

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Docket No. EP 788

**ELIMINATING REGULATORY BARRIERS TO
COMPETITION: REVIEW OF PART 1144**

OPENING COMMENTS OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSX”) respectfully submits these comments on the notice of proposed rulemaking issued in the above-captioned proceeding.¹ CSX understands the Board’s concern that 49 C.F.R. Part 1144 does not provide sufficient clarity on the factors that would support a Board order imposing prescriptions for reciprocal switching or through routes. CSX further understands that the Board has been hearing such concerns from shippers who seek further clarification or outright removal of the anticompetitive conduct standard. CSX does not object in principle to the Board’s removal of the current regulatory text and its determination to apply governing statutory standards in future adjudications—so long as the Board ensures that such future adjudications will apply the underlying statute in the way that Congress intended.

¹ Notice of Proposed Rulemaking, *Eliminating Regulatory Barriers to Competition: Review of Part 1144*, EP 788 (STB served Jan. 7, 2026) (“NPRM”).

During multiple recent proceedings in which the Board has reexamined its competitive access authority, CSX has presented constructive ideas that the Board could adopt to achieve its goals within the intended statutory framework. For example, CSX had serious concerns that the now-withdrawn 2016 proposal in Ex Parte 711 (Sub-No. 1) would have created widespread reciprocal switching access in a way that was inconsistent with the statute.² But CSX identified alternative pathways that the Board could take to improve and clarify its regulations consistent with governing law.³ CSX also actively participated in the Board’s Railroad-Shipper Transportation Advisory Council Metrics and Measurements subcommittee to assist with improving the value and utility of both customer and railroad fluidity-focused metrics, with the objective of helping the Board gain a better overall view of network health. And when the Board elected to pursue a service-metric-based approach to reciprocal switching in Ex Parte 711 (Sub-No. 2), CSX again offered constructive guidance on how the Board could make targeted changes to its proposed regulations to provide greater clarity on the circumstances and factors that could give rise to an authentic service failure.⁴

² See Opening Comments of CSX Transportation, Inc. at 51–64, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016).

³ See, e.g., Hearing Transcript at 1021–22, *Reciprocal Switching*, EP 711(1) (STB Mar. 16, 2022) (CSX testimony) (“we’ve talked about section 1147 as an alternative path to resolving service issues”).

⁴ See Opening Comments of CSX Transportation, Inc. at 10, 31–33, *Reciprocal Switching for Inadequate Service*, EP 711 (Sub-No. 2) (filed Nov. 7, 2023) (“Subsection E presents CSXT’s solution—a qualitative approach that allows petitioners to present any evidence they believe would show a service inadequacy,

In the same constructive spirit, CSX is providing these comments as the Board considers removing the Part 1144 regulations, altering aspects of the *Midtec* decision, and adjudicating future competitive access complaints on a case-by-case basis. CSX has two primary recommendations for the Board's consideration.

First, the Board should be mindful of the effect that lowered standards for competitive access prescriptions could have on both rail service and railroad investment. Over the past 40 years, railroads have relied on the current regulatory framework to make significant investments in customer-serving facilities with the expectation of a return on those investments so long as the railroad did not abuse its market power. Removing the Part 1144 regulations creates uncertainty, which undermines that reliance interest and has a negative impact on incentives for future investments. The STB anticipates this uncertainty by acknowledging that, "at least initially, there may be an increase in the number of matters that shippers bring before the Board."⁵

Second, if the STB proceeds with the repeal of Part 1144, it should reaffirm that its decision does not impact the statutory standards that would apply in any adjudication.⁶ In addition, the statutory requirement for complainants to demonstrate feasibility and practicability, the statutory bar on prescribing

and allows responding railroads to respond with any evidence they believe would be relevant.").

⁵ NPRM at 16.

⁶ In an Appendix to these Comments, CSX recaps some of the evidence of Congress's intended meaning that should be considered in any future adjudication.

switching outside terminal areas, and the statutory exemption provisions are all critical boundaries established by Congress.

I. The Board should carefully weigh impacts on railroad investment and service.

CSX has previously expressed its concerns about a potential change to the Board's application of its competitive access regulations in the Ex Parte 711 proceedings. CSX will not repeat those concerns at length but summarizes them below.

First, a loosened approach to the Board's competitive access regulations would harm reliance interests with respect to railroad investments that have been made with this framework in mind and would disincentivize future investments.⁷ CSX works hard to attract new customers to its network and to increase business from existing customers, including through industrial development and targeted capital investments. At the final Ex Parte 711 (Sub-No. 1) hearing, CSX testified about these extensive investments as part of CSX's commitment to growth. CSX also explained that it can justify infrastructure investments that exceed immediate short-term returns when it has an expectation that the customer volumes would support the investment over the long term. But if the prospect of future volumes becomes less certain, as it would be if the customer could force access to another carrier without a required showing of inadequate service or wrongful conduct by

⁷ See, e.g., Opening Comments of CSX Transportation, Inc. at 39–40, 62–63, *Reciprocal Switching*, EP No. 711 (Sub-No. 1) (filed Oct. 26, 2016).

CSX, it is harder to justify those investments and the resulting stranded assets.⁸ A regulatory framework that allows competitive access to be prescribed on demand or with a lowered standard would both undermine future investment incentives and undercut investments made in reliance on existing standards.⁹

Second, widespread access to reciprocal switching and through route prescriptions¹⁰ would degrade the quality and reliability of rail service by increasing car handlings, reducing predictability, and undermining network planning.¹¹ While some individual customers may believe they would benefit individually, the Board should be mindful of the service impacts that widespread competitive access prescriptions would have on the overall network and on other rail customers.

⁸ See Hearing Transcript at 1003–24, *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB Mar. 16, 2022) (testimony of Sean Pelkey).

⁹ Indeed, the Administrative Procedure Act requires the Board to take these reliance interests into account. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020) (agency must “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns”); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (agency must not only be “cognizant that longstanding policies may have ‘engendered serious reliance interests’” but also those interests “‘must be taken into account’”); *Id.* at 222 (holding that “[a] summary discussion” of the agency’s change in position was insufficient given “decades of industry reliance on the Department’s prior policy”).

¹⁰ Because the Ex Parte 711 proceedings did not contemplate changing the rules for prescribing terminal trackage rights or through routes, the records in those proceedings focus on the service impacts of forced reciprocal switching. But these other competitive access remedies would have similarly negative effects on predictability and network planning.

¹¹ See, e.g., Opening Comments of CSX Transportation, Inc. at 51–61, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016); Opening Comments of Ass’n of Am. R.Rs. at 34–37 & V.S. of William J. Rennie, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016).

Third, open access proposals are an attempt to compress rail revenues and exercise an end run around Congress's rate reasonableness framework.¹² Congress recognized in the Staggers Act that railroads, given their capital-intensive nature, need to differentially price to stay financially healthy—and that differential pricing ultimately benefits all stakeholders. And Congress contemplated rate reasonableness cases as the statutory mechanism to ensure that shippers without an effective competitive option would pay reasonable rates. The Board should not endorse the views of proponents who view competitive access as a way to reduce rates without having to demonstrate that a rate is unreasonable, as Congress intended. Ultimately, widespread open access would reduce railroad revenues by diminishing the ability to differentially price, leaving railroads with less to reinvest in their networks.

II. The Board should reaffirm the statutory limits on competitive access remedies.

The Board could mitigate some of the uncertainty that would be created by a repeal of Part 1144 by clarifying that statutory limits on competitive access remedies will continue to apply. It is important for any repeal decision to not leave a vacuum, but rather to reaffirm the key limitations that Congress put in place. Absent such guardrails, the Board should be cognizant that application of a case-by-case approach could stray from Congress's intent as time goes on and differently composed Boards decide these issues.

¹² Supp. Comments of Ass'n of Am. R.Rs., V.S. of Michael Baranowski & Nathaniel Zebrowski, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Feb. 14, 2022).

For one thing, the Board should clarify that its proposed removal of Part 1144 does not impact the statutory standards that would apply in any adjudication. While there may be disagreement between the parties in an adjudication about what those standards are, the Board should ensure that any future adjudications will apply the Interstate Commerce Act in the way that Congress intended.¹³

In addition, the STB should reaffirm the following limits on its jurisdiction:

- Any Complainant Must Demonstrate Feasibility and Practicability. The Board should clarify that any complainant relying on the “competitive rail service” prong of section 11102(c) (or requesting a prescribed through route under section 10705) must demonstrate the feasibility and practicability of its proposed prescription. This feasibility requirement is well established under current law, and the Board should confirm that it would apply even if the Board repeals Part 1144.¹⁴
- The Board Has No Authority to Order Switching Outside a Terminal Area. The Board should also clarify that 49 U.S.C. § 11102 gives the agency no authority to order reciprocal switching outside a terminal area. The plain language of the statute permits the agency to order terminal trackage rights “a reasonable distance outside a terminal”; in contrast, the reciprocal switching subsection does not contain language

¹³ See *Loper Bright Enters. v. United States*, 603 U.S. 369 (2024). There is significant legislative evidence that Congress approved and ratified the anticompetitive conduct standard, which CSX summarizes in the attached Appendix.

¹⁴ See *Central States Enters., Inc. v. ICC*, 780 F.2d 664, 669 (7th Cir. 1985) (holding that, with regard to the competitive rail service prong, Congress intended that service be “feasible,” among other requirements); *Midtec Paper Corp. v. Chi. & N. W. Transp. Co. (Use of Terminal Facilities and Reciprocal Switching Agreement)*, 1 I.C.C.2d 362, 366 (1985) (*Midtec I*) (holding, prior to the agency adopting Part 1144 and prior to *Midtec II*, that to satisfy the “competitive rail service” prong, there must be a showing that the requested switching would be “feasible”); *Canexus Chems. Can. L.P. v. BNSF Ry. Co.*, NOR 42131, slip op. at 9 (STB served Feb. 8, 2012) (“There are a broad variety of public interest factors that we consider here, including: the economy, efficiency (particularly, if it adds to the number of interchanges), and feasibility of the route” (internal footnote omitted)).

expanding the allowable distance for a prescription.¹⁵ This distinction within the same statutory section is compelling evidence that Congress did not intend reciprocal switching to extend outside a terminal area.¹⁶

- Competitive access remedies are not available to exempt traffic. The Board should also reaffirm that competitive access remedies would not be available to traffic subject to an existing exemption, and that the Board would not entertain a complaint seeking a competitive access remedy for exempt traffic unless that exemption were first revoked.
- Competitive access remedies should be adjudicated case-by-case: Consistent with the NPRM's call for case-by-case adjudication, the Board should make clear that it will entertain complaints meeting the statutory criteria brought by individual customers pertaining to a specific location (reciprocal switching) or route (through route). Attempts to bring class-type actions or multi-party complaints would immediately risk widespread impacts, and the Board should categorically not entertain such complaints.

CONCLUSION

If the Board moves forward with a final rule in this proceeding, it should make the clarifications that CSX describes above.

Respectfully submitted,

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¹⁵ Compare 49 U.S.C. § 11102(a), with § 11102(c).

¹⁶ See Opening Comments of CSX Transportation, Inc. at 77–81, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016) (detailing plain language argument and further evidence for terminal area limitation).

APPENDIX

SUMMARY OF EVIDENCE THAT CONGRESS KNEW OF AND APPROVED THE ANTICOMPETITIVE CONDUCT STANDARD

To provide further guidance to the Board, CSX details below some of the evidence that Congress knew of and approved the anticompetitive conduct standard.¹

The Part 1144 regulations were adopted soon after the Staggers Act by an agency that was familiar with the balance struck by Congress in Staggers. The keystone of that balance was differential pricing. Congress recognized that railroads need the flexibility to price to the market, including the ability to charge different rates to sole-served shippers than to shippers with a second rail option. The wisdom of the Staggers balance is that differential pricing ultimately benefits all shippers, because allowing railroads to charge lower rates to attract shippers with multiple options brings in contributions from those shippers that reduce the amount that sole-served shippers must pay to maintain rail infrastructure.

A corollary of Staggers' embrace of differential pricing is that a shipper having only one rail option is not, by itself, a problem that needs a regulatory fix. Staggers preserved multiple protections for such shippers, including the rights to reasonable rates and practices, the common carrier obligation, and competitive access provisions. But interpreting the competitive access provisions to mean that a sole-served shipper is entitled to obtain access to a second rail carrier simply by virtue of being sole-served would destroy the differential pricing principles at the heart of the Staggers balance.

For this reason, contemporaneously with the passage of Staggers, the ICC interpreted the competitive access provisions to require something more than a shipper simply being sole-served; rather, to justify a competitive access remedy under the statute, it required a showing of some anticompetitive conduct or a demonstrated service inadequacy. This paralleled the congressionally-mandated standard that the public interest prong be limited to situations where there was an actual and compelling need for the agency to prescribe access. And the ICC defended that interpretation to Congress in multiple hearings in the years after adoption of Part 1144 and in the hearings leading up to the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").

Importantly, the Part 1144 standards were a significant focus of debate in ICCTA's consideration, with the ICC and Department of Transportation defending

¹ See also Opening Comments of CSX Transportation, Inc. at 20–31, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016).

the anticompetitive conduct standard with the support of many shippers, and with other shippers advocating for Congress to change the standard. Congress then made a deliberate choice to reenact the provisions without change, while explaining that it was rejecting calls to change rules on “market access” and that it was explicitly endorsing “existing standards” and granting railroads freedom to act “so long as these actions are not anticompetitive.”² If there were any doubt about the faithfulness of the ICC’s interpretation of Congress’s intent when it adopted the anticompetitive conduct standard, this ratification by Congress removed that doubt.

The NPRM mentions ratification in a footnote with the explanation that the agency rebutted these arguments in 2016.³ In its Notice of Proposed Rulemaking in the EP 711 (Sub-No. 1) docket, the STB noted that CSX (among others) had not cited “any legislative history in which Congress even mentioned the agency’s interpretation [of the anticompetitive conduct standard], much less voiced approval for it.”⁴ As a result, STB concluded that “[t]he absence of any such affirmation or discussion by Congress. . . renders the ratification doctrine inapplicable.”⁵ In response, CSX provided extensive evidence of legislative history demonstrating Congress’s knowledge and approval of the standard.⁶ To CSX’s knowledge, the Board did not have occasion to respond to CSX’s legislative history evidence in the EP 711 (Sub-No. 1) docket, which was ultimately closed without a final rule.

Like all canons of statutory construction, the legislative ratification doctrine is a tool for discerning Congress’s intent. It is based on the logical inference that, if Congress knew of an administrative or judicial interpretation of a statute and chose to re-enact that statute without change while affirmatively indicating its approval of that interpretation, then the re-enactment can properly be interpreted as Congress’s ratification of that interpretation. *See, e.g., Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2000).

The doctrine of legislative ratification has three elements: (1) Congress re-enacted the statute without change; (2) Congress was made aware of the administrative interpretation; and (3) there is an “affirmative indication” that the re-enactment was intended to ratify the interpretation. *AAR v. ICC*, 564 F.2d 486, 493–94 (D.C. Cir. 1977). All three elements are satisfied by Congress’s decision in

² S. REP. NO. 104-176, at 9–10 (1995); H.R. REP. NO. 104-311, at 84, 98, reprinted in 1995 U.S.C.C.A.N. 793, 796.

³ NPRM, at 11, n.19.

⁴ Notice of Proposed Rulemaking, *Reciprocal Switching*, EP 711, slip op. at 12 (Sub-No. 1) (STB served July 27, 2016).

⁵ *Id.*

⁶ Opening Comments of CSX Transportation, Inc. at 23–26, *Reciprocal Switching*, EP 711 (Sub-No. 1) (filed Oct. 26, 2016).

ICCTA to reenact the competitive access provisions of the Staggers Act while knowing of and indicating its approval of the Part 1144 interpretation of those provisions.

A. Element 1: Re-enactment without change to statutory language.

In ICCTA, Congress kept the identical language from the Staggers Act with respect to the agency’s authority to grant reciprocal switching and trackage rights, except for changing the name of the agency from ICC to the Board.⁷ The statutory language governing the agency’s authority to prescribe through routes, 49 U.S.C. § 10705, was similarly reenacted without change, except for similar nomenclature changes and excising provisions relating to motor carrier jurisdiction and suspension authority.⁸ It is significant that Congress re-enacted these provisions without modification, because ICCTA was a significant revision and overhaul of the Interstate Commerce Act as a whole. Congress’s “selectivity” in modifying some provisions and not others “strongly suggests” that Congress intended to ratify the existing interpretation of the provisions it re-enacted without modification. *Lorillard v. Pons*, 434 U.S. 575, 582 (1978).

B. Element 2: Congressional awareness of agency interpretation.

At the time that Congress reenacted the reciprocal switching and through route provisions of the Staggers Act in ICCTA, it was well aware of the ICC’s consistent and longstanding interpretation of that language.

Staggers Oversight Hearings. In the years before ICCTA was considered, Congress heard repeatedly about the Part 1144 standards. In 1986 oversight hearings, ICC Chairman Gradison explained that “[t]he Commission will prescribe a through route or a joint rate under section 10705, or reciprocal switching under section 11103, if the prescription is necessary to remedy or to prevent an anticompetitive action,” and the Committee also heard from certain witnesses arguing that the ICC had interpreted the competitive access provisions of the statute too narrowly.⁹ In 1987 oversight hearings, Chairman Gradison again testified “that switching will be ordered where needed to remedy competitive abuse

⁷ Compare Staggers Act § 223, 94 Stat. at 1924 (Staggers Act version of then-§ 11103), with ICCTA § 102(a), 109 Stat. at 831 (ICCTA version of current § 11102).

⁸ Compare Staggers Act § 218, 94 Stat. at 1919–20 (1980) (Staggers Act version of § 10705, which did not alter earlier language regarding the Commission’s authority to prescribe through routes, see Public Law 95-473 § 10705, 92 Stat. at 1375 (1978)), with ICCTA § 102(a), 109 Stat. at 811 (1995) (ICCTA version of current § 10705).

⁹ *Staggers Rail Act*, Hearing before the Subcomm. on Comm., Transp. & Tourism of the Comm. on Energy and Com., 99th Cong. (1986).

or its threat,” and, at that same hearing, commenters described and expressed concerns about the *Midtec II* decision.¹⁰

ICC Regulatory Responsibilities Study. One of the key documents in ICCTA’s legislative history was the *ICC Regulatory Responsibilities Study*, a congressionally-mandated report that the ICC prepared for Congress on its current regulatory responsibilities, including recommendations on potential changes to that authority.¹¹ That ICC Report described to Congress how the ICC had interpreted the reciprocal switching and access provisions of the Staggers Act in *Intramodal Rail Competition*¹² (the rulemaking adopting Part 1144) and *Midtec II*¹³ (the ICC’s decision first applying the Part 1144 regulations). The Report advised Congress that “[t]he Commission will force such arrangements only where necessary to redress anticompetitive actions.”¹⁴

ICCTA Hearings. In the congressional hearings that preceded the enactment of ICCTA, several witnesses claimed that the ICC had misinterpreted the Staggers Act, and they asked Congress to amend the statute to make it easier for shippers to obtain agency-mandated reciprocal switching or terminal access.¹⁵ In those same hearings, Congress also heard from witnesses who urged Congress to retain the ICC’s interpretation—making it clear that there was a choice to be made on the

¹⁰ *Rail Industry/Staggers Act Oversight*, Hearings before the Subcomm. on Surface Transp., of the Comm. on Com., Sci., & Transp., 100th Cong. (June 9, June 17, & June 24, 1987), at 160 (Statement of Heather J. Gradison, Chairman, ICC); *id.* at 394 (Statement of William C. Harding, Chairman, Nat’l Grain & Feed Ass’n).

¹¹ Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (Oct. 25, 1994), available at 1994 WL 639996 (“ICC Regulatory Responsibilities Study”).

¹² Final Rule, *Intramodal Rail Competition*, EP 445 (Sub-No. 1), 1 I.C.C. 2d 466 (Oct. 29, 1985).

¹³ *Midtec Paper Corp. v. Chi. & N. W. Transp. Co. (Use of Terminal Facilities and Reciprocal Switching Agreement)*, 3 I.C.C.2d 171 (1986) (“*Midtec II*”).

¹⁴ *ICC Regulatory Responsibilities Study* at *25 & n.152.

¹⁵ For example, the National Industrial Transportation League (“NITL”) asked Congress to “guarantee . . . competitive switching rates” in order to “create more rail-to-rail competition.” *Disposition of the Railroad Authority of the Interstate Commerce Commission: Hearing Before the Subcomm. on Railroads of the H. Comm. on Transportation*, 104th Cong. (Jan. 26 & Feb. 22, 1995) (hereafter “*ICC Authority Hearings*”) at 183–84. NITL claimed that the ICC had misinterpreted the Staggers Act and urged Congress “to enact specific changes to the statute” that would “encourage rail-to-rail competition.” *Id.* at 259–60.

part of Congress. For example, the Department of Transportation recommended “no change” to the current rules under which the ICC “can order access under certain conditions” and “on a very limited basis.” *ICC Authority Hearings* at 17–18, 221. Many shippers also urged Congress to retain the ICC’s interpretation of its access authority and to reject suggestions to impose “a new scheme to force railroads to allow competitors to use their facilities.” *Id.* at 486 (statement of over 400 shipper members of Committee Against Revising Staggers).

All this is significant evidence that Congress was “aware of the administrative interpretation” of the agency’s access authority under the Staggers Act at the time Congress enacted ICCTA. *AAR*, 564 F.2d at 493.

C. Element 3: Affirmative indication that Congress intended to ratify the agency’s interpretation.

Finally, the legislative history shows that Congress made an affirmative decision to ratify the ICC’s existing standards for competitive access, and specifically the anticompetitive conduct standard.

For example, the Senate Report accompanying ICCTA acknowledged the shipper arguments for broader “market access” rules, but Congress elected instead to follow the recommendation of the Department of Transportation and to re-enact the existing statutory provision that the ICC interpreted in *Midtec II* to authorize access only to address a carrier’s anticompetitive actions:

The Committee recognizes that certain affected groups—most notably smaller shippers and smaller railroads—believe that further legislative changes are necessary or desirable to more fully protect their interests. However, the Committee is concerned that such additional measures would necessarily cast an overly broad regulatory net and even then might be ineffective to solve the underlying concerns (e.g. car supply, market access, etc.).¹⁶

Likewise, the Conference Report reiterated Congress’s intention to ratify “existing standards” for reciprocal switching and terminal access. H.R. REP. NO. 104-311, at 84, reprinted in 1995 U.S.C.C.A.N. 793, 796 (ICC functions including “terminal trackage rights and reciprocal switching jurisdiction” would be “transferred . . . under existing standards[,] with minor modifications for large Class I railroads’ transactions”).

¹⁶ S. REP. NO. 104-176, at 9–10 (1995); *see also id.* at 5 (“Many broader transportation policy proposals viewed by the Committee to be re-regulatory were not included in this bill.”).

But that is not all. When reenacting the through route provisions of § 10705, Congress explicitly referred to and endorsed the anticompetitive conduct standard of Part 1144. Specifically, the Conference Report stated that “The Committee intends that the Panel continue the policy of granting railroads the maximum possible freedom to set rates, routes, and divisions, so long as these actions are not anticompetitive.” *Id.* at 98 (emphasis added).

In sum, Congress was clearly aware of, and endorsed, the anticompetitive conduct standard in Part 1144. It reenacted the competitive access provisions of the statute in ICCTA without change and resolved the debate before it between parties asking Congress for a more lenient standard and parties asking Congress to reaffirm the existing standard in favor of the latter.