

# NITL WEBINAR

## STB EP 711

# Rulemaking on Competitive Switching

August 4, 2016



# Agenda

- Summary of EP 711: 2011- present
- Review of STB Decision
- Q&A
- Next Steps



# Speakers

## **Frank De Castro**

Chairman, NITL Rail Transportation Committee

## **Karyn A. Booth**

Partner, Thompson Hine  
General Counsel, NITL

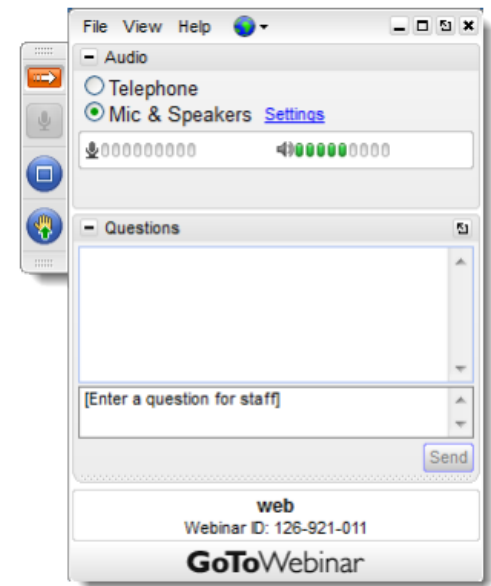
## **Jennifer Hedrick**

Executive Director, NITL  
*Moderator*



# General Housekeeping

- All attendees are muted
- Q & A at the conclusion of presentations
- Ask questions at any time using questions pane on your screen



# History of EP 711

**Frank De Castro**

Chairman, NITL Rail Transportation Committee



# Review of STB Decision

**Karyn A. Booth**

Partner, Thompson Hine

General Counsel, NITL



# Review of STB Decision: Topics

- Overview of the STB's Decision on Competitive Switching
- STB Deadlines and Process
- Preliminary Issues to Consider for NITL Comments

# STB Decision in EP 711

- On July 27, STB granted in part the NITL Petition for Rulemaking on Competitive Switching
- STB opened a rulemaking proceeding and proposed new rules on competitive switching arrangements and remedies
- A rulemaking proceeding is procedurally favorable, as compared to other possible outcomes





# STB Decision in EP 711

- STB has proposed two possible paths for shippers to obtain a competitive switching remedy:
  - switching must be practicable & in the public interest; OR
  - necessary to provide competitive rail service
- Proposed rules are tied directly to the governing statute (49 U.S.C. § 11102(c)(1))

# STB Decision in EP 711

- STB agreed with NITL that it has the legal authority to change its competitive switching policy
  - STB rejected railroads' "ICCTA ratification" arguments
- New switching policy is justified based on:
  - no requests for competitive access remedies in 20+ years
  - substantial changes in the rail industry have occurred since 1985
    - rail consolidation
    - rail industry improved financial health
    - increased productivity and technological advances

# STB Decision in EP 711

- As requested by NITL, STB reversed its Midtec policy that shippers must prove “competitive abuse” to obtain a switching remedy
- STB found NITL’s proposal to be a “valuable starting point for new reciprocal switching regulations”
- STB adopted aspects of NITL’s proposal but declined to adopt the “conclusive presumptions” (or fast-pass to relief) due to fairness concerns



# STB Proposed Switching Remedies

- STB favors relief that applies more equally to all shippers
- STB switching remedies require case-by-case evaluation of factual evidence
- STB proposals are designed to balance the “needs of the individual shipper versus the needs of the railroads and other shippers”
- STB proposals allow the Board to control the scope and extent of prescribed switching arrangements



# Practicable and In the Public Interest Remedy

## SHIPPER MUST PROVE:

1. Facilities of the shipper(s) and/or receiver(s) for whom switching is sought are served by Class I rail carriers
2. There is or can be a working interchange between the incumbent Class I carrier and another Class I carrier within a reasonable distance of facilities of the party seeking switching
  - there “is” a working interchange if one exists and is being utilized
  - there “can be” a working interchange if the infrastructure exists “without the need for construction” regardless of whether switching operations have occurred
3. Potential benefits from switching arrangement outweigh potential detriments

# Practicable and In the Public Interest Remedy

- In determining the benefits/detriments of a requested switching arrangement, STB seeks evidence concerning:
  - feasibility and safety
  - efficiency of the route
  - access to new markets
  - impact on capital investment
  - impact on service quality
  - impact on employees
  - amount of traffic that would use the switching arrangement
  - impact on the rail transportation network
  - RTP factors of § 10101
  - any other relevant evidence

# Necessary to Provide Competitive Rail Service Remedy

## SHIPPER MUST PROVE:

1. Facilities of the shipper(s) and/or receiver(s) for whom switching is sought are served by Class I rail carriers
2. There is or can be a working interchange between the incumbent Class I carrier and another Class I carrier within a reasonable distance of the shipper's facilities
3. No effective intermodal or intramodal competition exists as to the movements of the shipper(s) and/or receiver(s)
  - same standard used to determine market dominance in rate cases



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# Railroads' Affirmative Defense

- Railroad(s) may defeat a switching remedy under either prong by showing switching is not feasible or safe, or will harm service to other shippers
- STB will consider:
  - traffic density
  - the line's capacity
  - yard capacity
  - right-of-way widths
  - characteristics (rural, urban, etc.) of the surrounding area
  - grade separations
  - drainage
  - hazardous materials
  - network effects



# Competitive Access Fee

- Under the law, railroads involved in competitive switching have the initial right to agree on the access fee
- Access fee is paid to the incumbent railroad for the movement of rail cars between the shipper's facility and the interchange point
- If the railroads cannot agree, the Board will set the access fee

# Competitive Access Fee

- The Board has proposed two alternative access fee approaches
- Option #1: Consideration of Various Factors
  - geography where the proposed switch would occur
  - distance between the relevant facility and proposed interchange
  - the cost of the service
  - capacity of the interchange facility
  - other case-specific factors

# Competitive Access Fee

- Option #2: Akin to Methodology for Setting Trackage Rights Fees (SSW Compensation Model)
- Switching fee set by the Board would seek to compensate the incumbent for:
  - expenses incurred to provide the service, and
  - a fair and reasonable return on capital employed

# Time Period of Switching Prescription

- STB proposes that a competitive switching prescription would last as long as the criteria are met
  - STB could order a specific time limit based on the circumstances
- A party could petition the Board to reopen a switching remedy, based on substantially changed circumstances

# STB Deadlines and Process

- Opening comments are due by Sept. 26
- Replies are due by Oct. 25
- Requests for ex parte meetings with STB members are due by Oct. 10
- STB meetings will occur between Oct. 25 and Nov. 14

# Issues to Consider for NITL Comments

- Consider procedural and evidentiary limitations to reduce complexity, cost, and length of STB proceedings
- Should shortline carriers be included in a switching remedy as a competing and/or incumbent carrier?
- How should the Board define “reasonable distance”?
- Are the Board’s definitions of existing or future working interchanges acceptable?

# Issues to Consider for NITL Comments

- Are either of the Board's access fee options acceptable, or is an alternative preferred?
  - possible expert needed
  - oppose possibility of including the incumbent's lost contribution or opportunity costs as factor under Access Fee Option #1
- Other issues?

# QUESTIONS?





# Next Steps

- Rail Committee working group to work with staff and counsel on issues to be addressed in NITL comments
- NITL to coordinate with other trade associations and organizations
- Media campaign
- Hill visits
- Fundraising



# Thank You!

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