The Impact of Paying for College on Family Finances," Presentation to the Conference on "Funding Excellent Schools and Colleges for All Students," National Conference of State Legislatures, Savannah, Georgia, February 17, 2001.
- "China and the Internet," Remarks on Entertainment and the Internet in China at the EMASIA 2000 Forum, The Asia Society, Los Angeles, CA, May 23, 2000.
- "Is It The Star or Just an Extra? The Role Government Plays in a Digital Economy," Remarks on the Regulation of Global Electronic Commerce at the eCommerce and Global Business Forum, The Anderson School at UCLA and the University of Washington Business School, Santa Cruz, CA, May 18, 2000.
- "Lessons Learned from the Emergency Loan Guarantee Programs," Keynote Address at the Government Guaranteed Lending 2000 Conference, Coleman Publishing, Inc., May 4, 2000.
- "Don't Just Think, Believe," Remarks to the Assembly of Phillips Exeter Academy, Exeter, New Hampshire, February 9, 1999.

TESTIMONY BEFORE REGULATORY AGENCIES/CONGRESS:

- *Federal Trade Commission et al. v. Amgen Inc. & Horizon Therapeutics Plc.,* In the District Court for the Northern District of Illinois Eastern Division, (Case No. 23-CV-3053), (Expert Report & Declaration: August 21, 2023).
- *Petition for Rulemaking to Adopt Revised Competitive Switching Rules: Reciprocal Switching,* STB Ex Parte No. 711 (Sub-No. 1), Before the Surface Transportation Board, with Yair Eilat (Verified Statement: February 14, 2022; Hearing: March 15, 2022).
- *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended By the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05-311, Before the Federal Communications Commission, December 14, 2018.
- "A Response to the Economic Report of Gregory Rosston and Anderzej Skrzypacz, 'Using Auctions and Flexible-Use Licenses to Maximize the Social Benefits From Spectrum,'" with Maya Meidan, Before the Federal Communications Commission, GN Docket No. 14-177, November 9, 2017
- *Review of Commodity, Boxcar, and TOFC/COFC Exemptions,* Docket No. EP 704 (Sub-No 1), Before Surface Transportation Board, with Mark Israel (Verified Statement: July 26, 2016;

Reply Verified Statement: August 26, 2016).

- *Division of Insurance Regulation v. Aetna, Inc. and Humana, Inc.*, In the Department of Insurance, Financial Institution, and Professional Registration, State of Missouri, (Case No. 160325191C), (Hearing Testimony: May 16, 2016).
- *In the Matter of AT&T Mobility, LLC v. Iowa Wireless Services, LLC,* in File No. EB-15-MD-007, Before the Federal Communications Commission (Declaration: October 21, 2015; Reply Declaration: February 5, 2016).
- *In the Matter of World Call Interconnect, Inc. v. AT&T Mobility LLC*, in File No. EB-14-MD-011, Before the Federal Communications Commission (Declaration: November 5, 2014).
- Hearing on "Pay-for-Delay Deals: Limiting Competition and Costing Consumers," Testimony to the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, July 23, 2013.
- Hearing on "The Express Scripts/Medco Merger: Cost Savings for Consumers or More Profits for the Middlemen?" Written Testimony to the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, December 6, 2011.
- *In the Matter of Applications of AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control Licenses and Authorization,* in WT Docket No. 11-65, with Robert D. Willig and Jay Ezrielev, Submitted to the Federal Communications Commission, Commissioned by AT&T, June 9, 2011.
- "Response to Supplementary Comments of Hubert Horan," Submitted to the Department of Transportation, *Joint Application of Delta Airlines, Inc.; Virgin Blue Airlines PTY LTD; Virgin Blue International Airlines PTY LTD d/b/a V Australia; Pacific Blue Airlines (NZ) LTD; and Pacific Blue Airlines (Aust) PTY LTD*, with Mark Israel, Bryan Keating, and Robert D. Willig, Docket DOT-OST-2009-0155, Commissioned by Delta Air Lines, October 22, 2010.
- "Measuring Consumer Benefits from Antitrust Immunity for Delta Air Lines and Virgin Blue Carriers," Submitted to the Department of Transportation, *Joint Application of Delta Airlines, Inc.; Virgin Blue Airlines PTY LTD; Virgin Blue International Airlines PTY LTD d/b/a V Australia; Pacific Blue Airlines (NZ) LTD; and Pacific Blue Airlines (Aust) PTY LTD*, with Mark Israel, Bryan Keating, and Robert D. Willig, Docket DOT-OST-2009-0155, Commissioned by Delta Air Lines, October 13, 2010.
- *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* with Allan Shampine, Submitted to the Federal Communications Commission (WC Docket No. 07-245; GN Docket No. 09-51), Commissioned by the Edison Electric Institute, Declaration Submitted on October 4, 2010; Supplemental Declaration, Submitted on December 14, 2010.
- *In Re: Cable Subscribership Survey For the Collection of Information Pursuant to Section 612(g) of the Communications Act*, with Michael Katz and Theresa Sullivan, Submitted to the Federal Communications Commission (MB Docket No. 07-269), Commissioned by the National Cable & Telecommunications Association, DIRECTV, and DISH Network, December 16, 2009.
- *In The Matter of Applications for the Transfer of Control of Licenses and Authorizations From Centennial Communications Corp. to AT&T*, with Robert D. Willig and J. Loren Poulsen, Submitted to the Federal Communications Commission, Commissioned by AT&T, November 21, 2008.

- *In The Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* Filed in Conjunction With Reply Comments Submitted to the Federal Communications Commission (MB Docket No. 07-29; MB Docket No. 07-198), Commissioned by Discovery Communications, Inc., February 12, 2008.
- *In The Matter of Applications for the Transfer of Control of Licenses and Authorizations From Dobson Communications to AT&T*, with Robert D. Willig, Submitted to the Federal Communications Commission, Commissioned by AT&T, July 12, 2007.
- *In The Matter of Satellite Home Viewer Extension and Reauthorization Act of 1994,* with Jay Ezrielev, Submitted to the Library of Congress, Copyright Office (Docket No. RM 2005-07), Commissioned by EchoStar Satellite L.L.C., September 1, 2005.
- *In The Matter of Rainbow DBS Company, LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and related Special Temporary Authorization*, with Simon J. Wilkie, Submitted to the Federal Communications Commission (IB Docket No. 05-72), Commissioned by EchoStar Satellite L.L.C. and Rainbow DBS Company, LLC, April 12, 2005.
- *In The Matter of Applications for the Transfer of Control of Licenses and Authorizations From Western Wireless Corporation to ALLTEL Corporation*, with Robert D. Willig and Yair Eilat, Submitted to the Federal Communications Commission (WT Docket No. 05-50), Commissioned by ALLTEL Corporation and Western Wireless Corporation, March 29, 2005.
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- "An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers," with Peter R. Orszag and John M. Gale, Filed in Conjunction With Reply Comments Submitted to the Federal Communications Commission (CS Docket No. 01-290), Commissioned by EchoStar Satellite Corporation and DIRECTV, Inc., January 7, 2002
- Hearing on "The Department of Commerce Fiscal Year 2001 Budget and Its Native American Initiatives," Testimony to the United States Senate Indian Affairs Committee, February 23, 2000.
- Hearing on "Testimony on S. 614: The Indian Tribal Regulatory Reform and Business Development Act," Testimony to the United States Senate Indian Affairs Committee, May 19, 1999.

TESTIMONY IN LITIGATION PROCEEDINGS:

- *In Re: Cambridge Lane, LLC et al., v. J-M Manufacturing Company, Inc.*, United States District Court for the Central District of California (Case No. 2:10-CV-10-006638 GW PJW), (Expert Report: October 2, 2023).

- *In Re Automatic Card Shufflers Litigation,* In the Court of the Northern District of Illinois (Master File No. 1:21-CV-01798), (Expert Report: August 20, 2023).
- *Mesabi Metallics Company LLC (F/K/A Essar Steel Minnesota LLC) v. Cleveland-Cliffs Inc. et al*, In The United States Bankruptcy Court For the District of Delaware (Adv. Proc. No. 17-51210 (CTG)), (Expert Report: July 28, 2023).
- *In re Evanston Northwestern Healthcare Corporation Antitrust Litigation*, In the Court of the Northern District of Illinois (Master File No. 07-CV-4446), (Expert Report: April 21, 2023; Deposition Testimony: May 26, 2023).
- *In re CBS Corporation Stockholder Class Action and Derivative Litigation*, In the Court of Chancery of the State of Delaware (Consolidated C.A. No. 2020-0111-SG), (Rebuttal Expert Report: March 14, 2023; Deposition Testimony: April 11, 2023).
- *Fusion Elite All Stars, et al., v. Varsity Brands, LLC, et al*., United States District Court, Western District of Tennessee (Case No. 2:20-cv-02600-SHL-TEMP), (Expert Report: September 23, 2022; Deposition Testimony: November 11, 2022).
- *Jessica Jones, et al., v. Bain Capital Private Equity, et al*., United States District Court, Western District of Tennessee (Case No. 2:20-cv-02892-SHL-TEMP), (Expert Report: September 23, 2022; Deposition Testimony: November 15, 2022).
- *Jane Doe, et al., on behalf of themselves and all others similarly situated v. MEDSTAR HEALTH, INC., et al.*, In the Circuit Court for Baltimore City (Case No. 24-C-20-000591), (Expert Report: August 16, 2022; Deposition Testimony: November 17, 2022).
- *Djeneba Sidibe, et al., v. Sutter Health*, United States District Court, Northern District of California (Class Action Case no. 3: 12-cv-4854-LB), (Expert Report: November 19, 2021; Trial Testimony: March 7, 2022).
- *Chase Manufacturing, Inc., d/b/a Thermal Pipe Shields v. Johns Manville Corp.,* United States District Court for the District of Colorado (Civil Action No. 1:19-CV-00872-MEH), (Expert Report: November 19, 2021).
- *In Re: JUUL Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation*, United States District Court, Northern District of California, (Case No. 19-md-02913-WHO), (Expert Report: August 27, 2021; Deposition Testimony: September 22, 2021; Expert Report: November 15, 2021; Deposition Testimony: December 13, 2021; Expert Report: May 6, 2022; Supplemental Expert Report: May 27, 2022; Deposition Testimony: June 13, 2022).
- *Swisher International, Inc. v. United States Food and Drug Administration, et al.,* United States District Court, Middle District of Florida, Jacksonville Division, (Case No. 3:21-cv-00764), (Declaration: August 4, 2021).
- *Hank Haney and Hank Haney Media, LLC v. PGA Tour, Inc.,* United States District Court for the Southern District of Florida, (Civil Action No. 0:19-CV-63108-RAR), (Rebuttal Expert Report: March 19, 2021; Deposition Testimony: April 12, 2021).
- *Persian Gulf Inc et al. vs. BP West Coast Products, LLC et al and Richard Bartlett et al. v. BP West Coast Products LLC et al.*, United States District Court for the Southern District of California (Case No. 3:15-cv-01749-TWR-AGS; 3:18-cv-01373-TWR-AGS), (Expert Report: December 11, 2020; Deposition Testimony: January 13, 2021).

- *Academy of Allergy & Asthma in Primary Care, and United Biologics, LLC d/b/a United Allergy Services v. Superior Healthplan, Inc., and Centene Corp.,* United States District Court for the Western District of Texas, San Antonio Division, (Civil Action No. 5:17-CV-01122-FB), (Expert Report: September 8, 2020; Reply Expert Report: October 6, 2020; Deposition Testimony: November 18, 2020).
- *In re EpiPen (Epinephrine Injection, USP) Marketing Sales Practices and Antitrust Litigation*, United States District Court for the District of Kansas, (Case No. 17-md-2785-DDC-TJJ), (Expert Report: December 23, 2019; Deposition Testimony: January 23, 2020; Declaration: July 14, 2020).
- *In re Automotive Parts Antitrust Litigation, In re Wire Harness, FCA US LLC v. Yazaki Corp. et al.,* United States District Court, Eastern District of Michigan, Southern Division, (Case No. 2:17-cv-14138-MOB-MKM, Master File No. 12-md-02311), (Expert Report: December 23, 2019; Deposition Testimony: January 10, 2020).
- *In re Determination of Rates and Terms for Sound Recordings (2021-2025) and Making of Ephemeral Copies to Facilitate Those Performances (Web V)*, Before the United States Copyright Royalty Judges, (Docket No.: 19-CRB-0005-WR), (Written Direct Testimony: September 24, 2019; Written Rebuttal Testimony: January 10, 2020; Deposition Testimony: March 5, 2020; Trial Testimony: August 10-13, 2020; August 25, 2020).
- *Matthew Fero et al. v. Excellus Health Plan Inc. et al*, United States District Court, Western District of New York, (Case No. 6:15-cv-06569), (Expert Report: September 13, 2019; Deposition Testimony: October 30, 2019).
- *In re Premera Blue Cross Customer Data Security Breach Litigation,* United States District Court for the District of Oregon (Case No. 3:15-md-2633-SI), (Expert Report: September 19, 2018; Deposition Testimony, October 9, 2018).
- *Rimini Street, Inc. v. Oracle International Corporation and Oracle America, Inc.,* United States District Court for the District of Nevada (Case No. 2:14-CV-01699-LRH-CWH), (Expert Report: May 4, 2018; Rebuttal Report: June 22, 2018; Supplemental Rebuttal Report: July 20, 2018; Deposition Testimony: August 22, 2018; Second Supplemental Rebuttal Report: March 4, 2021; Trial Testimony: December 9, 2022).
- *Xaleron Pharmaceuticals, Inc. v. Actavis, Inc. and Allergan, Inc.*, In the Supreme Court of the State of New York, County of New York (Case No. 150587/2016), (Expert Report: December 27, 2017; Deposition Testimony: January 26, 2018).
- *Innovation Ventures, LLC f/d/b/a Living Essentials v. Custom Nutrition Laboratories, LLC and Nutrition Science Laboratories, LLC and Alan Jones*, United States District Court for the Eastern District of Michigan, Southern Division, (Case No. 12-13850), (Rebuttal Expert Report: March 23, 2017; Deposition Testimony: April 5, 2017; Rebuttal Expert Report: December 4, 2020; Deposition Testimony: January 15, 2021).
- *United States of America et al., v. Aetna Inc. and Humana Inc.,* United States District Court for the District of Columbia, (Case: 1:16-cv-01494(JDB)), (Expert Report: October 21, 2016; Expert Reply Report: November 11, 2016; Deposition Testimony: November 23, 2016; Trial Testimony: December 19-20, 2016).

- *In the Matter of Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (SDARS III)*, Before the United States Copyright Royalty Judges (Docket No.: 16-CRB-0001 SR/PSSR (2018-2022), (Written Direct Testimony: October 19, 2016; Deposition Testimony: January 17, 2017 and April 4, 2017; Written Rebuttal Testimony: February 17, 2017; Trial Testimony: April 25-26, 2017).
- *In Re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation,* United States District of Court for the Northern District of California, (Case: No. 4:14-md-2541-CW), (Expert Report: August 26, 2016; Deposition Testimony: September 28, 2016).
- *Federal Trade Commission et al., v. Staples, Inc. and Office Depot, Inc.,* United States District Court for the District of Columbia, (Case: 1:15-cv-02115-EGS), (Expert Report: February 29, 2016; Deposition Testimony: March 14, 2016).
- *American Airlines, Inc. v. British Airways PLC; Iberia Lineas Aereas de Espana, and Finnair OYJ,* Before the American Arbitration Association, (Expert Report: December 16, 2015).
- *U.S. Department of Justice v. AB Electrolux; Electrolux North America, Inc.; and General Electric Company*, United States District Court for the District of Columbia, (Case: 1:15-cv-01039-EGS), (Expert Report: September 30, 2015; Rebuttal Report: October 20, 2015; Deposition Testimony: October 28, 2015; Supplemental Report: November 11, 2015; Trial Testimony: December 3-4, 2015).
- *Vijay Singh v. PGA Tour, Inc.,* Supreme Court of the State of New York (Index No. 651659/2013), (Expert Report: June 12, 2015; Deposition Testimony: August 20, 2015).
- *In re: Lightsquared Inc., et al.,* In the United States Bankruptcy Court for the Southern District of New York (Case No. 12-12080 (SCC)), (Expert Report: February 3, 2015; Deposition Testimony: February 23, 2015; Trial Testimony: March 12, 2015).
- *Armando Diaz et al v. San Juan Cable* LLC In The United States District Court for the District of Puerto Rico (Civil Action No: 14-1244-CCC), (Expert Report: December 5, 2014).
- *In re Cablevision Consumer Litigation*, In The United States District Court for the Eastern District of New York (10-CV-4992 (JS) (AKT)) (Expert Report: July 18, 2014; Rebuttal Expert Report: September 11, 2014; Deposition Testimony: October 2, 2014).
- *Orbital Sciences Corporation v. United Launch Alliance, LLC, and RD Amross, LLC,* In the United States District Court for the Eastern District of Virginia (Civil No: 1:13-cv-00753 LMB/JFA), (Expert Report: February 28, 2014).
- *Puerto Rico Telephone Company, Inc. v. San Juan Cable LLC d/b/a OneLink Communications,* In the United States District Court for the District of Puerto Rico (Civil No: 11-2135 (GAG)), (Expert Report: December 11, 2013; Supplemental Report: December 23, 2013; Deposition Testimony: January 10, 2014).
- *Sky Angel U.S., LLC v. Discovery Communications, LLC, et al.* In the United States District Court of Maryland, Southern Division (Civil Action No. 8:13-cv-00031-DKC), (Expert Report: December 6, 2013; Deposition Testimony: January 31, 2014; Trial Testimony: November 23, 2015).
- *Oakley, Inc. vs. Nike, Inc. and Rory McIlroy*; In the United States District Court for the Central District of California (Case No. SACV12-02138 JVS-MLG), (Expert Report: November 26, 2013).

- *In re: Electronic Books Antitrust Litigation; The State of Texas, et al., v Penguin Group (USA), Inc., et al.*, In the United States District Court for the Southern District of New York (No. 11-md-02293 (DLC) and No. 12-cv-03394 (DLC)), (Declaration: November 15, 2013; Deposition Testimony: December 7, 2013; Sur-Reply Declaration: January 21, 2014).
- *Federal Trade Commission v. Actavis, Inc., et al.*, Signatory, Brief of Antitrust Economists as *Amici Curiae* before the Supreme Court, No. 12-416, February 28, 2013.
- *VOOM HD Holding LLC v. EchoStar Satellite LLC*, In the Supreme Court of the State of New York, County of New York (Index No. 600292/08), (Expert Report: December 4, 2009; Deposition Testimony: March 5, 2010; Supplemental Expert Report: August 10, 2012; Supplemental Deposition Testimony: September 14, 2012; Jury Trial Testimony: October 11-12, 2012).
- *Hewlett-Packard Company v. Oracle Corporation*, In the Superior Court of the State of California, County of Santa Clara (Case No 1-11-CV-203163), (Expert Report: March 26, 2012; Rebuttal Report: April 9, 2012; Deposition Testimony: April 19, 2012; Supplemental Expert Report: December 10, 2012; Supplemental Deposition Testimony: February 5, 2013; Trial Testimony: March 18, 2013; Updates to Supplemental Expert Report: November 30, 2015; Supplemental Rebuttal Report: March 15, 2016; Supplemental Deposition Testimony: March 24, 2016, April 20, 2016; Jury Trial Testimony: June 20-21, 2016, June 28, 2016; Declaration: August 1, 2016).
- *In The Matter of Game Show Network, LLC v. Cablevision Systems Corporation*, in File No. CSR-8529-P, Before the Federal Communications Commission (Expert Report: December 12, 2011; Reply Declaration: February 9, 2012; Expert Report: December 14, 2012; Deposition Testimony: February 7, 2013, March 12, 2015; Direct Testimony: March 12, 2013; Supplemental Direct Testimony: March 19, 2013; Rebuttal Report: December 15, 2014; Complete Direct Testimony: June 1, 2015; Trial Testimony: July 20, 2015).
- *In The Matter of The Tennis Channel v. Comcast Cable Communications, LLC*, in File No. CSR-8258-P, Before the Federal Communications Commission (Declaration: February 11, 2010; Reply Declaration: April 13, 2010; Expert Report: February 25, 2011; Deposition Testimony: March 8, 2011; Written Direct Testimony: April 15, 2011; Rebuttal Declaration: April 26, 2011; Courtroom Testimony: April 27, 2011; Supplemental Deposition Testimony: May 1, 2011; Supplemental Rebuttal Declaration, May 12, 2011).
- *Caroline Behrend, et al. vs. Comcast Corporation, et al.*, In the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 03-6604), (Declaration: August 21, 2009; Deposition: September 29, 2009).
- *In The Matter of TCR Sports Broadcasting Holding, LLP d/b/a Mid-Atlantic Sports Network v. Comcast Corporation*, in MB Docket No. 08-214, File No. CSR-8001-P, Before the Federal Communications Commission (Declaration with Jay Ezrielev: July 31, 2008; Expert Report: March 19, 2009; Deposition Testimony: April 23, 2009; Courtroom Testimony: May 26, 2009; Reply Declaration: June 1, 2009).
- *In The Matter of NFL Enterprises LLC v. Comcast Cable Communications, LLC*, MB Docket No. 08-214, File No. CSR-7876-P, Before the Federal Communications Commission (Declaration with Jay Ezrielev: June 20, 2008; Expert Report: March 13, 2009; Deposition Testimony: April 1, 2009; Written Direct Testimony: April 6, 2009; Courtroom Testimony: April 16, 2009).

- *In Re: Intel Corp. Microprocessor Antitrust Litigation; Phil Paul et al v. Intel Corporation*, In the United States District Court for the District of Delaware (MDL Docket No. 05-1717 (JJF) and C.A. No. 05-485 (JJF), (Declaration: August 10, 2007; Declaration: April 23, 2007).
- *Microsoft Corporation v. Commission of the European Communities*, European Court of First Instance, Case T-201/04 R, April 24-25, 2006.

EXHIBIT B

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EDUCATION

Ph.D., Economics: Harvard University, Cambridge, MA Completion: 2002

- Fields of specialization: Industrial Organization, Economic Development
- Awarded a full tuition and stipend scholarship

B.A., Law and in Economics: Hebrew University, Jerusalem, Israel Completion: 1996

- Rector's Prize (awarded each year to the top two students in the Faculty), Faculty of Social Sciences: 1992/3
- Dean's List, Faculty of Law: 1992/3, 1993/4

PROFESSIONAL EXPERIENCE

Compass Lexecon February 2021 – Present

Senior Consultant

Independent Consultant, Ramot Menashe, Israel February 2020 – February 2021

Israel Antitrust Authority, Jerusalem, Israel January 2016 – February 2020

Chief Economist and Head of Economics Department

In charge of all the economic work at the Authority and on advising the Director General on all matters.

- Oversaw a group of 35 economists responsible for market studies, policy analysis, merger and conduct evaluation, litigation expert testimony, and competition advocacy
- Since mid 2017, served as the *Acting Director General* on matters without a permanent Director General
- Served on intra-governmental committees

Compass Lexecon, Oakland, CA, USA 2002– 2015

Senior Vice President

- Provided economic consulting on antitrust, regulatory, and competition policy matters to dozens of Fortune 500, international companies and the U.S. government in various industries including high tech, telecoms, transportation, entertainment and consumer products
- Managed many projects that required analysis of firms' strategic business practices, as well as the use of advanced theoretical and empirical economics tools and vast datasets
- Submitted written testimony and presented research results to the U.S. Department of Justice and Federal Trade Commission regarding the competitive effects of several large proposed mergers
- Retained by the U.S. Securities and Exchange Commission to author a distribution plan for the Con Agra security plan settlement

Harvard Institute for International Development, Cambridge, MA 1999 – 2001

Researcher

- Worked as a development economics researcher during Ph.D. studies
- Co-authored several published papers with economists Jeffrey Sachs and Clifford Zinnes

The Israel Democracy Institute, Jerusalem, Israel 1996 – 1997

Israeli parliament intern

- Economic intern at the Knesset's Economics Committee and State Audit Committee through the Institute's Knesset internship program

Various academic institutes

- Teaching positions at Harvard University, Hebrew University and Tel Aviv College of Management Academic Studies

RESEARCH AND PUBLICATIONS

See https://eilatyair.wixsite.com/home/papers

MISCELLANEOUS

- Citizenship: USA, Israel, Italy
- Languages: English, Hebrew