do not mandate or circumscribe the conduct of small entities. If a party wishing to utilize the proposed procedures files a complaint, petition, application, or request for dispute resolution, that entity will not encounter any additional burden. Rather, the procedures are being updated and clarified by the proposed regulations. Therefore, the Board certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities as defined by the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

List of Subjects in 49 CFR Part 1109

Administrative practice and procedure, Maritime carriers, Motor carriers, Railroads.

It is ordered:

1. Comments on this proposal are due by August 31, 2016; reply comments are due by September 30, 2016.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the **Federal Register.**

4. This decision is effective on its service date.

Decided: July 28, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Kenyatta Clay,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1109 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS

■ 1. Revise the authority citation for part 1109 to read as follows:

Authority: 5 U.S.C. 571 *et seq.* and 49 U.S.C. 1321(a), 24712(c), and 24905(c).

■ 2. Add § 1109.5 to read as follows:

§ 1109.5 Resolution of certain disputes involving the State Sponsored Route Committee and the Northeast Corridor Commission.

(a) In addition to the mediation procedures under this part that are available following the filing of a complaint in a proceeding before the Board, Amtrak or a State member of the State Supported Route Committee established under 49 U.S.C. 24712 may request that the Board informally assist in securing outside professional mediation services in order to resolve disputes arising from:

(1) Implementation of, or compliance with, the cost allocation methodology for State-Supported Routes developed under section 209 of the Passenger Rail Investment and Improvement Act of 2008 or amended under 49 U.S.C. 24712(a)(6);

(2) Invoices or reports provided under 49 U.S.C. 24712(b); or

(3) Rules and procedures implemented by the State Supported Route Committee under 49 U.S.C. 24712(a)(4). Such a request for informal assistance in securing outside professional mediation services may be submitted to the Board even in the absence of a complaint proceeding before the Board.

(b) In addition to the mediation procedures under this part that are available following the filing of a complaint in a proceeding before the Board, the Northeast Corridor Commission established under 49 U.S.C. 24905, Amtrak, or public authorities providing commuter rail passenger transportation on the Northeast Corridor may request that the Board informally assist in securing outside professional mediation services in order to resolve disputes involving implementation of, or compliance with, the policy developed under 49 U.S.C. 24905(c)(1). Such a request for informal assistance in securing outside professional mediation services may be submitted to the Board even in the absence of a complaint proceeding before the Board.

(c) A request for informal Board assistance in securing outside professional mediation services under paragraph (a) or (b) of this section shall be submitted by letter duly authorized to be submitted to the Board by the requesting party. The request letter shall be addressed to the Director of the Board's Office of Public Assistance, Governmental Affairs, and Compliance, and shall include a concise description of the issues for which outside professional mediation services are sought. The Office of Public Assistance, Governmental Affairs, and Compliance shall contact the requesting party in response to such request within 14 days of receipt of the request.

[FR Doc. 2016–18102 Filed 8–2–16; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

49 CFR Parts 1144 and 1145

[Docket No. EP 711; Docket No. EP 711 (Sub-No. 1)]

Petition for Rulemaking To Adopt Revised Competitive Switching Rules; Reciprocal Switching

AGENCY: Surface Transportation Board (the Board or STB).

ACTION: Notice of proposed rulemaking.

SUMMARY: In this decision, the Board grants in part a petition for rulemaking filed by the National Industrial Transportation League seeking revised reciprocal switching regulations. The Board proposes new regulations governing reciprocal switching in Docket No. EP 711 (Sub-No. 1), which would allow a party to seek a reciprocal switching prescription that is either practicable and in the public interest or necessary to provide competitive rail service.

DATES: Comments are due by September 26, 2016. Replies are due by October 25, 2016. Requests for ex parte meetings with Board Members are due by October 10, 2016 and meetings will be conducted between October 25, 2016 and November 14, 2016. Meeting summaries are to be submitted within two business days of the ex parte meeting.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's Web site at ''*www.stb.dot.gov*'' at the ''E–FILING'' link. Any person submitting a filing in paper format should send an original and 10 paper copies of the filing to: Surface Transportation Board, Attn: Docket No. EP 711 (Sub-No. 1), 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Allison Davis at (202) 245–0378. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Competitive access generally refers to the ability of a shipper or a competitor railroad to use the facilities or services of an incumbent railroad to extend the reach of the services provided by the competitor railroad. The Interstate Commerce Act makes three competitive

access remedies available to shippers and carriers: The prescription of through routes, terminal trackage rights, and, as relevant here, reciprocal switching. Under reciprocal switching, or as it is sometimes called, ''competitive switching,'' an incumbent carrier transports a shipper's traffic to an interchange point, where it switches the cars over to the competing carrier. The competing carrier pays the incumbent carrier a switching fee for bringing or taking the cars from the shipper's facility to the interchange point, or vice versa, which is incorporated into the competing carrier's total rate to the shipper. Reciprocal switching thus enables a competing carrier to offer its own single-line rate to compete with the incumbent carrier's single-line rate, even if the competing carrier's lines do not physically reach a shipper's facility.

On July 7, 2011, the National Industrial Transportation League (NITL) filed a petition to institute a rulemaking proceeding to modify the Board's standards for reciprocal switching. The Board took public comment and held a hearing on the issues raised in the petition. After consideration of the petition and the comments and testimony received, the Board is granting NITL's petition in part and instituting a rulemaking proceeding in Docket No. EP 711 (Sub-No. 1) to modify the Board's standards for reciprocal switching. Because we are proposing rules in a separate sub-docket, we will also close the docket in Docket No. EP 711.

Statutory and Regulatory History

Reciprocal switching can occur as part of a voluntary arrangement between carriers, or it may be ordered by the Board. The statutory provision governing the Board's authority to order reciprocal switching arrangements was first enacted by Congress in the Staggers Rail Act of 1980, Public Law 96–448, 94 Stat. 1895 (Staggers Act). Under the Staggers Act, the agency 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.* The rail carriers entering into such an 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) (emphasis added) (previously codified at 49 U.S.C. 11103(c) (1980)).

In 1985, the Board's predecessor agency, the Interstate Commerce Commission (ICC), adopted regulations pertaining to competitive access, including reciprocal switching.[1] *Intramodal Rail Competition,* 1 I.C.C.2d 822 (1985), *aff'd sub nom Balt. Gas & Elec.* v. *United States,* 817 F.2d 108 (D.C. Cir. 1987). Those regulations were adopted upon the filing of petitions from NITL and the Association of American Railroads (AAR) asking the agency to adopt rules that they had negotiated. A subsequent joint petition was filed by the AAR and the Chemical Manufacturers Association (CMA) that clarified the negotiated NITL–AAR agreement. The ICC adopted this agreed-upon proposal, with some modifications. *Id.* The regulations provided that reciprocal switching would only be prescribed if the agency determines that it is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive,'' and ''otherwise satisfies the criteria of . . . 11102(c). 49 CFR 1144.2(a)(1);[2] *see also Intramodal Rail Competition,* 1 I.C.C.2d at 830, 841.

The following year, in 1986, the ICC decided its first reciprocal switching case under the new regulations. In *Midtec Paper Corp.* v. *Chicago & North Western Transportation Co.* (*Midtec Paper Corp.*), 3 I.C.C.2d 171 (1986), the ICC denied a shipper's petition for competitive access either via terminal trackage rights or reciprocal switching. In so doing, the ICC elaborated on the rules it adopted in *Intramodal Rail Competition* and their relation to the statute:

> [W]e think it correct to view the Staggers [Act] changes as directed to situations where some competitive failure occurs. There is a vast difference between using the Commission's regulatory power to correct abuses that result from insufficient intramodal competition and using that power to initiate an open-ended restructuring of service to and within terminal areas solely to introduce additional carrier service.

Id. at 174. Thus, although ''[u]nder [11102(c)], awarding reciprocal switching is discretionary,'' the ICC explained that the key issue under its then-new regulations was whether the incumbent railroad ''has engaged or is likely to engage in conduct that is contrary to the rail transportation policy or is otherwise anticompetitive.'' *Id.* at 181. In assessing anticompetitive conduct, the essential questions for the ICC were whether the railroad had used its market power to extract unreasonable terms or had shown a disregard for the shipper's needs by furnishing inadequate service. *Id.* The shipper in *Midtec Paper Corp.* made general allegations about the carrier's rates and specific allegations about its service as evidence of anticompetitive conduct, but the ICC found no evidence that the rates to the complaining shipper were higher than other shippers and found the evidence of service inadequacies unconvincing. *Id.* at 182–85. Accordingly, the ICC rejected the request for reciprocal switching.

On appeal of *Midtec Paper Corp.,* the United States Court of Appeals for the District of Columbia Circuit upheld the application of the reciprocal switching regulations, including the anticompetitive conduct requirement, as a permissible exercise of the agency's discretion, stating:

> [The *Intramodal*] rules narrow the agency's discretion under section 1110[2] by describing, for example, the circumstances in which it would not grant discretionary relief—where there is no reasonable fear of anticompetitive behavior. We could not say in *Baltimore Gas,* and cannot say now, that the Commission's narrowing of its own discretion is manifestly inconsistent with the terms or the purposes of section 1110[2], or with the broader purposes of the Staggers Act.

Midtec Paper Corp. v. *United States,* 857 F.2d 1487, 1500 (D.C. Cir. 1988) (statutory sections updated to reflect current numbering); *see also Balt. Gas & Elec.,* 817 F.2d at 115 (stating that ICC's competitive access rules are ''a reasonable accommodation of the conflicting policies set out in its governing statute.'').

Since adoption of the agency's competitive access regulations in 1985, the regulations have not changed substantively. Few requests for reciprocal switching have been filed with the agency since then, and in none of those cases has the Board granted a request for reciprocal switching. *See, e.g., Midtec Paper Corp.,* 3 I.C.C.2d at 171; *Vista Chem. Co.* v. *Atchison, Topeka & Santa Fe Ry.,* 5 I.C.C.2d 331 (1989).

[1] These regulations did not include a prescription for terminal trackage rights. The ICC stated that ''there is no present need to adopt rules for prescription of terminal trackage rights. Such rights have rarely been sought in recent years, and we do not anticipate a surge of such cases.'' *Intramodal Rail Competition,* 1 I.C.C.2d at 835.

[2] Formerly codified at 49 CFR 1144.5(a)(1). The regulations at 1144.2(a) also provide a list of relevant factors that the agency shall take into account in making this determination in subsection (a)(1), along with a ''standing'' requirement in subsection (a)(2).

NITL's Petition and Comments Received

In June 2011, the Board held a public hearing in *Competition in the Railroad Industry,* Docket No. EP 705, to explore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, and asked parties to comment on issues pertaining to the Board's authority to impose reciprocal switching under 49 U.S.C. 11102(c), among other items. Soon after the hearing, NITL filed a petition for rulemaking in *Petition for Rulemaking to Adopt Revised Competitive Switching Rules,* Docket No. EP 711. NITL's petition, which it describes as ''flow[ing] from the inquiry that the Board initiated in Ex Parte No. 705,'' urges regulatory change and argues that the Board's reciprocal switching regulations have not promoted Congress's goal in enacting 11102(c), which was to encourage greater competition through reciprocal switching. (NITL Pet. 2, 17.) [3] NITL therefore proposes new regulations under which reciprocal switching by a Class I rail carrier would be mandatory if certain conditions were present. (*Id.* at 2–6.)

Specifically, NITL proposes regulations under which Board-ordered competitive switching by a Class I rail carrier would be mandatory if four criteria were met: (1) The shipper (or group of shippers) is served by a single Class I rail carrier; (2) there is no effective intermodal or intramodal competition for the movements for which competitive switching is sought; (3) there is or can be ''a working interchange'' between a Class I carrier and another carrier within a ''reasonable distance'' of the shipper's facility; and (4) switching is safe and feasible and would not unduly hamper the carrier's ability to serve existing shippers. (*Id.* at 7.)

NITL's proposal includes several conclusive presumptions. With respect to the criterion that no effective competition exists, NITL proposes two presumptions. Specifically, a shipper would be conclusively presumed to lack effective intermodal or intramodal competition where either: (a) The rate for the movement for which switching is sought has a revenue-to-variable cost ratio of 240% or more ($R/VC_{\geq 240}$), or (b) where the incumbent carrier serving the shipper's facilities for which switching is sought has handled 75% or more of the transported volumes of the movements at issue for the 12-month period prior to the petition requesting that the Board order switching. (*Id.* at 8.)

With respect to the criterion that there is a working interchange within a reasonable distance, NITL also proposes two presumptions. Specifically, the presence of a working interchange within a reasonable distance of the shipper's facility would be presumed if either: (a) The shipper's facility is within the boundaries of a ''terminal'' of the Class I rail carrier, at which cars are ''regularly switched,'' or (b) the shipper's facility is within 30 miles of an interchange between the Class I rail carrier and another rail carrier, at which cars are ''regularly switched.'' (*Id.* at 8.)

Following receipt of NITL's petition, the Board received a number of replies to the petition. The Board initially deferred consideration of NITL's petition pending a review of the comments received in Docket No. EP 705, in a decision served on November 4, 2011. In a decision served on July 25, 2012, the Board, without instituting a rulemaking proceeding, sought comments and further study of a number of issues with the NITL proposal, and subsequently received comments and replies. The Board also received oral testimony in a hearing held on March 25 and 26, 2014. For a list of the numerous parties that have participated in this proceeding at various stages, see the Appendix.[4] Most shippers who commented support NITL's general proposal that the Board should revise its reciprocal switching regulations in order to make the remedy more widely available. Supporters of the NITL proposal contend that it would introduce more competition into the rail transportation marketplace. (*E.g.,* ACC Comments 3–5; NITL Comments 6.) Pointing to the Canadian experience with ''interswitching,'' [5] supporters argue that the proposal is practicable. (*E.g.,* Diversified CPC Comments 8–10; Highroad Comments 17–20; NITL Comments 59–63.) They also argue that the proposal could improve rail service generally, would not harm shippers ineligible for a switching order, and would not undermine rail network efficiency. (AECC Reply 7–11; Diversified CPC Comments 6; Highroad Comments 9–10; NITL Comments 56–63; NITL Reply 27–34.)

Some commenters generally support modifying the Board's competitive access regulations in a manner similar to NITL's proposal, but disagree over the precise changes the Board should adopt. For example, although some parties support using $R/VC_{\geq 240}$ to determine effective competition (*see, e.g.,* GLE Comments 8–10), others instead support the use of $R/VC_{\geq 180}$ or a carrier's Revenue Shortfall Allocation Methodology benchmark (*see* Agricultural Parties Comments 17–18, 23; Diversified CPC Comments 12; Highroad Comments 16–17; Roanoke Cement Comments 11–12; USDA Comments 6). Similarly, although some parties appear to agree on having a limitation based on distance, they disagree on what a reasonable distance would be and the number of miles that should be used for a presumption. (*See* Agricultural Parties Comments 24; Highroad Comments 16; Roanoke Cement Comments 8.) In addition, some commenters state that they are not in favor of any rule that would require shippers to prove market dominance or prove that rates exceed a regulatory benchmark in order to obtain competitive access. (Diversified CPC Comments 9; Highroad Comments 16, 22; Roanoke Cement Comments 11.)

Moreover, some shipper groups that generally support NITL's proposal acknowledge that their members would have few opportunities to qualify for reciprocal switching under the proposal. (ARC Comments 13; Agricultural Parties Reply 4–5.) Additionally, many shippers or shipper groups question whether the NITL proposal would in fact increase competition or have an appreciable impact on rates. Olin contends that NITL's proposal is flawed because it is ''premised on the false assumption that the railroads are actually interested in competing for business.'' (Olin Comments 6.) The Chlorine Institute argues that NITL's proposal would not ensure that any rate offered by a second carrier would be reasonable or competitive. (Chlorine Institute Comments 1–2.) Agricultural Parties, though not opposing NITL's proposal, state that the Board ''should not *conclusively presume* that access to an alternative Class I railroad via mandatory switching will result in effective competition,'' or that any competition that occurs would ensure reasonable rates and service. (Agricultural Parties Comments 15 (emphasis in original).) According to Joint Coal Shippers, ''any assumption that the availability of mandatory switching constitutes *de facto*

[3] Unless otherwise noted, all record cites are to submissions made in *Petition for Rulemaking to Adopt Revised Competitive Switching Rules,* Docket No. EP 711. Additionally, all references to comments and replies in Docket No. EP 711 refer to those received in response to the Board's July 25, 2012 decision.

[4] To the extent this decision refers to parties by abbreviations, those abbreviations are listed in the Appendix.

[5] ''Interswitching'' refers to government-mandated reciprocal switching for shippers within a certain distance of a competing carrier's interchange.

competition would constitute a significant and unjustifiable harm to captive shippers.'' (Joint Coal Shippers Comments 11.) Similarly, ARC maintains that shifting freight from one railroad to a potential competitor does not guarantee any reduction in rates. (ARC Comments 8.)

Rail carriers and rail interests oppose NITL's proposal for a variety of reasons. They contend that the proposal is unnecessary because shippers are concerned more about rates than access to additional rail carriers, as revealed in the testimony given in Docket No. EP 705. (CSXT Comments 21–23; KCS Comments 3–7.) Moreover, rail carriers argue that the proposal is unwise because it would favor a small group of shippers to the detriment of others. (AAR Comments 5–6, Joint V.S. Eakin & Meitzen 3–5; CEI Reply 3; NSR Reply 28–30.) Additionally, they contend that the proposal would have serious, adverse effects on rail service, carrier revenues, network efficiency, and incentives to invest in the rail network. (*See, e.g.,* CEI Reply 3; CSXT Comments 24–48; KCS Comments 14–16; NSR Comments 79–80.) In response to some shippers' claim that the Canadian interswitching model demonstrates the practicability of the NITL proposal, railroads argue that differences between the Canadian and U.S. rail networks make the Canadian regulatory regime an unreliable guide as to what would happen under NITL's proposal. (AAR Reply 31–32; CSXT Reply 42–47; KCS Reply 30–33; CEI Reply 7; UTU–NY Reply 3.)

Rail carriers and carrier interests also argue that the NITL proposal is legally flawed. They contend that it is unlawful because Congress ''ratified'' the *Midtec Paper Corp.* standard of anticompetitive behavior when Congress re-enacted the reciprocal switching language in 11102 without change in the ICC Termination Act of 1995 (ICCTA), Pub. L. 104–88, 109 Stat. 803. (CSXT Comments 11–21; NSR Comments 23–28.).

Rail interests also question the practicality of NITL's proposal, argue that there are too many unknowns regarding its parameters for it to be easily implemented, and contend that these unknowns will lead to increased litigation before the Board. These unknowns, according to the carriers, include matters such as access pricing, agreement terms, yard and line capacity, service levels, routing issues, labor protection, environmental impacts, general switching standards and procedures, whether the 75% presumption for lack of effective competition applies regardless of price level or availability of other modes of transportation, how the 30-mile limit would be calculated (specifically, whether it would be route miles or radial miles), and whether qualifying for mandatory switching lasts in perpetuity. (*See, e.g.,* CSXT Comments 2, 54–57; KCS Comments 17–19.) Additionally, they argue that NITL did not define several terms, including ''terminal,'' ''regular switching,'' ''safe and feasible operations,'' what it would mean to ''unduly hamper'' the ability of a carrier to serve shippers, and the meaning of the phrase ''shipper (or group of shippers) served by a single Class I carrier.'' (CSXT Comments 49; KCS Comments 19; NSR Comments 64.) NSR also argues that NITL's presumptions are not conclusive because, under NITL's proposal, if one of the presumptions does not apply, the shipper can still litigate the issue before the Board. (NSR Comments 40.)

Commenters also disagreed on the impact the proposal would have on the railroad industry. Based on analyses of waybill data, supporters of NITL's proposal argue that the proposal would affect a relatively modest amount of traffic and carrier revenue. (DOT Comments 2–3; NITL Comments 43; NITL Reply 23; USDA Comments 10–11.) NITL estimates that 4% of carloads on the networks of the four larger Class I rail carriers (BNSF, CSXT, NSR, and UP) under ''full competition'' [6] would be subject to potential reciprocal switching under its proposal. (*See* NITL Comments 43.) The railroads generally argue that NITL's proposal is too vague to derive proper estimates. (AAR Comments 10–13; BNSF Comments 1; NSR Comments 5.) Given the data available, AAR surmises that NITL's proposal could affect approximately half of the stations currently served by only one Class I carrier. (AAR Comments 13.) DOT estimates, based on the four Class I railroads it examined, that NITL's proposal would affect 2.1% of revenue and 1.3% of carloads. (DOT Comments 2–3.)

[6] NITL describes ''full competition'' as a scenario where the incumbent and competing carriers compete vigorously to win the traffic after a reciprocal switch arrangement is put in place, resulting in a rate that is ''equal to the average 'competitive' rate, for that carrier, commodity and mileage block.'' This full competition rate is contrasted with the broader ''reduced competition'' rate, in which a railroad might lower a shipper's rate in response to the possibility of being required to provide reciprocal switching under the NITL's proposal, but not down to the maximum competitive rate. (NITL Hearing Presentation, Slide 15 (filed Mar. 25, 2014).)

The Need To Revisit the Board's 11102(c) Interpretation and Reciprocal Switching Regulations

Many commenters in both this proceeding and in Docket No. EP 705 expressed the view that the agency's decision to narrow its discretion under 11102(c)—by requiring anticompetitive conduct—has proven, over time, to set an unrealistically high bar for shippers to obtain reciprocal switching, as demonstrated by the fact that shippers have not filed petitions for reciprocal switching in many years, despite expressing concerns about competition.[7] The sheer dearth of cases brought under 11102(c) in the three decades since *Intramodal Rail Competition,* despite continued shipper concerns about competitive options and quality of service, suggests that part 1144 and *Midtec Paper Corp.* have effectively operated as a bar to relief rather than as a standard under which relief could be granted.

In other contexts where the Board has observed that important available remedies have become dormant, the agency has examined the underlying regulations and pursued modifications, where appropriate. *See, e.g., Simplified Standards for Rail Rate Cases,* EP 646 (Sub-No. 1) (STB served Sep. 5, 2007) (revising the Board's regulations for smaller rate disputes). For this reason alone, it is appropriate to revisit the agency's regulations and precedent with regard to reciprocal switching.

But there have also been many changes that have occurred in the rail industry since *Intramodal Rail Competition* and *Midtec Paper Corp.* In the 1980s, the rail industry was reeling from decades of inefficiency and serial bankruptcies. The significant changes since then include, but are not limited to, the improved economic health of the railroad industry and increased consolidation in the Class I railroad sector. In its report on the recently enacted Surface Transportation Board Reauthorization Act of 2015, Pub. L. 114–110, 129 Stat. 2228, the Senate Committee on Commerce, Science, and Transportation noted that ''[t]he U.S. freight railroad industry has undergone a remarkable transformation since the enactment of the Staggers Rail Act of 1980,'' and elaborated that ''the industry has evolved and the railroads' financial viability has drastically improved.'' S. Rep. No. 114–52, at 1–2 (2015).

[7] *See, e.g.,* Agricultural Parties Comments 4; USDA Comments 2. *See also* CURE Comments 11–12, Apr. 12, 2011, *Competition in the R.R. Indus.,* EP 705; E.I. du Pont de Nemours & Co. Comments 12, Apr. 12, 2011, *Competition in the R.R. Indus.,* EP 705; USDA Comments 5, Apr. 12, 2011, *Competition in the R.R. Indus.,* EP 705.

Particularly relevant to reciprocal switching, the consolidation of Class I carriers and the creation of short lines that may have strong ties to a particular Class I likely reduces the chance of naturally occurring reciprocal switching as carriers seek to optimize their own large networks. While this is not in itself problematic, it could lead to reduced competitive options for some shippers and thus should be considered. Likewise, to avoid obsolescence of the Board's regulatory policies, we must consider the better overall economic health of the rail industry as well as increased productivity and technological advances.[8]

For these reasons, the Board concludes that the agency's regulations and precedent, in which the public interest and competition statutory bases for reciprocal switching were consolidated into a single competitive abuse standard, makes less sense in today's regulatory and economic environment. Therefore, to the extent that the ICC adopted a single anticompetitive act standard in awarding reciprocal switching under 11102(c) in *Intramodal Rail Competition* and *Midtec Paper Corp.,* the Board proposes to reverse that policy. However, before turning to the issue of what revised reciprocal switching regulations should entail, we will first address the scope of the Board's authority to revise its interpretation of 11102(c) and adopt new reciprocal switching regulations.

The Board's Authority To Revise Its Interpretation of 11102(c) and Adopt New Reciprocal Switching Regulations

As discussed above, the Board has broad discretion under 11102(c) to require carriers to enter into reciprocal switching arrangements when they are practicable and in the public interest or necessary to provide competitive rail service. The agency's primary duty in exercising its statutory reciprocal switching discretion is to ensure it does so in a manner that is not ''manifestly contrary'' to the statute. *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1500.

Even though it adopted one set of regulations in 1985, the agency retains broad authority to revise its statutory interpretation and the resulting regulations. It is an axiom of administrative law that an agency's adoption of a particular statutory interpretation at one point in time does not preclude later different interpretations. *See, e.g., Hinson* v. *NTSB,* 57 F.3d 1144, 1149–50 (D.C. Cir. 1995). If it changes course, an agency must provide ''a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored,'' *Grace Petroleum Corp.* v. *FERC,* 815 F.2d 589, 591 (10th Cir. 1987) (citing *Greater Bos. Television Corp.* v. *FCC,* 444 F.2d 841, 852 (D.C. Cir. 1970), and its new interpretation must be permissible under the governing statute, *see Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council,* 467 U.S. 837, 865 (1984).

In proposing new reciprocal switching rules, the Board has provided a reasoned explanation for departing from past precedent and has explained why the rules are a permissible exercise of its jurisdiction under 11102. The agency is free to do so because nothing in the plain language of 11102 [then 11103] required the agency in 1985 to adopt the anticompetitive act framework proposed by AAR and NITL. Neither of the two statutory bases for reciprocal switching—practicable and in the public interest, or necessary to provide competitive rail service—mandates a finding that a rail carrier has engaged in anticompetitive conduct. Although the ICC chose to order reciprocal switching only when there had been a ''competitive failure,'' the agency appeared to recognize that the anticompetitive act standard was merely one approach of several it could take. *Midtec Paper Corp.,* 3 I.C.C.2d at 174. The fact that the ICC chose (based largely on stakeholder negotiations)[9] the anticompetitive conduct approach over other approaches did not eliminate those other interpretations from later adoption. As the court in *Baltimore Gas & Electric* made clear, given the broad statutory language and conflicting rail transportation policies, the agency has a wide range of options for competitive access regulation. 817 F.2d at 115 (observing that the complainant's open access statutory interpretation, rejected by the ICC, ''might well reflect sound economics, and might—we do not decide—be a reasonable interpretation of the statute. Certainly, however, it is not the *only* reasonable interpretation, because as we have noted, the statutory directives under which the ICC operates do not all point in the same direction.''). In response to NITL's petition, CSXT and NSR argue that the Board lacks the authority to change its reciprocal switching rules because Congress ''ratified'' the *Midtec Paper Corp.* standard when it reenacted the reciprocal switching language in ICCTA. (CSXT Comments 11–21; NSR Comments 23–28.) Legislative ratification (also known as legislative reenactment) is a doctrine that examines whether Congress' decision to leave undisturbed a statutory provision that an agency has interpreted in a particular manner can be read as tacit approval of the interpretation, thereby giving the agency's interpretation ''the force and effect of law.'' *Isaacs* v. *Bowen,* 865 F.2d 468, 473 (2d Cir. 1989). Recognizing that Congressional reenactment of the same statutory language does not ordinarily ''freeze all pre-existing agency interpretations of language, forever after immunizing them from change,'' *Bernardo* v. *Johnson,* 814 F.3d 481, 498 (1st Cir. 2016), courts apply the doctrine cautiously. The doctrine applies ''[w]hen a Congress that re-enacts a statute voices its approval of an administrative or other interpretation . . . .'' *United States* v. *Bd. of Comm'rs,* 435 U.S. 110, 134 (1978).

The arguments offered by NSR and CSXT do not persuade us that the Board lacks authority to alter its interpretation of 11102. NSR suggests that ratification requires only that Congress was aware of an issue and reenacted the statutory provision without change, but NSR ignores the searching analysis ordinarily performed by courts to determine whether there was some affirmative expression of approval by Congress. (*See* NSR Comments 23–28.) Courts seek to ''ascertain whether Congress has spoken clearly enough to constitute acceptance and approval of an administrative interpretation. Mere reenactment is insufficient.'' *Isaacs,* 865 F.2d at 468 (stating that Congress must have ''expressed approval'' of an agency interpretation by taking ''an affirmative step to ratify it''); *Ass'n of Am. R.R.s* v. *ICC,* 564 F.2d 486, 493 (D.C. Cir. 1977) (explaining that the doctrine requires awareness by Congress plus some affirmative indication to preclude subsequent reinterpretation).[10] Indeed,

[8] Moreover, the increase in access provided by this regulation also addresses the mandate from the President of the United States to federal agencies to consider ''pro-competitive rulemaking and regulations'' and ''eliminating regulations that create barriers to or limit competition.'' Exec. Order No. 13,725, 81 FR 23,417 (Apr. 15, 2016).

[9] Having encouraged rail carriers and shippers to work together on implementation issues arising from the Staggers Act, one important basis for the ICC's competitive access regulations was to give as much effect as possible to proposed rules that had been negotiated by AAR, NITL, and CMA. *Intramodal Rail Competition,* 1 I.C.C.2d at 822–23 (''In adopting the regulations set forth below, we have attempted to preserve to the maximum extent possible the product of negotiation and compromise among the major carrier and shipper interests.'') Those negotiated rules included the concept that competitive access would only be available upon a finding that it was necessary to remedy or prevent an anticompetitive act. *See* 50 FR 13,051 (1985).

[10] Even in those cases where the courts have not expressly stated that applicability of ratification requires a review of Congressional intent, many

Continued

the consensus upon which ratification is based must be ''so broad and unquestioned'' as to permit an assumption that Congress knew of and endorsed that interpretation. *Jama* v. *Immigration & Customs Enf't,* 543 U.S. 335, 349 (2005). Application of the doctrine is particularly difficult when the legislative term is ambiguous or subject to an agency's discretion. *See Bernardo,* 814 F.3d at 488.

Here, while Congress in ICCTA reenacted the reciprocal switching provision without change, CSXT and NSR do not cite any legislative history in which Congress even mentioned the agency's interpretation of former 11103 (now 11102), much less voiced approval for it. The absence of any such affirmation or discussion by Congress, combined with judicial recognition that reciprocal switching is a matter of agency discretion, renders the ratification doctrine inapplicable here.

Nor have NSR and CSXT persuaded us that the doctrine of ratification can be used to wholly eliminate the agency's broad policy discretion, particularly where that broad discretion and the potential for varying, reasonable interpretations of 11102 have been judicially recognized prior to legislative reenactment. In reviewing the competitive access rules adopted in *Intramodal Rail Competition,* the D.C. Circuit Court of Appeals recognized that the agency's exercise of its reciprocal switching discretion was a ''reasonable accommodation of the conflicting policies set out in its governing statute.'' *Balt. Gas & Elec.,* 817 F.2d at 115 (noting that there were ''fifteen different and not entirely consistent goals'' in the rail transportation policy of 10101 and rejecting the argument that there was only one reasonable interpretation). Likewise, the *Midtec Paper Corp.* court found that the agency had ''narrowed its own discretion in a manner that was not manifestly inconsistent with [11102] or the broader purposes of the Staggers Act.'' If the ICC was able to narrow its discretion, by implication, it must also be able to broaden its discretion, so long as the agency does not exceed the limitations set forth in the statute. *Midtec Paper Corp.* v. *United States,* 857 F.2d at 1500 (''[T]he Commission is under no mandatory duty to prescribe reciprocal switching where it believes that doing so would be unwise as a matter of policy. . . . In order to support its exercise of discretion, the agency must provide a reasoned analysis that is not manifestly contrary to the purposes of the legislation it administers.'').[11] Given that the ICC in *Intramodal Rail Competition* and *Midtec Paper Corp.* did not say that its anticompetitive conduct standard was required by the statute, and given the absence of any suggestion that Congress intended to limit the agency's discretion with regard to reciprocal switching, the Board cannot conclude that the doctrine of ratification (even if it were applicable) would compel this result. (*See* NITL Reply 45 (''To the extent there was any 'ratification,' it was to ratify the very discretion that Congress gave the Board in the statute's original iteration.''); ACC Reply 5 (''Congress's failure to change 11102(c) in ICCTA indicates, at most, nothing more than Congress's view that the 1985 competitive access rules were within the realm of permissible uses of ICC competitive switching discretion.'')).

New Reciprocal Switching Regulations

Having determined that the ICC's interpretation of 11102, including its anticompetitive conduct requirement, may no longer be appropriate and that the agency has the authority to revise its reciprocal switching regulations, the Board must appropriately balance the competing policy considerations in proposing new regulations. To do so, we will first examine the concerns that we have with some aspects of the proposed regulations put forth by NITL in Docket No. EP 711. We will then discuss the Board's proposed regulations in Docket No. EP 711 (Sub-No. 1), including how they differ from both NITL's approach and the agency's current regulations.

Docket No. EP 711

The Board has reviewed NITL's petition and the numerous comments and testimony in this docket. We conclude that NITL's proposal, while a valuable starting point for new reciprocal switching regulations, does not, on its own, strike the appropriate policy balance. The Board is chiefly concerned that NITL's approach, with its substantial reliance on conclusive presumptions, would lead to problems regarding fairness among different categories of shippers. The Board prefers a reciprocal switching standard that makes the remedy more equally available to all shippers, rather than a limited subset of shippers, and that would allow the Board to examine reciprocal switching on a case-by-case basis.

NITL's use of multiple presumptions raises questions of fairness in terms of who would be able to take advantage of the NITL proposal and who would not. Whatever presumptions are adopted—whether those proposed by NITL or others—lines would be drawn that would favor some shippers (for example, those within a 30-mile radius of an interchange) over other shippers (for example, those outside the 30-mile radius). Under NITL's proposal, some shippers who want reciprocal switching might not be eligible for improved access to reciprocal shipping because they do not meet the criteria.[12] Conversely, not all shippers who qualify under the presumptions would necessarily want or need reciprocal switching. Put more simply, basing the availability of reciprocal switching primarily on conclusive presumptions based on bright-line cut-offs would make this remedy both overinclusive and underinclusive.

The record here suggests that shippers of certain commodities, particularly chemical shippers, would be the major beneficiaries of the conclusive presumptions proposed by NITL, as these shippers move traffic with higher R/VC ratios and thus would be more likely to meet the $R/VC_{\geq 240}$ presumptions. (*See, e.g.,* ACC Comments 4–5 (stating that more than half of all chemical traffic has R/VC ratios above 240% and that ''[c]hemical shipments have the largest potential savings of any commodity group'' under the proposal).) A significant number of chemical shippers are also located within 30 miles of multiple railroads. In contrast, shippers of other commodities, particularly agricultural shippers, would tend not to qualify under the conclusive presumptions proposed by NITL, as agricultural shippers tend to be located in more remote locations that are generally only served by one railroad, and thus are less likely to be within 30 miles of an interchange. (*See* Agricultural Parties Reply 3 (''[L]ess than 6% (and probably substantially less) of [agricultural commodities] . . . would be shipped to and from facilities

courts have nonetheless performed such a review. *See, e.g., Lindahl* v. *OPM,* 470 U.S. 768, 782 n.15 (1985) (explaining that the court need not rely on ''bare force of this assumption'' regarding reenactment because legislative history indicated that Congress intended interpretation to continue); *FDIC* v. *Phila. Gear Corp.,* 476 U.S. 426 (1986) (stating that the legislative history indicated that Congress intended to include the FDIC's prior interpretation).

[11] In *Midtec Paper Corp.,* the agency likewise recognized its own discretion: ''Under [former] 11103(c), awarding reciprocal switching is discretionary. Nevertheless, under the rules adopted in *Intramodal,* we will award that relief if significant use will be made of it, and when switching is necessary to remedy or prevent an act that is either contrary to the competition policies of 49 U.S.C. 10101a or otherwise anticompetitive.'' 3 I.C.C.2d at 176.

[12] We recognize that, under NITL's proposal, a shipper could still seek to obtain reciprocal switching by proving the criteria without use of the conclusive presumptions. (NITL Pet. 35–36; NITL Reply 35–36.)

that met the conclusive presumptions under the Proposal.''); USDA Comments 5 (noting difficulties that many agricultural shippers in the West would have meeting the presumptions); *see also* ARC Comments 13 (same).)

Our concerns about the issue of fairness are reinforced by comments regarding the potential impacts of NITL's proposal on shippers that would *not* be eligible under the proposal's presumptions. NITL maintains that the impacts on ineligible shippers would be ''nil,'' arguing that railroads would be unlikely to raise rates on such shippers because the carriers are presumably already maximizing revenues on this ineligible traffic. (NITL Comments 56–57.) [13] In addition to AAR (AAR Comments 17), however, Agricultural Parties also suggest that there might be rate impacts on ineligible shippers, stating that ''the fact that so few NGFA Commodity shippers could qualify for competitive switching could expose the NGFA Commodity shippers as a class to rate increases imposed to offset the reductions obtained by other rail shippers . . . as a result of the establishment of competitive switching for their facilities.'' (Agricultural Parties Comments 23.) Further, some commenters argue that even if rail carriers do not raise the rates of those shippers that are not eligible, there could be other negative impacts on service and investment. (AAR Comments 17; KCS Reply 26 (stating that ineligible shippers would suffer service problems and be competitively disadvantaged compared to their competitors who are eligible); UP Comments 66 (''[T]he most significant impacts of NITL's proposal on shippers that cannot use forced switching would likely be the impacts on their rail service and on competition in markets for the goods they ship or receive.'').)

After reviewing these comments, we are concerned that reciprocal switching based on the proposed conclusive presumptions could have adverse effects on categories of shippers not eligible under NITL's proposal. If NITL's proposal places downward pressure on the rates of those shippers who are eligible, then there may be an incentive for railroads that cannot make up any shortfall to raise the rates of ineligible shippers or degrade service in an effort to cut costs. While these incentives might exist to some degree with any increase in reciprocal switching (a remedy expressly authorized by Congress), we are concerned about the effects on categories of shippers who have less access to relief under a presumption-based approach.

For these reasons, the Board prefers a reciprocal switching standard that makes the remedy more equally available to all shippers, rather than a limited subset of shippers. Imposing reciprocal switching on a case-by-case basis would also allow the Board a greater degree of precision when mandating reciprocal switching than is afforded under the approach advanced by NITL. We believe such an approach would allow the Board to better balance the needs of the individual shipper versus the needs of the railroads and other shippers. Therefore, although the Board's proposal is guided in many instances by NITL's proposal, we are deviating from NITL's proposal in several respects. We are granting NITL's petition to institute a rulemaking in part, closing the proceeding in Docket No. EP 711, and instituting a rulemaking proceeding in Docket No. EP 711 (Sub-No. 1). The Board's proposal is outlined below.

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

In developing new reciprocal switching regulations, we begin by looking back to Congress' directive, as set forth in the statute (11102(c)). As noted, we must also weigh and balance the various rail transportation policy (RTP) factors enumerated in 49 U.S.C. 10101. *See, e.g., Intramodal Rail Competition,* 1 I.C.C.2d at 823.

It has long been the position of the agency and the courts that 11102 (and other Staggers Act routing provisions) were not designed to provide shippers with full, open access routing. *See, e.g., Midtec Paper Corp.* v. *United States,* 857 F.2d at 1507 (there is no indication that Congress intended the agency to prescribe reciprocal switching whenever it would enhance competition); *Review of Rail Access & Competition Issues,* EP 575, slip op. at 6 (STB served Apr. 17, 1998) (noting that statute requires a showing of need for access remedies and does not permit such remedies merely ''on demand''). [14] However, 11102 was clearly intended to empower the agency to encourage the availability of reciprocal switching when appropriate. H.R. Rep. No. 96–1035 at 67 (1980); *see also Midtec Paper Corp.* v. *United States,* 857 F.2d at 1500–01 (acknowledging Congress' desire for the agency to ''encourage'' reciprocal switching). As explained above, 11102(c) sets out two prongs by which the Board can order reciprocal switching: where reciprocal switching is practicable and in the public interest, or where reciprocal switching is necessary to provide competitive rail service. The ICC, through its decisions in *Intramodal Rail Competition* and *Midtec Paper Corp.,* essentially consolidated those two prongs into a single standard, which requires shippers to demonstrate anticompetitive conduct by the railroad. For reasons discussed above, we conclude that the ICC's consolidation of these two prongs is overly restrictive in today's environment. [15]

In determining whether to adopt competitive new access rules, the Board must also weigh and balance the various rail transportation policy (RTP) factors enumerated in 49 U.S.C. 10101. *See, e.g., Intramodal Rail Competition,* 1 I.C.C.2d at 823. [16] Here, there are several RTP factors relevant to our analysis, including relying on and encouraging effective competition (10101(1), (4), (5), (6)), promoting a safe and efficient rail transportation system by allowing carriers to earn adequate revenues (10101(3)), promoting public health and safety (10101(8)), avoiding undue concentrations of market power (10101(12)), and providing fair and expeditious handling of issues (10101(2), (15).

We believe that one way to reinterpret 11102(c) and undo the restriction on access to reciprocal switching is to adhere more closely to the statutory language than the ICC did, thereby broadening the framework under which reciprocal switching could be justified. By explicitly recognizing Congress' decision to provide two distinct pathways to obtain reciprocal switching—practicable and in the public interest *or* necessary to provide competitive rail service—we would enhance the ability of shippers and carriers to make a case for (or against)

[13] UP also argues that widespread rate increases would be unlikely. (UP Comments 66.)

[14] *See also Balt. Gas & Elec.,* 817 F.2d at 115 (''We see not the slightest indication that Congress intended to mandate a radical restructuring of the railroad regulatory scheme [by making a bottleneck monopoly impossible through mandated open access] so as to parallel telecommunications regulation''); *Cent. Power & Light Co.* v. *S. Pac. Transp. Co.,* NOR 41242, *et al.,* slip op. at 5 (STB served Dec. 31, 1996) (''Congress chose not to provide for the open routing that shippers seek here.'').

[15] NITL's proposal also combined the two criteria. (NITL Pet. 67.)

[16] It is well established that the Board's statutory directives are often conflicting or contradictory. *See Mkt. Dominance Determinations—Prod. & Geographic Competition,* 5 S.T.B. 492, 497 (STB served Apr. 3, 2001) (acknowledging that the RTP ''contains 15 separate and sometimes conflicting policy goals that together establish the framework for regulatory oversight of the rail industry. No special significance attaches to the order in which these various policy goals are set out in the statute.''); *see also Ass'n of Am. R.R.s* v. *STB,* 306 F.3d 1108, 1111 (D.C. Cir. 2002); *Balt. Gas & Elec.,* 817 F.2d at 115. Nevertheless, we have and will continue to strive to balance the competing statutory directives appropriately.

reciprocal switching in a particular instance. Accordingly, we propose a two-pronged approach, pursuant to which the Board would have the ability to order reciprocal switching either when it is practicable and in the public interest *or* when it is necessary to provide competitive rail service. The two-pronged approach would be consistent with the RTP in weighing issues such as competition and market power, rail service needs (for complaining and non-complaining shippers), the impact on the involved carriers, and whether specific facilities are appropriate for particular switching operations.

The proposed regulations would revise the Board's reciprocal switching rules to promote further use and availability of reciprocal switching, but—consistent with the agency's and the courts' long-established precedent—they would not provide shippers unfettered open access to carriers and routes. Indeed, one of the Board's concerns is the potential for operational challenges in gateways and terminals that are vital to the fluidity of the rail network. Most major gateways and terminals (including St. Louis, Memphis, Houston, Minneapolis-St. Paul, Los Angeles, and Kansas City, to name a few) are served by at least two Class I carriers. In Chicago, the most important hub in the rail network, there are six Class I carriers, as is also the case in New Orleans. As has been demonstrated by real-world instances, operational issues in the gateways and terminals can easily spread to other parts of the rail network. The service crises of the late 1990s [17] and the winter of 2013–2014 [18] are stark reminders that local congestion can turn quickly into regional and national backlogs, affecting shippers of all commodities. The Board's proposal provides for a case-by-case review, in which the Board can evaluate a switching arrangement based on the specific circumstances at hand. In this way, the Board can exercise a greater degree of precision when mandating reciprocal switching, thus mitigating the chance of operational challenges in a given area.

[17] The service crisis of the late 1990s, for example, began in the Houston area and quickly spread throughout the western United States. *See Joint Pet. for Service Order*, 2 S.T.B. 725, 729–30 & n.4 (1997); *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, 3 S.T.B. 1030, 1036 (1998).

[18] The Board recognized the ''longstanding importance of Chicago as a hub in national rail operations and the impact that recent extreme congestion in Chicago has had on rail service in the Upper Midwest and nationwide.'' *U.S. Rail Serv. Issues—Performance Data Reporting*, EP 724 (Sub-No. 4), slip op. at 6 (STB served Dec. 30, 2014).

Under the proposal, the availability of reciprocal switching would not be presumed based on one-size-fits-all criteria, but instead would be based on factual determinations derived from the evidence provided by the parties. Pursuant to the RTP, we believe this approach would be fairer than both the current regulations as well as the NITL proposal in EP 711. Specifically, as discussed below, a particularized analysis is warranted.

In this notice of proposed rulemaking, we propose to remove references to reciprocal switching from 49 CFR part 1144 (which also governs the prescriptions of through routes) and to create a new Part 1145 to govern reciprocal switching under either of the two statutory prongs provided in 11102(c). The proposed regulations can be found in below.

Practicable and in the Public Interest Prong

The first prong under which a party could obtain a reciprocal switching prescription is by showing that the proposed switching would be practicable and in the public interest. The ICC has previously explained that there is no mechanical test for determining what is practicable and in the public interest, and the totality of the circumstances should be considered. *See Midtec Paper Corp.* v. *Chicago & NW. Transp. Co.,* 1 I.C.C.2d 362, 363–64 (1985). ''In determining what is 'in the public interest,' the Commission considers not only the interests of particular shippers at or near the terminal in question, but also the interests of the carriers and the general public.'' *Del. & Hudson Ry.* v. *Consol. Rail Corp.,* 367 I.C.C. 718, 720 (1983) (citing *Jamestown Chamber of Commerce* v. *Jamestown, Westfield & Nw. R.R.,* 195 I.C.C. 289 (1933)).

The Board proposes three criteria that shippers must satisfy to demonstrate that reciprocal switching is practicable and in the public interest: (1) That the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s); (2) that there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching; and (3) that the potential benefits from the proposed switching arrangement outweigh the potential detriments. In making this third determination, in addition to questions about operational feasibility and safety, the Board may consider any relevant factor including, but not limited to: The efficiency of the route, access to new markets, the impact on capital investment, the impact on service quality, the impact on employees, the amount of traffic that would use the switching arrangement, the impact on the rail transportation network, and the RTP factors. Notwithstanding these three showings, however, the Board will not find a switching arrangement to be practicable and in the public interest if either rail carrier shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.

The non-exhaustive list of factors included within the proposed regulation provides a sufficient basis for parties to argue that a switching prescription would or would not be practicable and in the public interest. The Board will not attempt to formalize the precise showings that parties would make in a given case to address the third factor or the rail carrier arguments against switching, which are all intended to be flexible. However, parties should present these factors to the Board with specificity relating to the factual circumstances of each case. Individual reciprocal switching proceedings are not an appropriate forum to litigate, for example, the general merits of reciprocal switching as a statutory remedy, the general health of the rail industry, or revenue adequacy. Accordingly, we expect that parties' presentations would be focused on the particular proposed switching arrangement and would not attempt to litigate broad regulatory policies. In designing case-specific presentations on these issues, we believe that the Board's current petition for exemption process is instructive. 49 U.S.C. 10502. Under the petition for exemption process, the Board considers whether the application of a particular statutory provision is necessary to carry out the RTP with regard to a particular action. *See, e.g., Cal. High-Speed Rail Auth.—Construction Exemption—in Fresno, King, Tulare, & Kern Ctys, Cal.,* FD 35724 (Sub-No. 1) slip op. at 12–14 (STB served Aug. 12, 2014). This analysis does not entail going factor by factor through the RTP, but instead addresses only those RTP factors that are relevant to the specific exemption proceeding. Nor does it involve large-scale litigation over industry-wide policy determinations. *See id.*

Necessary To Provide Competitive Rail Service Prong

The second prong under which a party could obtain a reciprocal switching prescription is by showing

that the proposed switching is necessary to provide competitive rail service. Again, the Board proposes three criteria that shippers must satisfy: (1) That the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by a single Class I rail carrier; (2) intermodal and intramodal competition is not effective with respect to the movements of the shipper(s) and/or receivers(s) for whom switching is sought; and (3) there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching. Again, notwithstanding these three showings, the Board will not find a switching arrangement to be practicable and in the public interest if either rail carrier shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.

Feasibility, Safety, and Service

Under both prongs, either of the railroads that would potentially be subject to a reciprocal switching order may attempt to show as an affirmative defense that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers. If a railroad carries its burden in making this showing, the Board will not order reciprocal switching. In addressing these issues, parties might present evidence regarding: Traffic density; the line's capacity; yard capacity; right-of-way widths; grade separations; drainage; hazardous materials; network effects; and characteristics of the surrounding area (*e.g.,* urban, rural, industrial). These forms of evidence are examples only, and parties may also present other evidence that is relevant to feasibility, safety, and service quality.

Removal of Anticompetitive Conduct Requirement

Unlike the agency's current regulations, neither prong of these proposed regulations requires a showing of anticompetitive conduct. But removal of this requirement does not create ''open access'' or ''on demand'' routing.[19] Under the Board's proposal, reciprocal switching would not be ''open'' to any party ''on demand,'' and any request under this section would be subject to a detailed review. In particular, shippers would be required (as is the case today) to initiate a proceeding with the Board and bear the burden of showing that reciprocal switching is needed. There would be no presumption of need.[20]

Additional Aspects of Proposed Rules

Several of the factors in each of these prongs stem from NITL's proposal. For example, both prongs of the Board's proposal require a showing that there is or can be a working interchange within a reasonable distance, as did NITL. And both provide that a switching arrangement would not be established if either rail carrier shows that the proposed switching is not feasible or is unsafe, or that such switching would unduly hamper the ability of the carrier to serve its shippers. There are several additional aspects of the rules that differ from NITL's proposal, which we describe in greater detail below. However, the most notable is the absence of conclusive presumptions; as previously described, the Board would make an individualized determination on the facts of each case under the proposed rules.

We will now address specific aspects of the proposed rules, including, where relevant, how the proposal deviates from NITL's proposal.

Class I Carriers

Under both prongs of the proposed regulations, prescriptions of reciprocal switching would be limited to instances in which both the incumbent railroad and the competing railroad are Class I carriers. NITL's proposal specifically limited the proposed remedy to situations where the incumbent railroad was a Class I carrier by requiring that the party seeking switching be ''served by rail only by a single, Class I rail carrier (or a controlled affiliate).'' (NITL Pet. 67.) Under NITL's proposal, reciprocal switching would be ordered between this Class I rail carrier and ''another carrier.'' NITL states that its proposal thus does not distinguish between Class I and Class II or III carriers vis-à-vis the competing carrier. (NITL Pet. 53.)

The only commenter to address this question in detail, ASLRRA, states that, ''if the Board decides to adopt the NITL petition, it should expressly limit the application to situations in which no Class II or Class III railroad participates at any point in the movement of the traffic whether or not the small railroad appears on the waybill.'' (*See* ASLRRA Reply 1–4; Testimony of Richard F. Timmons 4–6, Mar. 26, 2014.) The record contains little information on the potential effects on the industry that would result from making Class II and/or Class III rail carriers subject to reciprocal switching prescriptions.

Although the ICC rejected a request to exempt smaller carriers from its reciprocal switching regulations in *Intramodal Rail Competition,* 1 I.C.C.2d at 835–36, the Board is proposing in this decision to limit the availability of reciprocal switching prescriptions to those situations that only involve Class I rail carriers due to the lack of specific information on this matter and the concerns raised by ASLRRA. However, we request comments on this issue in order to consider whether the Board should, now or in the future, extend the rules to include smaller carriers.

Working Interchanges Within a Reasonable Distance

Under both prongs of the proposed regulations, the party seeking switching must show that ''there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.'' This showing, while based on NITL's proposal, does not include any conclusive presumption as to what is or is not a reasonable distance or what is or is not a working interchange. (*See* NITL Pet. 67.) NITL had proposed that the Board conclusively presume that there is a working interchange within a reasonable distance if either: (1) A shipper's facility is within the boundaries of a ''terminal'' of a Class I carrier in which cars are ''regularly switched,'' or (2) there is an interchange at which cars are regularly switched within 30 miles of the shipper's facilities. As commenters pointed out, NITL did not define ''terminal,'' or ''regularly switched.'' (*See, e.g.,* NSR Comments 49–50.) While the fact that cars are regularly switched at a point on the rail system would certainly be evidence of a working interchange, these determinations should be made on a case-by-case basis. The Board, nonetheless, invites comments on defining the term ''reasonable distance'' in an effort to provide guidelines to parties that may seek switching under the proposed regulations.

The proposal also deviates from NITL's insofar as it would define the

[19] *See, e.g., Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.,* 3 S.T.B. 1030, 1032 (1998) (stating that the Board's governing statute does not provide for open access).

[20] Section 11102(c) does not set out a time period for how long a reciprocal switching prescription would last. Accordingly, the Board proposes that a prescription would last for as long as the criteria for each prong are met, unless otherwise ordered by the Board in a particular circumstance, with parties free to petition the Board for reopening if there are substantially changed circumstances.

term ''is or can be'' a working interchange. NITL stated in its petition that this requirement would not be ''limited to existing interchanges, but the petitioner could prove on the basis of facts and circumstances that a working interchange could reasonably be constructed.'' (NITL Pet. 53.) Few comments were received specifically on this point. The Board is concerned that the breadth of NITL's proposed language could be read to imply that railroads be required to construct brand-new interchange facilities to satisfy a switching prescription. Thus, we are proposing that the Board would determine that there ''is'' a working interchange if one already exists and is currently engaged in switching operations. The Board would determine that there ''can be'' a working interchange only if the infrastructure currently exists to support switching, without the need for construction, regardless of whether switching operations are taking place or have taken place using that infrastructure. We recognize that there was a lack of comment on this point and that we may be proposing a narrower definition than the one proposed by NITL. We therefore also specifically seek comment on this matter.

Effective Intermodal and Intramodal Competition

Under the competition prong of the proposed regulations, a petitioner for switching must show that intermodal and intramodal competition is not effective with respect to the movements for which switching is sought. This aligns with one of the elements of NITL's proposal, which would have made reciprocal switching available ''only for movements that are without effective inter- or intra-modal competition.'' (NITL Pet. 7.) However, for the reasons discussed above, the conclusive presumptions proposed by NITL have not been adopted. Applying this factor without conclusive presumptions, according to NITL, would involve ''an individualized inquiry in light of the applicant's relevant facts and circumstances.'' (NITL Reply 35–36.)

The Board already has a framework for conducting such an individualized inquiry—specifically, in determining the reasonableness of rates, the Board performs a market dominance analysis. *See* 49 U.S.C. 10707 (requiring ''an absence of effective competition from other rail carriers or modes of transportation,'' which the statute describes as ''market dominance''). The Board's market dominance test has a quantitative component and a qualitative component. Under the quantitative component, if the rail carrier proves that the rate at issue results in a R/VC ratio less than 180%, the Board will find that the rate is subject to effective competition. *See* 10707(d)(1)(A). If this quantitative R/VC ratio threshold is met, the Board moves to the second component, a qualitative analysis. *Wis. Power & Light Co.* v. *Union Pac. R.R.,* 5 S.T.B. 955, 961 (2001), *aff'd sub nom. Union Pac. R.R.* v. *STB,* 62 F. App'x 354 (D.C. Cir. 2003). In this analysis, the Board determines whether there are any feasible transportation alternatives that are sufficient to constrain the railroad's rates to competitive levels, considering both intramodal and intermodal competition. *E.I. du Pont de Nemours & Co.* v. *CSX Transp., Inc.,* NOR 42099, slip op. at 2 (STB served June 30, 2008). Even where feasible transportation alternatives are shown to exist, those alternatives may not provide ''effective competition.'' *See Mkt. Dominance Determinations & Consideration of Prod. Competition,* 365 I.C.C. 118, 129 (1981) (''Effective competition for a firm providing a good or service means that there must be pressures on that firm to perform up to standards and at reasonable prices, or lose desirable business.''), *aff'd sub nom. W. Coal Traffic League* v. *United States,* 719 F.2d 772 (5th Cir. 1983) (en banc).

The Board proposes to apply the market dominance test to determine whether a movement is without effective intermodal or intramodal competition.[21] The ICC, in *Midtec Paper Corp.,* held that market dominance is not a jurisdictional prerequisite to obtaining relief in an access proceeding under 11102. 3 I.C.C.2d at 180. That remains the case; unlike rate reasonableness cases, where the statute creates such a prerequisite to obtaining rate relief, 49 U.S.C. 10707(c), there is no such statutory requirement for reciprocal switching. However, there is nothing in 11102 that prohibits the use of the market dominance test here as part of the analysis, rather than a jurisdictional prerequisite. The Board has developed this methodology through numerous rate reasonableness decisions, and although it was developed in the context of rate cases, it answers the same question that the Board would address under the competition prong of the proposed reciprocal switching analysis: Whether effective competition exists for an individual movement or movements. It is therefore appropriate to apply this approach, which is familiar to litigants before the Board, under the competition prong of the reciprocal switching analysis as well. Use of a mature analytical framework to gauge whether a shipper lacks effective competition is desirable. Accordingly, the proposed rules would apply the Board's existing market dominance test to determine the intramodal/intermodal competition element under the competition prong.

Effect on Market Dominance Determinations in Rate Reasonableness Cases

NITL and several other commenters express concern regarding the potential effects of a reciprocal switching order on market dominance determinations in rate reasonableness cases. (*See, e.g.,* NITL Comments 14–16; USDA Comments 7.) For example, Joint Coal Shippers argue that the availability of a reciprocal switching remedy should not change the Board's methodology for assessing market dominance and that losing the ability to pursue maximum rate relief would seriously harm shippers. (Joint Coal Shippers Comments 7–14; Joint Coal Shippers Reply 2–9.) These commenters emphasize that 49 U.S.C. 10707, which establishes the market dominance threshold for rate reasonableness cases, requires *effective* competition, and they argue that a transportation alternative provided by a reciprocal switching order would not necessarily be an effective constraint on the incumbent railroad's pricing power. (*E.g.,* Joint Coal Shippers Comments 8–9, 13–14.)

At least one railroad commenter appears to view the situation similarly—that is, in market dominance analyses, the Board would assess a reciprocal switching order in the same way as other transportation alternatives to determine whether or not it provides effective competition. (*See* CSXT Reply 49–50 (urging the Board against ''a blanket ruling that these newly available competitive remedies are *not* an effective competitive option for rate reasonableness purposes'') (emphasis added).) AAR, however, asserts that because shippers claim NITL's proposal would introduce competition and reduce rates, should they be successful in getting a switching order from the Board, they should not be ''allowed to bring rate cases that are permitted only in the absence of competition.'' (AAR Reply 28.) Similarly, BNSF contends that ''mandated reciprocal switching . . . would create an effective competitive alternative that would

[21] We note that NITL, while arguing against applying a market dominance framework, advocated for a presumption of the absence of effective competition in cases where the R/VC ratio for the traffic at issue was 240% and above. (*See* NITL Reply 59–60.)

preclude a finding of market dominance under the statute.'' (BNSF Reply 8.)

There is no need to issue a blanket rule that the existence of a reciprocal switching order would (or would not) preclude a finding of market dominance in rate cases. Instead, a reciprocal switching prescription should be treated in the same way as any other transportation alternative that would be assessed in our market dominance inquiry. AAR and BNSF provide no support for their claims that reciprocal switching would automatically be a source of *effective* competition. The Board has held that even where feasible transportation alternatives are shown to exist, those alternatives may not provide effective competition. *E.g., M&G Polymers USA, LLC* v. *CSX Transp., Inc.,* NOR 42123, slip op. at 2 (STB served Sept. 27, 2012) (citing *Mkt. Dominance Determinations & Consideration of Prod. Competition,* 365 I.C.C. 118, 129 (1981)). In evaluating market dominance in rate reasonableness cases, we propose to continue to analyze whether or not a transportation alternative provides effective competition, including an alternative provided under a reciprocal switching order.

Access Pricing

Pursuant to 49 U.S.C. 11102(c)(1), ''[t]he rail carriers entering into [reciprocal switching ordered by the Board] shall establish the conditions and compensation applicable to such [switching], 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.'' Thus, the determination of access fees is left, by statute, to the carriers in the first instance.

To the extent that the Board would become involved in establishing switching fees (*i.e.,* when the rail carriers do not agree), several parties note in their comments that NITL's petition does not address the issue of access pricing methodology. (*See, e.g.,* Agricultural Parties 18; KCS Comments 20; NSR Comments 36; AAR Reply 17; UP Reply 6.) Several commenters offer proposals for access pricing, which are summarized below.

Although NITL did not address access pricing in its petition for rulemaking, in its opening comments in response to the Board's order requesting additional information, it uses a simplified version of the Canadian interswitching model, arguing that the Canadian access pricing model is ''rigorously determined by the Canadian Transportation Agency, on the basis of railway costs and other information supplied by the Canadian carriers and . . . is designed to cover both variable costs and a share of the carriers' fixed costs.'' (NITL Comments 31–32.)[22] Using the simplified version of this model, which eliminates the use of varying prices based on distance zones, NITL assumes access fees of $300 per car for movements involving 1–59 cars and $89 per car for movements involving 60 or more cars, based on Canada's latest figures at the time. (*Id.* at 34.) Similarly, USDA recommends that the Board use the average of Canadian interswitching rates for access prices, estimating $279 per car for 1–59 car movements and $84 per car for movements 60 cars or greater. (USDA Comments 20.)

Highroad, Diversified CPC, and Roanoke Cement favor adoption of the Canadian interswitching model without modification. (Highroad Comments 22; Diversified CPC Comments 8–10; Roanoke Cement Comments 9–10.) They contend that the Canadian model is straightforward and easy to implement. Although Agricultural Parties do not believe that the Board should adopt the Canadian model, they express the view that it merits further study by the Board. (Agricultural Parties Comments 19.)

Agricultural Parties also note that there are numerous U.S. terminal switching rates that might serve as a benchmark for access pricing here, but state that they are not in a position to perform the study necessary to make such an evaluation. (Agricultural Parties Comments 19–20.)

Some commenters suggest that trackage rights fees are a form of access pricing and that the Board should look to how those fees are set. GLE states that it supports the use of mutually agreed trackage rights fees or haulage rights fees for access pricing. (GLE Comments 3.) Citing the ICC's decision in *Arkansas & Missouri Railroad* v. *Missouri Pacific Railroad,* 6 I.C.C.2d 619 (1990), Agricultural Parties, however, state that they examined the agency's methodology used in trackage rights cases, referred to as ''SSW Compensation,'' but believe that this type of approach to compensation is not appropriate where the instigating party is a shipper as opposed to a railroad. (Agricultural Parties Comments 18.)

While not offering a specific methodology, some parties comment on the principles that the Board should consider if it is required to set an access price. UP, for example, argues that the access price must cover the serving railroad's actual cost of providing the switching service as well as the serving railroad's lost contribution from the long-haul. (UP Comments 61–62.) KCS argues that any proposed access standard must allow an incumbent carrier to assess switching charges that allow that carrier to move toward revenue adequacy. As such, KCS argues that a prescribed switching rate below an incumbent carrier's RSAM would be inconsistent with the RTP. (KCS Comments 38.)

Given the importance of the issue and the relative lack of detail in the record regarding access pricing methodologies, the Board will propose two alternative approaches to access pricing for public comment.

Under Alternative 1, we propose to determine access pricing based on a specified set of factors, in the event that the Board is called upon to establish compensation. Based on precedent, such factors could include the geography where the proposed switch would occur, the distance between the shipper/receiver and the proposed interchange, the cost of the service, the capacity of the interchange facility and other case-specific factors. *See Switching Charges & Absorption Thereof at Shreveport, La.,* 339 I.C.C. 65 (1971) (discussing revenues, cost of service, amount of switching, other terminals in adjacent territory, and other factors); *CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.,* FD 33388 et al. (STB served Dec. 18, 1998) (discussing appropriate switching fees in New York Terminal Area based on specific cost relative to actual operations). We also seek comment on whether the list of factors should include any portion of the incumbent rail carrier's loss contribution or opportunity costs, per UP's suggestion.

Under Alternative 2, we seek comment on the adoption of a variant of the agency's SSW Compensation methodology to establish switching fees, in the event that the Board is called upon to establish compensation. Although SSW Compensation is used primarily in trackage rights cases where one rail carrier is actually operating over another rail carrier's lines, many of the principles that inform the methodology would apply in the reciprocal switching fee context as well. Thus, what we call Rental Income in SSW Compensation would have an analogy in a directed switch in the form of Imputed Rental Income. A switching fee set by the Board could seek to compensate the incumbent for the expenses incurred to provide the service, plus a fair and

[22] Under the Canadian interswitching access pricing model, the switching fee is based on distance zones, with the price increasing the greater the distance from the shipper's facility to the point of interchange.

reasonable return on capital employed. Given that the regulatory goals in trackage rights compensation and reciprocal switching compensation are similar, we seek comment on whether and how SSW Compensation could be adapted to devise fair access fees in reciprocal switching cases.

Parties may also comment on other potential access fee methodologies.

Separation of Through Routes

The Board's current regulations in Part 1144 address not only reciprocal switching under 49 U.S.C. 11102(c), but also through routes under 49 U.S.C. 10705. As explained, the Board proposes to implement the changes proposed here by separating through routes and reciprocal switching in the Board's regulations. In other words, the previously-shared regulations at Part 1144 would be modified to eliminate references to reciprocal switching, and then adopt new Part 1145 to address reciprocal switching. The Board also recognizes that, from a theoretical perspective, some of the issues addressed in this proceeding could arguably apply to through routes as well. Today's decision, however, is a proposed incremental change to the Board's competitive access regulations based on NITL's petition and the record built in response, all of which pertain to reciprocal switching specifically. Thus, aside from removing references to reciprocal switching from Part 1144, the current standards for through routes would be maintained.

Changes From Part 1144

Although the standard governing reciprocal switching in new Part 1145 differs from that governing through routes in Part 1144, we have attempted to model Part 1145 on Part 1144, as they both pertain to competitive access remedies that have previously been closely aligned. Thus, for example, the Board proposes to include in Part 1145 the same provision on negotiation that exists in Part 1144. To the extent that we depart from some of the language in Part 1144, we address those departures below.

Section 1144.2(a)(2) of the Board's regulations currently states that a through route or reciprocal switching order requires a finding that either ''[t]he complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination,'' or ''[t]he complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.'' This requirement, referred to by the ICC as the ''standing'' requirement, was adopted because the statute at the time provided that the ICC could not suspend a proposed cancellation of a through route and/or a joint rate pursuant to former 10705 and 10707 unless it appeared that failure to suspend would cause substantial injury to the protestant. *Intramodal Rail Competition,* 1 I.C.C.2d at 825–26, 830. However, because the statutory provisions regarding cancellation of through routes and/or joint rates are no longer in force, it is not necessary to include the standing requirement in the Board's proposed reciprocal switching regulations. The Board would continue to consider this factor in evaluating whether a reciprocal switching arrangement would be practicable and in the public interest, as that could be a relevant factor under that prong. We would not, however, include it as part of the determination of whether a reciprocal switching arrangement is necessary to provide competitive rail service. The purpose of ordering reciprocal switching under this prong is to encourage competition between two carriers. As such, a shipper would have the choice between using the incumbent carrier or the competing carrier depending on which one provided the better rates or service. Thus, in order for the reciprocal switching order to serve its intended purpose, the shipper should be free to choose between the two carriers. Requiring the shipper to use the competing carrier pursuant to a reciprocal switching order for a significant amount of traffic would limit the shipper's flexibility, which would be contrary to the goal of such an order.

The Board's current regulations in Part 1144 also state that ''[t]he Board will not consider product competition,'' and, ''[i]f a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.'' 49 CFR 1144.2(b)(1). The ICC adopted this language in 1985 in *Intramodal Rail Competition,* stating that the treatment of geographic competition ''is consistent with the way this issue will be handled in the market dominance context,'' and that the provision eliminating consideration of product competition ''reflects a negotiated agreement between the major railroad and shipper interests.'' 1 I.C.C.2d at 828–29 & n.6. In 1998, however, the Board excluded evidence of product and geographic competition from the market dominance inquiry because such evidence was not required by 49 U.S.C. 10707(a) and because of the substantial burden its inclusion imposed on the parties and the Board. *Mkt. Dominance Determinations—Prod. & Geographic Competition,* 3 S.T.B. 937 (1998); *see also Ass'n of Am. R.R.s* v. *STB,* 306 F.3d 1108 (D.C. Cir. 2002) (denying petition for review of the Board's decision following earlier remand); *Pet. of Ass'n of Am. R.R.s s to Inst. a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Mkt. Dominance Determinations for Coal Transported to Utility Generation Facilities,* EP 717 (STB served Mar. 19, 2013) (denying request to consider reintroducing indirect competition as a factor in market dominance analyses).

As discussed above, the second factor under the proposed competition prong—the absence of effective intermodal or intramodal competition—incorporates the market dominance inquiry of 49 U.S.C. 10707 (requiring ''an absence of effective competition from other rail carriers or modes of transportation''). Moreover, when the ICC adopted the current language of 1144.2(b)(1), it explained the treatment of geographic competition as being consistent with the agency's approach in evaluating market dominance. Accordingly, it is appropriate for the Board to address this question consistently in both the reciprocal switching and rate reasonableness contexts. Therefore, in proposed Part 1145, the Board instead proposes language providing that it will not consider product or geographic competition.

Finally, 1144.3(c) of the Board's regulations currently states that ''[a]ny Board determinations or findings under this part with respect to compliance or non-compliance with the standards of 1144.2 shall not be given any res judicata or collateral estoppel effect in any litigation involving the same facts or controversy arising under the antitrust laws of the United States.'' In adopting this provision, the ICC explained: ''The parties to the agreement [NITL, AAR, and CMA, now known as ACC] have requested adoption of this rule. We only note that it is unenforceable by us.'' *Intramodal Rail Competition,* 1 I.C.C.2d at 832. As indicated above, the Board's proposal is not based on this prior agreement among stakeholders. Therefore, this language is not included in the reciprocal switching regulations.

Procedural Schedule and Ex Parte Waiver

As the Board explained in *United States Rail Service Issues—Performance Data Reporting,* EP 724 (Sub-No. 4), slip op. at 1–2 (STB served Nov. 9, 2015), the agency has long interpreted its ex parte prohibition as encompassing informal rulemakings. However, the Board may waive its own regulations in appropriate proceedings and take steps to ensure that a fair process is established, including notice, disclosure, and an opportunity for parties to comment on information discussed during informal meetings. *Id.* at 2.

In this proceeding, we find good reason for a limited waiver of the Board's ex parte prohibitions. As we noted in our July 25, 2012 decision in Docket No. EP 711 in response to NITL's petition, a vigorous debate regarding the appropriate methodology for competitive access has been ongoing since at least the 1980s. There are many different (and often conflicting views) regarding the potential benefits of increased reciprocal switching to shippers and the potential impact to carriers. As was made clear in the record following NITL's petition, those potential benefits and impacts are complicated and often inter-related. Given that there has been no significant change in agency policy regarding reciprocal switching in more than 30 years, the Board believes it would be beneficial to hear directly from stakeholders on these issues and ask follow-up questions.[23] These stakeholder discussions will supplement the written record and allow the Board to better understand these complex issues.

To ensure that the public has a complete record of the evidence and arguments that the Board will consider in its decision-making, ex parte communications in informal rulemaking proceedings require special procedures to maintain both fairness and accessibility. *U.S. Rail Service Issues,* slip op. at 3. We will establish the following measures to ensure that all parties have an opportunity to meet with Board Members should they choose to do so, have the ability to review the substance of all such discussions, and have the opportunity to comment on information presented at these discussions. Meetings with Board Members will take place between October 25, 2016, either at the Board's offices or by telephone conference (pursuant to each party's request). Any party seeking to meet with a Board Member should contact the Member's office no later than October 10, 2016 to schedule a meeting.[24] If a party wishes to meet with multiple Board Members, separate meetings with each Board Member must be scheduled.

The Board will disclose the substance of each meeting by posting, in Docket No. EP 711 (Sub-No. 1), a summary of the arguments, information, and data presented to the Board Member at each meeting (including the names/titles of attendees of the meeting) and a copy of any handout given or presented to the Board Member. Parties participating in ex parte meetings will be responsible for preparing the summaries, and we encourage parties to use the Board's staff-prepared summaries in *Rail Service Issues* as examples.[25] Summaries, plus any handouts, should be submitted, via email, to the Board Member office with whom the party met within two business days of the meeting.[26] The Board expects that meeting summaries will be posted in the docket within 14 days of the meeting.[27]

The Board will provide notice when all meeting summaries have been posted in the record, and set a comment period for replies to the meeting summaries in that decision.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The regulations proposed here are limited to Class I railroads and, thus, would not impact a substantial number of small entities.[28] Accordingly, pursuant to 5 U.S.C. 605(b), the Board certifies that the regulations proposed herein would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

List of Subjects

49 CFR Part 1144

Intramodal rail competition.

49 CFR Part 1145

Reciprocal switching.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the **Federal Register**.

2. The procedural schedule for Docket No. EP 711 (Sub-No. 1) is established as follows: comments regarding the proposed rules are due by September 26, 2016; replies are due by October 25, 2016; requests for meetings with Board Members are due by October 10, 2016;

[23] Ex parte meetings under this decision will only be permitted with Board Members, their individual office staffs, and certain other staff.

[24] Chairman Elliott's office can be reached at (202) 245–0220. Vice Chairman Miller's office can be reached at (202) 245–0210. Commissioner Begeman's office can be reached at (202) 245–0200. For each meeting request, parties should indicate multiple available requested days/times and meeting attendees.

[25] If multiple parties are present at a single ex parte meeting, only one meeting summary should be submitted.

[26] Summaries and handouts regarding meetings with Chairman Elliott should be sent to Janie Sheng at *janie.sheng@stb.dot.gov.* Summaries and handouts regarding meetings with Vice Chairman Miller should be sent to Brian O'Boyle at *brian.oboyle@stb.dot.gov.* Summaries and handouts regarding meetings with Commissioner Begeman should be sent to James Boles at *james.boles@stb.dot.gov.*

[27] Parties are directed to limit their communications at these meetings (including any handouts) to non-confidential information only. To the extent parties wish to provide confidential information, they should do so in their written comments, pursuant to a protective order.

[28] Effective June 30, 2016, for the purpose of RFA analysis, the Board defines a ''small business'' as a rail carrier classified as a Class III rail carrier under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016) (Commissioner Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $38,060,383 or less when adjusted for inflation using 2014 data. Class II rail carriers have annual operating revenues of up to $250 million in 1991 dollars or up to $475,754,802 when adjusted for inflation using 2014 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its Web site. 49 CFR 1201.1–1.

meetings with Board Members will occur between October 25, 2016 and November 14, 2016 meeting summaries are to be submitted within two business days of the ex parte meeting; the period for comments on meeting summaries will be set by separate decision.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

4. The Board terminates the proceeding in Docket No. EP 711.

5. This decision is effective on the day of service.

Decided: July 25, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller commented with a separate expression and Commissioner Begeman dissented with a separate expression.

Brendetta S. Jones,

Clearance Clerk.

VICE CHAIRMAN MILLER, commenting:

The Board's regulatory mission is set out in the Rail Transportation Policy (RTP) at 49 U.S.C. 10101. Two important but competing goals in the RTP are to promote an efficient, competitive, safe and cost-effective rail network by enabling railroads to earn adequate revenues that foster reinvestment in their networks, attract outside capital, and provide reliable service, while at the same time working to ensure that effective competitions exists between railroads and that rates are reasonable where there is a lack of effective competition. As in all major rulemakings the Board undertakes, my goal here has been to develop a proposal for reciprocal switching that properly satisfies both of these goals.

In finding the appropriate balance, I believe that we have taken a prudent approach by creating a standard that is closely tied to the statutory language of 49 U.S.C. 11102(c), rather than trying to create our own standard out of the statutory language. By doing so, I believe we have been able to develop a proposal that would satisfy the competing goals, as well as effectuate Congress' express grant of authority to permit reciprocal switching in certain circumstances. And although I have no doubt both our railroad and shipper stakeholders will find things to dislike about today's proposal, I believe that it would address the most significant concern raised by each side.

For shippers, the Board would remove the anticompetitive standard that was created in Intramodal Rail Competition and Midtec Paper Corp., which has proven to be a nearly impossible bar. Regardless of whatever evidence shippers have presented in the handful of cases the agency has decided—whether it be high rates or poor service—the agency has consistently found it to be lacking. As such, it appears that the only way that a shipper could meet this standard would be to provide evidence that the railroad was intentionally behaving in an anticompetitive manner. But demonstrating such a clear intent is difficult. By eliminating the anticompetitive conduct showing, shippers will now be free to seek reciprocal switching without having to produce a smoking gun. It is undeniable that Congress gave the Board the power to order reciprocal switching, yet our existing anticompetitive standard has essentially nullified this power. The railroads' arguments that the Board should keep the existing standard essentially amount to a request that we ignore the Congressional authorization for the Board to allow shippers (or other railroads) to be able to obtain reciprocal switching in certain instances.

But even if the anticompetitive conduct standard had not proven to be unworkable, I believe that the need for such a high bar on shippers to obtain reciprocal switching no longer exists. While the anticompetitive standard may have made sense in 1985, just after de-regulation and in an era where the railroad industry was still trying to restore itself to financial health, the landscape today is much different. As we have noted in the decision, railroads are in a much better financial condition than they were three decades ago. I believe that 49 U.S.C. 11102(c) was written in a way that gives the Board flexibility to alter the standard for obtaining reciprocal switching if, based on our judgment, the balance between the two important goals described above has changed. Based on what I have observed of the railroad industry in my time at the Board, I believe that we have reached that point.

However, just because the railroads are financially stronger today does not mean that the Board should upend the existing regulatory scheme with broad, sweeping changes. While a change to the reciprocal switching standard is needed, I believe that the NITL approach swings too far in the other direction. I believe that for shippers to obtain this remedy, a shipper should still have to demonstrate that reciprocal switching is needed based on one of the reasons articulated by Congress, rather than for it to simply be presumed to be needed. Without assessing requests for reciprocal switching on a case-by-case basis (at least for now), the potential for unintended consequences is too great. For that reason, I ultimately determined that I could not support the NITL proposal.

By rejecting the NITL proposal, today's decision addresses what I consider the most significant concern raised by the railroads: that a new reciprocal switching standard will result in its widespread application, to the significant detriment of the industry's financial health and operations. By keeping in place the requirement that shippers demonstrate that it is needed on a case-by-case basis, I believe that we have addressed that concern. Removing the anticompetitive conduct requirement will likely mean that some shippers will actually now be able to obtain a reciprocal switching prescription, but I believe the criteria proposed here would enable the Board to apply it only when appropriate.

In considering how to revise the reciprocal switching standard, I have been acutely aware of the fact that the railroads are currently facing changing economic conditions. With the decline of coal traffic, which is unlikely to return to previous volumes, and declining or sluggish volume growth for other commodities, there is no doubt that the railroads today find themselves in a difficult environment. I am mindful of the concerns that additional regulation could impact their ability to weather this storm. But I do not believe that the proposal we have announced today, if adopted, would impose significant burdens on the railroad industry. Indeed, it is my hope that the Board will rarely be called upon to impose the reciprocal switching remedy, but instead, that whatever final rules we adopt will merely provide a bit more incentive for carriers to ensure that their customers' needs are being met in those instances where that is not the case. So long as a carrier meets the needs of its customers, there should be little reason for a customer to seek such a remedy. Moreover, it is my belief that today's proposal would not undo the accomplishments that have been achieved through deregulation under the Staggers Act.

That being said, I recognize that today's proposal is unlikely to be perfect. In fact, there are aspects of the proposal that still concern me. However, if the Board were to continue to delay this proceeding in order to try to develop a perfect proposal, this proceeding would never end. It is my belief that any issues with the proposal can be addressed after the Board has had an opportunity to hear from the parties. I am particularly pleased that

we have decided to waive our ex parte communication prohibition in this proceeding (though, as I have noted in the past, I still advocate the outright elimination of this prohibition, rather than waiving it on case-by-case basis). I believe that these meetings will allow the Board Members to better understand the impacts this proposal would have and ways in which it can be improved.

As a final point, I would again note my frustration that it has taken the Board five years to reach this stage. Much of this delay feels like it could have been avoided by not asking the parties to submit additional evidence in July 2012. It seems that today's decision could have been made without this additional evidence, which was not heavily relied on in reaching today's decision. As I have noted on other occasions, I find that the amount of time that it takes the Board to complete proceedings to be troubling. In addition to the inexcusably long time that our stakeholders were kept waiting, they were left in the dark as to the progress. If parties are going to have to wait unnecessarily long periods of time for outcomes, the Board could at least be more transparent on the progress of their cases. No doubt having heard such complaints from our stakeholders, Congress required the agency to begin issuing quarterly reports on its unfinished regulatory proceedings as part of the Surface Transportation Board Reauthorization Act of 2015. The benefits of this reporting are already being seen, as it has been forced the Board to set deadlines in its many long-delayed rulemakings, and the Board has even completed some that have been pending for years. It is my belief that the Board needs to develop a similar (if not the same) reporting system for its other significant proceedings. This would provide parties with greater transparency on the progress of their cases, force the Board to develop deadlines, and ensure that the agency is adhering to them.

Commissioner Begeman, dissenting in part:

I want to begin by commending the National Industrial Transportation League (NITL) for the considerable and thoughtful effort it went to—more than five years ago—in prompting the Board to revisit the agency's competitive switching rules. I have valued the views and knowledge of the NITL leadership and members since first meeting them when I was a young Senate staffer. Then, as now, NITL can be counted on to provide insight and to explain how businesses across the county are impacted by even the most arcane laws and regulations.

When stakeholders demonstrate that the agency's regulations or processes present too high a bar to allow their use, we have an obligation to examine whether we can improve those regulations or processes, while keeping the promotion of safe and efficient rail service at the top of our agenda. Although I have a number of questions and concerns about NITL's competitive switching proposal, many of which I shared during the April 2014 hearing, there is no dispute that since the current rules were adopted in 1985, very few reciprocal switching requests have been filed and none have been granted. As such, it is hard to believe that the existing regulations adequately implement Congress' intent that the Board order reciprocal switching when necessary.

While I may not be an advocate of the status quo, I do not casually embrace regulatory changes. Any altering of the Board's existing switching rules must be balanced, fair, and supported by analyses that indicate the changes will not have unintended consequences for our stakeholders or the public. I do not believe today's proposal meets those standards. This decision also ignores fundamental questions that the Board should have asked and answered before issuing today's proposal, and after five years, there has been ample time to do so. For example:

- The reciprocal switching proposal rejects the use of conclusive presumptions, which were argued by NITL as necessary to mitigate the complexity and costs of litigating competitive switching. What does today's proposal offer to mitigate the complexity and costs? Should the Board use rebuttable presumptions to create a more predictable process for shippers and carriers?
- The Department of Transportation estimated that NITL's proposal would affect 2.1 percent of revenue and 1.3 percent of carloads, figures that are considered significant inside the agency. What impact to revenue and carloads would be permitted under today's proposal? Once that level is reached, will the Board no longer consider new switching applications?
- The proposal seems to suggest that if the Board acts on a case-by-case basis, there is no need to assess the potential impact it could have on the rail system overall. But how can the Board provide fair and consistent switching judgments on a case-by-case basis without creating complexity and cost impacts on the one hand, and not introducing more unpredictability to the rail network on the other?
- How long will it take to process the cases envisioned under today's proposal? What is the procedural timeline? Do we have any projections for how long such a case will take to process inside the agency? Currently, the Board is struggling to determine how to meet new Congressional mandates for timeliness. How will this type of new access case (*i.e.,* presumably time sensitive yet not subject to any specific Congressional timing mandate) fit into the Board's crowded priority list?
- Given the majority's stated position that it ''will not attempt to formalize the precise showings'' that parties would have to make in a given case because of its desire to be ''flexible,'' what would a party seeking a reciprocal switch really have to demonstrate to the Board? What would the carrier have to demonstrate to convince the Board the requested switch should not be granted?
- What is the ''reasonable distance'' that is surprisingly left undefined in the proposal? While the language that dismisses the NITL's conclusive presumptions implies that the Board's proposal could involve switches of more than 30 miles, my briefings suggest it may be only a very short distance (*i.e.,* the distances that have historically been involved with reciprocal switching). How could historical norms of switching be relied on while the decision cites massive industry changes that would make those historical norms uninformative at best?
- How does today's decision mitigate impacts on network efficiency and service, particularly at major gateways and terminals? The Board has required weekly performance data reports on the Chicago hub since October 2014 because of its importance to national rail operations and the impact that congestion in that gateway can have on rail service nationwide. Should Chicago and other major gateways be excluded from new reciprocal switching requirements?
- Is permanence for a switching arrangement under the proposed new rule, which may not require robust evidence, fair to either the carrier or the other shippers impacted by that switching arrangement?

Today's decision incorporates a concern I expressed after seeing an earlier version of the proposal, which is that short line carriers be exempted from the requirements. The decision also waives the Board's rigid ex parte rules to allow the members to hear from stakeholders, as the Vice Chairman and I insisted. However, I cannot support

the rest of it. We have no idea how the proposed rule would or even could be utilized. We don't know its potential impact on the shippers that would be granted a reciprocal switch or its potential impact on shippers that wouldn't benefit from a reciprocal switch. We also don't know the proposal's potential impact on the rail carriers. Nor do we know its potential impact on the fluidity of the rail network. All of these impacts matter. After all, rail volumes have been down all of 2016, and are currently down nearly six percent from just a year ago. I firmly believe that what we do here, ultimately, could cause greater harm than good. Or, it may result in nothing more than an empty promise to prospective applicants.

It is incumbent on the Board Members and staff to listen to all interested stakeholders on these issues if there is to be any hope for adopting meaningful, lawful regulations designed to better implement the agency's statutory reciprocal switching authority. And I certainly recognize that stakeholders are at a disadvantage because today's proposal, in my view, is full of gaps by design. The goal appears to be that we can slip these and other unanswered questions by now and figure them out later. I implore our stakeholders to fully engage this agency and not allow such an outcome.

I support only those aspects of the decision that waive the Board's ex parte prohibitions and exclude Class II and Class III carriers from reciprocal switching prescriptions. Otherwise, I dissent.

The Board received written and/or oral comment from the following parties in Docket No. EP 711:

- AkzoNobel, Inc.
- Alliance for Rail Competition, Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Montana Farmers Union, Nebraska Wheat Board, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producers Board, Washington Grain Commission, National Association of Wheat Growers (collectively, ARC)
- Alliance of Automobile Manufacturers
- American Chemistry Council (ACC)
- American Short Line and Regional Railroad Association (ASLRRA)
- Arkansas Electric Cooperative Corporation (AECC)
- Association of American Railroads (AAR)
- Bayer MaterialScience LLC
- BNSF Railway Company (BNSF)
- Cargill Inc.
- CEMEX, Inc.
- The Chlorine Institute, Inc.
- Competitive Enterprise Institute (CEI)
- Consumers United for Rail Equity (CURE)
- CSX Transportation, Inc. (CSXT)
- Diversified CPC International, Inc. (Diversified CPC)
- Dow Chemical Company
- Entergy Arkansas, Inc., Kansas City Power & Light Company, Seminole Electric Cooperative, Inc., and Wisconsin Electric Power Company d/b/a WE Energies (collectively, Joint Coal Shippers)
- The Fertilizer Institute
- Florida East Coast Railway, LLC
- Glacial Lakes Energy, LLC (GLE)
- Glass Producers Transportation Council
- Heartland Consumers Power District
- Highroad Consulting, Ltd. (Highroad)
- Indorama Ventures EO & Glycols, Inc., StarPet, Inc., AlphaPet, Inc., and Auriga Polymers Inc.
- International Warehouse Logistics Association
- Interstate Asphalt Corp.
- Kansas City Southern Railway Company (KCS)
- National Grain and Feed Association (NGFA)
- NGFA, Agricultural Retailers Association, National Barley Growers Association, USA Rice Federation, National Oilseed Processors Association, National Chicken Council, National Association of Wheat Growers, National Council of Farmer Cooperatives, National Corn Growers Association (collectively, Agricultural Parties)
- NITL
- Norfolk Southern Railway Company (NSR)
- Olin Corporation (Olin)
- Paper and Forest Products Industry Transportation Committee
- Portland Cement Association
- PPG Industries, Inc.
- PPL Corporation
- Roanoke Cement Company (Roanoke Cement)
- Steel Manufacturers Association
- Union Pacific Railroad Company (UP)
- United Transportation Union-New York State Legislative Board (UTU–NY)
- U.S. Department of Agriculture (USDA)
- U.S. Department of Transportation (DOT)

Additionally, the following Members of Congress submitted comments, either individually or as joint comments:

- Senator Tammy Baldwin
- Representative Corrine Brown
- Representative Jeff Denham
- Representative William Enyart
- Senator Al Franken
- Representative Nick Rahall
- Representative Bill Shuster
- Senator David Vitter

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, of the Code of Federal Regulations by revising part 1144 and adding part 1145 to read as follows:

PART 1144—INTRAMODAL RAIL COMPETITION

■ 1. Revise the authority citation for part 1144 to read as follows:

Authority: 49 U.S.C. 1321, 10703, and 10705.

■ 2. Revise § 1144.1(a) to read as follows:

§ 1144.1 Negotiation.

(a) *Timing.* At least 5 days prior to seeking the prescription of a through route or joint rate, the party intending to initiate such action must first seek to engage in negotiations to resolve its dispute with the prospective defendants.

* * * * *

■ 3. Amend § 1144.2 by revising paragraphs (a) introductory text, (a)(1) introductory text, (a)(1)(iii) and (iv), (a)(2), and (b)(3) to read as follows:

§ 1144.2 Prescription.

(a) *General.* A through route or a through rate shall be prescribed under 49 U.S.C. 10705 if the Board determines:

(1) That the prescription is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101 or is otherwise anticompetitive, and otherwise satisfies the criteria of 49 U.S.C. 10705. In making its determination, the Board shall take into account all relevant factors, including:

* * * * *

(iii) The rates charged or sought to be charged by the railroad or railroads from which prescription is sought.

(iv) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription is necessary to remedy or prevent an act contrary to the competitive standards of this section; and

(2) That either:

(i) The complaining shipper has used or would use the through route or through rate to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route or through rate for a significant amount of traffic.

(b) * * *.

(3) When prescription of a through route or a through rate is necessary to remedy or prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

* * * * *

■ 4. Add part 1145 to read as follows:

PART 1145—RECIPROCAL SWITCHING

Sec.

Authority: 49 U.S.C. 1321 and 11102.

§ 1145.1 Negotiation.

(a) *Timing.* At least 5 days prior to seeking the establishment of a switching arrangement, the party intending to initiate such action must first seek to engage in negotiations to resolve its dispute with the prospective defendant(s).

(b) *Participation.* Participation or failure to participate in negotiations does not waive a party's right to file a timely request for the establishment of a switching arrangement.

(c) *Arbitration.* The parties may use arbitration as part of the negotiation process, or in lieu of litigation before the Board.

§ 1145.2 Establishment of reciprocal switching arrangement.

(a) *General.* A reciprocal switching arrangement shall be established under 49 U.S.C. 11102(c) if the Board determines that such arrangement is either practicable and in the public interest, or necessary to provide competitive rail service, except as provided in paragraph(a)(2)(iv) of this section.

(1) The Board will find a switching arrangement to be practicable and in the public interest when:

(i) The party seeking such switching shows that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by Class I rail carrier(s);

(ii) The party seeking such switching shows that there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching; and

(iii) The party seeking such switching shows that the potential benefits from the proposed switching arrangement outweigh the potential detriments. In making this determination, the Board may consider any relevant factor, including but not limited to:

(A) Whether the proposed switching arrangement furthers the rail transportation policy of 49 U.S.C. 10101;

(B) The efficiency of the route under the proposed switching arrangement;

(C) Whether the proposed switching arrangement allows access to new markets;

(D) The impact of the proposed switching arrangement, if any, on capital investment;

(E) The impact of the proposed switching arrangement on service quality;

(F) The impact of the proposed switching arrangement, if any, on employees;

(G) The amount of traffic the party seeking switching would use pursuant to the proposed switching arrangement; and

(H) The impact of the proposed switching arrangement, if any, on the rail transportation network.

(iv) Notwithstanding the provisions of (a)(1)(i)–(iii) of this section, the Board shall not find a switching arrangement to be practicable and in the public interest under this section if either rail carrier between which such switching is sought to be established shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.

(2) The Board will find a switching arrangement to be necessary to provide competitive rail service when:

(i) The party seeking such switching shows that the facilities of the shipper(s) and/or receiver(s) for whom such switching is sought are served by a single Class I rail carrier;

(ii) The party seeking such switching shows that intermodal and intramodal competition is not effective with respect to the movements of the shipper(s) and/or receivers(s) for whom switching is sought; and

(iii) The party seeking such switching shows that there is or can be a working interchange between the Class I carrier servicing the party seeking switching and another Class I rail carrier within a reasonable distance of the facilities of the party seeking switching.

(iv) Notwithstanding the provisions of (a)(2)(i)–(iii) of this section, a switching arrangement will not be established under this section if either rail carrier between which such switching is sought to be established shows that the proposed switching is not feasible or is unsafe, or that the presence of such switching will unduly hamper the ability of that carrier to serve its shippers.

(b) *Other considerations.*

(1) In considering requests for reciprocal switching under (a)(2) of this section, the Board will not consider product or geographic competition.

(2) In considering requests for reciprocal switching under (a)(2) of this section, the overall revenue inadequacy of the defendant railroad will not be a basis for denying the establishment of a switching arrangement.

(3) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

§ 1145.3 General

(a) *Effective date.* These rules will govern the Board's adjudication of individual cases pending on or after [EFFECTIVE DATE OF FINAL RULE].

(b) *Discovery.* Discovery under these rules is governed by the Board's general rules of discovery at 49 CFR part 1114.

[FR Doc. 2016–17980 Filed 8–2–16; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 160129062–6643–01]

RIN 0648–BF49

Atlantic Highly Migratory Species; Commercial Retention Limit for Blacknose Sharks and Non-Blacknose Small Coastal Sharks in the Atlantic Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing modifications to the commercial retention limits for blacknose sharks and non-blacknose small coastal sharks