APPENDIX M: CHEMICALS, PLASTICS, AND RELATED INTERESTS

American Chemistry Council and American Plastics Council. The American Chemistry Council (ACC)[156] and the American Plastics Council (APC)[157] contend that, although the Board has articulated a substantial and welcome policy goal (that mergers should preserve and enhance competition), the Board has declined so far to adopt any specific remedies to ensure that this policy goal will be implemented. The Board, ACC and APC explain, aspires to a substantial change in principle but, to date, has offered little that actually goes beyond the status quo. ACC and APC insist that, in light of the unique competitive harms that would be created by a transcontinental rail merger, the proposed rules are too vague and lack objective and predictable standards.

Merger/alliance review by DOJ. ACC and APC contend that, given the extreme concentration of the North American rail industry and the serious anticompetitive dangers posed by further rail mergers or rail alliances, the authority to review and approve U.S. rail mergers and rail marketing agreements/alliances should be transferred (by statute) from the Board to the Department of Justice, which (ACC and APC advise) has developed detailed guidelines and precedents for reviewing both mergers and alliances and which (ACC and APC further advise) has extensive experience reviewing mergers in both regulated and unregulated industries, including mergers and marketing alliances among transportation companies. There is, ACC and APC argue, no reason that the rail industry should continue to be singled out for special treatment notwithstanding that it already resembles the classic heavily consolidated industries that provoked the enactment of the original antitrust laws (i.e., it is monolithic, it is unresponsive to its customers, and it too often offers "take it or leave it" terms).

Strengthening of proposed rules. ACC and APC contend that, if rail merger jurisdiction remains with the Board, the Board should substantially strengthen the proposed rules by adopting specific rules with teeth. ACC and APC explain that, although the NPR in general represents a movement in the right direction, the proposed rules do not set any objective standards for evaluating mergers and omit entirely any scrutiny of proposed marketing alliances. A standard that says "we'll know what's enough competition when we see it," ACC and APC argue, is no standard at all. Concrete guidelines, ACC and APC insist, should be adopted for evaluating mergers and for ensuring that they do not have anticompetitive consequences.

---

[156] ACC was formerly known as the Chemical Manufacturers Association (CMA).

[157] ACC (a trade association representing the leading companies engaged in the business of chemistry) and APC (a trade association representing 26 of the largest resin producers) filed jointly.

Gateways. (1) ACC and APC insist that all existing gateways, and not only "major" gateways, must be kept open. ACC and APC explain: that keeping gateways open would permit connecting carriers to compete for a portion of the shipper's business, and would thus further the procompetitive intent of the proposed rules; that closing gateways would not significantly contribute to efficiency, because inefficient gateways have already largely been eliminated; and that closing any gateway, given the reality of limited shipper choices at origin and destination, would amount to an anticompetitive tying arrangement that would not be permitted in an industry subject to the antitrust laws. ACC and APC therefore propose that merging railroads be required to commit to keep all gateways/interchange points open, so long as the railroad prior to the merger had published tariffs, or participated in contract movements, via those gateways or interchange points. ACC and APC add that, because railroads seldom publicly announce that they are closing gateways (rather, they employ pricing strategies to direct traffic over their preferred routes), keeping gateways open, to be meaningful, must deal with actions going beyond outright cancellation of tariffs or restrictions on routing or interchange choices.

(2) ACC and APC contend that their previously proposed "Access Condition" (see NPR, slip op. at 285-87) would provide the best solution to the gateway issue, and the best way to ensure that future mergers are not anticompetitive. ACC and APC explain: that the Access Condition would entitle every captive shipper on future merged systems to gain access to one competing carrier, which would choose whether to provide the service based upon whether doing so would produce a sufficient economic return; that offering a joint rate at a shipper-selected interchange point would be one method by which access could be provided under the Access Condition, but it would be up to the shipper, the origin railroad, and the connecting carrier to negotiate the precise method and terms of access (subject to best offer arbitration); that the Access Condition would be preferable to traditional regulatory solutions dependent upon maximum rate proceedings, because it would be based on actual competition rather than simulated competitive benchmarks; and that the Access Condition would be based on a competitive marketplace in which access would be permitted but not mandated so that competition would occur only where a competing carrier could efficiently and profitably compete for a movement or a portion of a movement. ACC and APC add that it is only because the Access Condition was not included in the NPR that ACC and APC have now outlined alternative suggestions regarding preservation of gateways, bottleneck rates, service and rate guarantees, and the like.

(3) ACC and APC argue that, if the Board continues to be unwilling to adopt the Access Condition, the Board, to ensure that merging railroads do not close or disadvantage gateways that exist at the time of the merger, should require merging carriers to publish rates to/from any interchange point to or from which the railroad published a rate prior to the merger, or to or from which the railroad carried traffic under a contract. ACC and APC add that such rates should be required to be published in proportion to the distance between the origin and the interchange point, as compared with the distance between the origin and the originating carrier's preferred

long-haul interchange or destination point, after adjusting for costs at origin and destination. ACC and APC insist that such a market-driven proportional rate condition (which, ACC and APC believe, the Board has authority to impose under 49 U.S.C. 10701) would increase the ability of would-be connecting carriers to offer alternative joint rates, and they further insist that the resulting competition would encourage innovation, efficiency, and customer service. ACC and APC suggest that their proportional rate condition arguably has an advantage over trackage rights, haulage, or other means of providing physical access because (ACC and APC explain) the carrier cannot interfere with or penalize the competing carriers through operational means, and also because (ACC and APC add) this mechanism does not require any special efforts to dispatch the trains of more than one carrier in the local terminal area.

(4) ACC and APC concede, in essence, that their proportional rate proposal bears some resemblance to the DT&I conditions that the ICC/STB have chosen not to impose in recent mergers. ACC and APC contend, however: that times have changed drastically in the nearly 20 years since the DT&I conditions were abandoned; that, during this time, the number of carriers and carrier routing combinations has dramatically decreased; that route structures have been rationalized and inefficient gateways have already largely been eliminated; and that, therefore, rather than perpetuating an almost infinite and highly inefficient maze of routings and combinations, imposition of similar conditions today would simply preserve a dwindling number of efficient routing choices. And, ACC and APC add, their proportional rate proposal is less intrusive than other means of enabling an alternative or connecting carrier to compete for a portion of the movement.

(5) ACC and APC contend: that their proportional rate proposal should apply both to domestic gateways and interchanges and also to international gateways and interchanges; that the Board should affirm that shippers of international traffic should have all rights regarding interchange, interswitching, and competitive access that they now have under Canadian (or Mexican) law; and that, following any future merger, the Board should maintain an ongoing enforcement proceeding to hear any shipper complaints that gateways have been closed or commercially disadvantaged. ACC and APC add that, in order that merging carriers are not penalized for offering rates over new single-system routings that may be lower than former joint rates for the same or competing routes, a shipper should not have the right to argue that a gateway has been commercially disadvantaged merely because such a new, lower rate has been offered.

Bottlenecks. ACC and APC, which believe that the bottleneck rule should be changed in the case of merged systems, contend that one of the ANPR's most positive suggestions was that, in the case of merged systems, the bottleneck rule should be modified so as to permit the challenge of bottleneck rates regardless of whether the shipper has a signed contract in hand from a connecting carrier. This change, ACC and APC explain, would cut through the chief impediment to increased rail-to-rail competition today (i.e., the tacit agreement of the major railroads that they will not attempt to "poach" on each other's exclusive territories by agreeing to serve shippers on routings involving bottleneck segments). ACC and APC argue that, rather than requiring railroads applying for a merger to proffer some undefined quantum of enhanced competition, the Board should say that, if carriers want to merge, they must offer reasonable rates to interchange points. The Board, ACC and APC maintain, has clear authority to do so derived from 49 U.S.C. 10701 and from the carrier's "common carrier" obligation to provide rates and service upon request. ACC and APC therefore insist that, in order to ensure that rival railroads have an opportunity to compete for a shipper's business for at least a portion of the route from origin to destination, the Board should modify the bottleneck rule to require merging carriers to publish rates to/from any reasonable interchange point with another carrier, regardless of whether the shipper has obtained a contract or commitment from the connecting carrier regarding the portion of the movement beyond the interchange point. ACC and APC add that, given the difficulty and expense of formal litigation, the Board should encourage increased use of alternative dispute resolution (including arbitration) as a means of resolving disputes respecting bottlenecks.

Acquisition premiums. ACC and APC believe that, because captive shippers have borne the financial burden of failed mergers for too long, the Board must take a hard look at the recovery of "acquisition premiums" in any future mergers. ACC and APC argue: that the consistent pattern of the past several mergers has been that service has been disrupted and costs have gone up for both railroads and shippers; that this record of failure justifies imposing a heavy burden on the railroads to show clearly and convincingly how the costs of their merger transaction will be paid without harming shippers; and that, in particular, the Board should consider how merging railroads can achieve a return on the tremendous sums they pay for acquiring each other without increasing rates on captive traffic (it is meaningless, ACC and APC argue, to say that in principle a merger enhances competition if shippers have to pay higher rates to finance the huge windfall to shareholders lucky enough to have owned stock in the acquired railroad). ACC and APC add that the analysis the Board should undertake of the "acquisition premium" issue is conceptually straightforward (How will the merged system pay off any debt incurred in the merger transaction? Will the increased costs of the merger be paid off with increased efficiencies? If so, how and over what time period? Will increased traffic enable the debt to be paid off? Again, how and over what time period?).

Joint marketing agreements and alliances. ACC and APC contend that, whereas the Board indicated during the CN/IC merger proceeding that it does not feel that it needs to review the terms of joint marketing agreements, antitrust enforcement experts recognize that marketing alliances can have anticompetitive effects, depending on factors such as the duration of the alliance, its involvement in pricing and asset allocation issues, and its exclusivity. ACC and APC further contend that DOJ and FTC, which recognize that competitor collaborations can have competitive effects identical to those that would arise if the participants merged in whole or in part, have published guidelines for assessing the competitive impacts of marketing alliances.

ACC and APC believe that, so long as the Board (rather than DOJ) continues to have authority to review mergers, the Board should expand the scope of its rules to encompass review of joint marketing agreements and alliances and their potential anticompetitive effects, and (in such expanded review) should use the guidelines employed by DOJ and FTC. ACC and APC add that the Board should also clarify to what extent marketing alliances must apply for joint rate authority under 49 U.S.C. 10706, and what the standards will be for the Board's review and approval of such applications.

Geographic and industry balance. ACC and APC insist that the Board should require geographic and industry balance when merger-related harms are offset by enhanced competition or other benefits. The proposed rules, ACC and APC explain: suggest that a merger might be approved, even if it will probably cause competitive harm or service disruptions, so long as the merger also proposes some undefined quantum of "enhanced" competition; appear to suggest that the enhanced competition need not be directed to the same shipper groups, industries, or geographic areas that suffer the harm from the merger; and can therefore be taken to mean that merger applicants will no longer be required to preserve all competitive options that would otherwise be lost to particular shippers if a merger were approved without conditions. ACC and APC maintain that the NPR, if read to eliminate the current rule that all specific competitive harms resulting from a merger are to be remedied, represents a sharp step backwards. ACC and APC argue that, short of their Access Condition, no plan for enhancing competition would effectively ensure that all shippers, industries, and geographic areas that would otherwise be harmed by a proposed merger are made whole, unless the Board is prepared to require merging carriers to accept liability for money damages if their merger results in service problems or higher rates. ACC and APC therefore contend that, at a minimum: (1) the Board should clarify that it is not retreating from the longstanding insistence that there be a full, direct, and proportional condition adopted by the merging carriers to remedy each and every competitive harm that would be created by a merger in the absence of conditions; and (2) the Board should require that any plan for enhancing competition be accompanied by a study showing that the benefits of the procompetitive plan outweigh the possible harms that would be caused by the merger both in the aggregate and in the case of each shipper group, industry, and geographic area that would potentially be harmed by the merger.

Contingent remedies. ACC and APC insist that proposed contingent remedies in the event benefits fail to materialize must have real teeth. ACC and APC contend that there really is no effective remedy short of mandated post-merger rate caps (so that captive shippers do not have to pay the costs of a merger's failures) and mandated liability for degradation in post-merger service. ACC and APC further contend that any contingent remedies short of such across-the-board service and rate guarantees would be largely illusory. ACC and APC add that, because every merger applicant says that its merger will result in greater efficiency, lower costs, and better service, there really is no good reason that merging carriers should not provide across-the-board service and rate guarantees. Such guarantees, ACC and APC explain, would be the only reliable way to ensure that the railroads' claims are not just talk.

Canada-U.S. Rule 11 routings. ACC and APC insist that another issue the Board should address is the continued availability of "Rule 11" routings between Canada and the United States. ACC and APC explain: that, under Canadian law, shippers in Canada currently have the right to specify, in a bill of lading, that their traffic is to be carried by the originating carrier to an interchange point, thence via another carrier beyond to destination; that this is usually done by reference to AAR Accounting Rule 11 for the movement beyond the interchange point (although, ACC and APC add, the existence of Rule 11 is not essential for that purpose); and that the bill of lading reference signals the originating carrier that the shipper has chosen a routing for its traffic that requires the originating carrier to interchange the traffic to a connecting carrier for furtherance to destination. ACC and APC warn that this right could be affected by future mergers involving Canadian railroads; a CN/BNSF merger, ACC and APC indicate by way of example, could effectively eliminate the ability of shippers to seek competitive rates at points where CN connects with BNSF, unless (ACC and APC add) the Board and Canadian authorities reviewing the merger ordered as a condition to the merger that Rule 11 routings must continue to be offered. ACC and APC contend that the simplest and best principle, which (they argue) the Board should include in its final merger rules, is that, in any future merger, shippers of international traffic between the U.S. and Canada will continue to have all rights they enjoyed pre-merger under either Canadian or U.S. law, or under existing railroad practices, to select gateways, routings, and connecting carriers for their international traffic.

BASF Corporation and Williams Energy Services. BASF Corporation (BASF) and Williams Energy Services (Williams)[158] contend that, although the NPR gives the appearance of offering change for the future, the fact of the matter is that the NPR fails to provide solutions to the serious problems experienced in previous mergers. BASF and Williams insist that, if the proposed rules are adopted without change, shippers and other affected parties will have lost much and gained little. And, BASF and Williams add, the NPR is overly and needlessly general in nature.

Procompetitive modifications. BASF and Williams contend that, to protect individual shippers from the loss of competitive alternatives stemming from the merger of Class I railroads, the Board should implement procompetitive modifications such as reciprocal switching, competitive line rates, bottleneck rate challenges, trackage rights, and haulage rights. BASF and Williams contend, in particular, that merger applicants should be required: to identify all competitive harms that the transaction may create; to propose specific remedies to mitigate and offset each competitive harm; and to explain how they would preserve competitive options for

[158] BASF and Williams filed separately.

each group of shippers and for Class II and III rail carriers. BASF and Williams further contend: that the measures applicants should be required to propose to mitigate and offset merger harms should not simply preserve, they should also enhance, competition; and that, at a minimum, applicants should be required to explain how they would preserve and enhance the use of major gateways, reciprocal switching, shared asset areas, competitive line rates, build-outs or build-ins, and other procompetitive measures, and also the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

Rebuttable presumption. BASF and Williams contend that, because future end-to-end Class I mergers will significantly diminish competition without appreciably increasing efficiency (and because such mergers, given their size, may potentially disable the entire North American transportation network), the Board should adopt a rebuttable presumption that further Class I rail mergers are not in the public interest. BASF and Williams contend, in particular, that NPR § 1180.1(a) should be revised to provide that, "[a]lthough [past] mergers of Class I railroads may have advanced our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board will reject further consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved." BASF and Williams further contend that NPR § 1180.1(c) should be revised to provide that, "[a]lthough the Board cannot rule out the possibility that further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board adopts the rebuttable presumption that additional consolidation in the industry will result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. To overcome this presumption, merger applications must include provisions for enhanced competition, with no reduction or loss of service. Unless merger applications are so framed, [the proposal] of proposed combinations where both carriers are financially sound will cause the Board to reject the application or, alternatively, to make broad use of the powers available to it in 49 U.S.C. 11324(c) to condition its approval to preserve and enhance competition." And, BASF and Williams add, NPR § 1180.1(c)(1) should be revised to provide that "[a] merger transaction must improve existing competition or provide new competitive opportunities."

Sequential implementation. BASF and Williams contend that the Board should apply comprehensive and rigorous pre-merger testing within a merger review process segmented into 3 sequential steps: Step 1 (the corporate merger); Step 2 (the business merger); and Step 3 (the operational merger). BASF and Williams indicate that the sequential process they contemplate does not contain additional review or approval steps compared to the procedures proposed in the NPR, but, rather, places the steps for approving a merger into a logical progression in order to assure a higher degree of confidence in its success.

(1) *Step 1 (the corporate merger).* BASF and Williams contemplate that the filing requirements for the corporate merger would consist of all financial and organizational information, an estimation of downstream effects, and generalized statements of the harm and benefits of the merger and the applicants' plans for overcoming the harms. The objective, BASF and Williams explain, would be to determine whether the applicants can establish a prima facie case that overcomes the rebuttable presumption against further mergers. BASF and Williams further explain that, if the applicants fail the preliminary test, that ends the matter, saving the railroads, the Board, and the economy in general considerable time and effort. BASF and Williams add: that they have previously suggested that the applicants should be able to proceed to consummate a corporate merger (by exchanging stock, electing common directors, and beginning to merge the corporate entities) following Step 1; that, however, BASF and Williams now realize that implementing this plan would require prior preparation of a retrograde movement, in case the combination needs to "un-merge"; that, once the corporate entities are merged, it can become difficult to contend that if the railroads fail to resolve their anticompetitive problems, they should "un-merge" into competing entities; and that, therefore, BASF and Williams now suggest that approval to consummate the merger should occur only after applicants pass the tests in Step 2.

(2) *Step 2 (the business merger).* BASF and Williams contemplate that most of the requirements that would have to be met by applicants would be part of the second step (i.e., the business merger phase). BASF and Williams contemplate, in particular: that the first event in Step 2 would be the market study, which would identify the competitive harms; that applicants and participants would then develop or determine the conditions that would resolve those harms and enhance competition; and that this would be followed by comments by shippers and small railroads. BASF and Williams add that Step 2, which would culminate in approval or disapproval of the merger, would also include the operational integration plans (i.e., part of the decision in Step 2 would be the schedule for Step 3).

(3) *Step 3 (the operational merger).* BASF and Williams contemplate that the schedule for the operational merger phase would prescribe the testing programs, the capacity measures, and the detailed operational changes that would be required to make the merging railroads operate as one. BASF and Williams add: that the testing programs they contemplate would be comprehensive and rigorous, and would be applied in a step-wise process to determine whether the systems to be used post-merger are capable of handling the volume of data necessary to run the merged or successor system with no computer system failures; that applicants would be required to run "parallel" systems (i.e., the current system and the proposed post-merger system) for the entire merged operation for as long as needed to demonstrate that the systems are equal to the challenge; and that failure of the merged computer system during the recommended test would not necessarily cause the merger to be denied but would more likely lead to delay until the problems with the successor system are fixed.

Shipper compensation for reduced service. BASF and Williams contend that the Board should guarantee shippers compensation for reduction and loss of rail service caused by mergers. BASF and Williams contend, in particular, that the Board should require both a temporary remedy (BASF and Williams argue that shippers damaged by deteriorated service and other merger problems should be compensated in monetary terms for the losses sustained) and a permanent remedy (BASF and Williams argue that the permanent remedy would be restoration of service to pre-merger or better standards). BASF and Williams add: that, while monetary damages should continue to accrue until service has been restored, they are not the goal; that monetary damages are not sufficient to recoup the losses sustained by shippers during a merger-related service collapse; that the real and lasting remedy is restoration of service; and that the monetary damages are designed to motivate railroads in that direction. BASF and Williams further add that the Board should establish rules and procedures for the prompt resolution of merger-related service complaints.

Blue Ribbon Advisory Panel. BASF and Williams contend that a Blue Ribbon Advisory Panel should be created to provide timely and objective oversight during merger review and implementation. BASF and Williams add: that the Advisory Panel would be assembled by, and would report to, the Secretary of Transportation, and would assist the Board by developing objective and impartial recommendations on issues designated by the Secretary; that the Advisory Panel, which would be representative and balanced to ensure objectivity and impartiality, would be made up of representatives of railroads (including small railroads) and shippers (including small shippers) as well as government (including a Board representative); that the Advisory Panel would be activated by the filing of a merger application; that the Advisory Panel, once activated, would conduct technical reviews, would issue approvals for passing milestones in the step-wise process, and would conduct other tasks assigned by the Secretary (such other tasks, BASF and Williams note, might involve the methodology for testing post-merger systems, or the measurement of service benchmarks and compensatory damages for merger-related service failures); that the recommendations of the Advisory Panel would be binding on the Board unless subsequent compelling evidence indicated otherwise; that the Advisory Panel would focus on technical issues for which the Board's resources are insufficient (e.g., review of railroad operating plans and approval of railroad testing plans, processes, and results); and that the Advisory Panel would advise whether the railroads' systems can be merged with some assurance that efficiency and effectiveness will not be materially harmed.

Other issues. (1) *NPR § 1180.1(c).* BASF and Williams contend that, although "enhanced competition" is among the more promising policy changes articulated in the NPR, the NPR falls considerably short of what is needed; it is necessary, BASF and Williams insist, to build effective procedures that will implement the "enhanced competition" policy change. BASF and Williams claim that, although the competitive enhancements called for by the NPR would be proposed by the applicant railroads, applicant railroads in past merger proceedings have volunteered this type of action only to the extent required to get an application approved. BASF and Williams further contend: that, at the present stage of the railroad merger process, there will be only limited improvements to competition; that there will also be possible losses in the choice of connecting carriers on east-west movements; that, accordingly, "enhanced competition" is vitally important; that, unless the Board is willing to condition approval on opening additional access to competing carriers, the NPR's proposed enhancement of competition rings hollow; and that, without a defined set of criteria and procedures, any enhancement of competition is likely to be at best minimal and superficial. BASF and Williams insist that a simple remedy would be to call for all of the involved parties to propose enhancements of competition, or procedures to enhance competition; the record already established in this case, BASF and Williams advise, identifies numerous procedures that could meet that need.

(2) *NPR § 1180.1(c)(1).* BASF and Williams contend: that the types of potential benefits listed in NPR § 1180.1(c)(1) are those already addressed in rail mergers; that, in reality, the benefits to be shared with shippers are limited to those situations in which the railroads operate in a competitive environment, at the time of the merger; that, as a practical matter, many shippers do not have rail competitive options today; and that, therefore, if the sharing of potential benefits is limited to situations where the railroads currently operate in a competitive environment, those benefits are for the most part non-existent or, at best, inconsequential. BASF and Williams therefore insist that the Board should remove the constraining condition that limits the provision to situations in which the railroads operate in a competitive environment at the time of the merger. BASF and Williams insist, rather, that the Board should apply this provision broadly and should use it to truly enhance competition.

(3) *NPR § 1180.1(c)(2)(i).* BASF and Williams believe that it is inappropriate to designate the applicants as the parties to propose remedies to offset harms resulting from reduction of competition; this "self-policing" policy, BASF and Williams explain, is weak in design and likely to be weaker in application. BASF and Williams insist that the proposed regulations should be modified to allow and encourage all parties to propose remedies to offset competitive harms.

(4) *NPR § 1180.1(c)(2)(ii).* BASF and Williams contend that the terms "essential services" and "sufficient public need" should be defined to clarify the Board's intent. BASF and Williams explain that, without an understanding of the intent, the responses may be off-point and the policy implementation may be misguided.

(5) *NPR § 1180.1(c)(2)(iii).* BASF and Williams warn that NPR § 1180.1(c)(2)(iii) will not enable the Board to foresee service problems before they arise, but, rather, will perpetuate the procedures that have already produced monumental service failures. BASF and Williams explain that NPR § 1180.1(c)(2)(iii): does not specify the procedures the Board will use to weigh the likelihood of service problems; does not address pre-merger testing of operations or other systems; and does not discuss the identification and establishment of pre-merger operations

benchmarks. BASF and Williams add: that applicants should be required to explain how they would cooperate with other carriers in overcoming serious service problems; that a plan should be in place with other railroads to cope with natural disasters or service disruptions; that service problems require agreements in place with other railroads; that, although applicants can speculate about what they would do if the situation arises, without an agreement with other railroads this may be rhetoric; and that, therefore, the merger applicants must be required to obtain a commitment in writing from the other railroads, including involved shortlines.

(6) *NPR § 1180.1(d).* BASF and Williams contend that it is inappropriate to designate the applicants as the parties to propose the solutions that will enhance competition; history, BASF and Williams insist, has shown that this is a prescription for incomplete and sub-competitive remedies. BASF and Williams argue that the Board: should require input from shippers, from non-applicant railroads, and from the Advisory Panel; and should mandate consideration of that input by requiring a revised applicant railroad mitigation plan, reflecting shipper and non-applicant input. BASF and Williams add that the revised plan might be produced by the Board's staff, by the applicant railroads, or by the Advisory Panel.

(7) *NPR § 1180.1(h).* BASF and Williams contend that, although any future mergers will be critically in need of pre-merger testing, the NPR's "service assurance and operational monitoring" proposal makes no provision for pre-merger testing, but, rather, is geared entirely to a post-approval process (which, BASF and Williams claim, is the same failed process used in recent mergers). BASF and Williams argue that the Board must act before the merger; discovering problems by means of another plunge into chaos, BASF and Williams explain, is not good policy. BASF and Williams insist, therefore, that the Board needs to take steps before the merger to reduce the chances of a repeat of the major service problems encountered in previous mergers.

(8) *NPR § 1180.3(b).* BASF and Williams contend that, although Canadian railroads and U.S. railroads have different accounting systems and different reporting requirements, it is important that full reporting of appropriate data not be obscured by national boundaries. BASF and Williams therefore insist: that the Board should specify the requirements on the content and format of financial and cost data to be provided by non-U.S. railroads; that non-U.S. railroads that merge with U.S. railroads should be required to submit the same cost information on the same basis as U.S. railroads, and to submit such information for the entire merged network; and that, likewise, U.S. railroads operating outside the U.S. should be required to include the costs of those operations in their reports to the Board and other regulatory agencies.

(9) *NPR § 1180.4(e).* BASF and Williams contend that, although NPR § 1180.4(e) indicates that the evidentiary proceeding will be completed within 1 year after the primary application has been accepted for a major transaction (180 days for a significant transaction; 105 days for a minor transaction), this plan has a serious procedural weakness. BASF and Williams

explain: that, if substantial problems arise, the applicants may try to handle them during the approval period; and that, if shippers raise important issues during the process, the Board may inappropriately defer addressing the issues due to the exigencies of ongoing operations. BASF and Williams add that, because "acceptance" starts the clock, the regulations should clearly identify the requirements for acceptance and should specify exactly what constitutes acceptance.

(10) *NPR § 1180.6(b)(10)(ii).* BASF and Williams contend that, although NPR § 1180.6(b)(10)(ii) gives the appearance of progress, the fact of the matter is that the requirement for applicants to explain how they are going to improve service has been a part of the application process for many years. BASF and Williams, which claim that few if any of the service improvements predicted in past merger proceedings have ever materialized, insist that, without proper testing, the merits of claimed service improvements cannot be properly evaluated.

(11) *NPR § 1180.6(b)(11).* BASF and Williams insist that applicants should be required to measure and report public benefits. It is not enough, BASF and Williams argue, to require quantification of public benefits and negative effects only "where possible."

(12) *NPR § 1180.6(b)(12).* BASF and Williams contend that it is not enough to require applicants to analyze and evaluate the impacts of downstream mergers; applicants' estimates of downstream effects, BASF and Williams argue, will be largely "guess work." BASF and Williams therefore insist that time and effort should be allotted explicitly in the procedural schedule for the comments and views of the non-applicant railroads on downstream effects.

(13) *NPR § 1180.6(b)(13).* BASF and Williams contend that the requirement that applicants discuss "[t]he purpose sought to be accomplished by the proposed transaction" is not really new. BASF and Williams, which insist that the Board is missing an opportunity to focus on and elevate the priority of purposes such as the public interest, enhanced competition, and maintenance of adequate service levels, argue that the Board should adopt a proactive pre-merger approach to identifying and solving problems.

(14) *NPR § 1180.10.* BASF and Williams, which believe that the "service assurance plan" proposal does not actually require applicants to perform any more analysis than they did in previous mergers, insist that NPR § 1180.10 should specify that necessary and sufficient testing of the operating plan must be accomplished and that the test results must be provided to the Board, the Advisory Panel, and other interested parties for evaluation. BASF and Williams further contend that the Board should establish 2 specific remedies for service failures that lead to "service damage." (a) The first remedy contemplated by BASF and Williams is monetary and would have 2 levels. At the first level, if rail service falls more than 20% below pre-merger levels (as measured by pre-merger transit times), the applicant railroad(s) would be required to pay, within 30 days, the lease costs of securing the additional equipment required to compensate for service deterioration. At the second level, if service failures (based on a 20% or greater

increase in transit times) cause a plant to curtail production or to shut down, the railroad(s) would be required to pay, again within 30 days, the costs of the shut down or curtailment. BASF and Williams add that the Advisory Panel could review and certify the "service damage" bills as being reasonable, and that the Board, or a court of competent jurisdiction, could rule on causation if that became an issue. (b) The second remedy contemplated by BASF and Williams would be a long-term lasting remedy, i.e., restoration of service to pre-merger levels or better. BASF and Williams note, however, that this might take months or years, and, indeed, might never be realized. BASF and Williams indicate that, in the interim, the "service damage" bills would rightly assign financial responsibility for the service failure to the railroad(s) causing that failure.

(15) *NPR § 1180.10(e).* BASF and Williams contend: that, although pre-merger testing of information technology systems has taken place in past mergers, it was done with only samples of the post-merger movements; that, however, experience has shown that such samples were not sufficient; and that, therefore, as a condition of future mergers the merging railroads should be required to run parallel systems (their current system and the proposed post-merger system) for the entire merged operation for at least 3 months, in order to demonstrate whether or not the systems to be used post-merger are capable of handling the volume of data necessary to run the merged system without computer system failures.

(16) *NPR § 1180.10(i).* BASF and Williams contend that having a contingency plan in place seems more of a ready excuse than an effective remedy. BASF and Williams add: that the requirement for preventive measures and rigorous pre-merger testing is clear; that the people on the railroad rescue team will almost inevitably be largely the same people that designed the initial operations in the potential trouble area; that, again, the NPR is defaulting to problem solving in a crisis mode rather than designing a managed and controlled rail network; and that this is another area where the Advisory Panel can have a positive impact.

(17) *Intramodal competition.* BASF and Williams contend: that rail-to-rail competition is what is lost in mergers; that, however, it is doubtful that rail-to-rail competition will be much affected by the next round of mergers, except at the gateways; that, therefore, it is critically important that rail competition be enhanced; and that haulage rights, trackage rights, and reciprocal switching are just some of the possibilities for enhancing rail-to-rail competition.

(18) *Upstream effects.* BASF and Williams agree that the Board should include "upstream effects" in its deliberations.

(19) *Simplified rate reasonableness tests.* BASF and Williams contend that the Board should allow shippers to challenge bottleneck rates, regardless of the makeup of the through rate; any portion of a rate, BASF and Williams insist, should be open to challenge and should stand on its own merits. BASF and Williams explain that allowing shippers to review individual revenue divisions can restrain monopolistic pricing; and, BASF and Williams add, combining that

knowledge with a simple procedure to challenge rates that are unreasonably high will remedy many of the bottleneck rate problems. BASF and Williams further contend: that the simplified rate reasonableness challenge could also be extended to maximum rate cases; that the Advisory Panel could develop procedures to make it easier for shippers to challenge a rate; that such simplified procedures could also make it less expensive to challenge rates (the current procedures, BASF and Williams insist, present a major impediment to regulatory access except for those with the persistence and resources to pursue the seemingly interminable and frequently fruitless pathway of maximum rate challenges); and that the process could be simplified by requiring that the rate for any portion of a movement be open to challenge on its own merits.

(20) *Limited open access.* BASF and Williams contend that many shippers are now served by only 1 railroad, and that, if the remaining railroads merge into 2 transcontinental systems, many shippers currently served by 2 carriers will see their choice effectively reduced to 1 (not because the 2 serving carriers will merge, BASF and Williams explain, but because at least 1 of the carriers will be able to offer a single-line haul from origin to destination; only in rare instances, BASF and Williams add, will the shipper have both the origin and destination served by both transcontinental railroads). BASF and Williams argue: that they have previously called for relief such as trackage and haulage rights, reciprocal switching, interswitching, and competitive line rates; that, however, trackage and haulage rights often seem to leave the traffic at the mercy of the railroad owning the tracks, and competitive line rates may be too difficult for the shipper to gain; and that, although the most practical alternatives would seem to be reciprocal switching and interswitching, these options would be unavailable to the many sole-served shippers that do not have another carrier nearby. BASF and Williams further argue: that it is now time to require enhanced competition, both to prevent further damage and also to remedy the legacy of past mergers; that this will involve application of limited "open access" remedies such as those proposed by BASF and Williams (reciprocal switching, interswitching, shared asset areas, competitive line rates, trackage rights, and haulage rights); and that the design and application of such remedies to enhance competition is a matter that the Advisory Panel could assist.

(21) *Industry-wide reforms.* BASF and Williams contend that the Board should convene independent inquiries at the time it examines the next merger to consider industry-wide reforms that would enhance competition broadly, and not just within the context of the merging railroads. These reforms, BASF and Williams add, would deal with rights of access, reciprocal switching zones, competitive rate plans, and the rights of shippers to appeal against unreasonable rates and terms of service.

Dow Chemical Company. The Dow Chemical Company (Dow) agrees that the Board's new approach to rail mergers must be to "enhance" rather than merely to "preserve" competition; merging carriers, Dow argues, should be required to propose "enhanced competition" in order to cure the complex and subtle losses in competition that have been permitted to go unremedied in previous mergers. Dow indicates, however, that it is concerned that the proposed rules: lack sufficient specificity in major areas; are too vague or general to provide clear notice of the standards that will be applied; and are drafted so broadly that they could be applied in a way that accomplishes no real changes over the current rules. And, Dow adds, it is also concerned that the Board's insistence upon addressing competition only as it pertains to merging carriers will undermine the overall goal of "enhanced competition."

Enhanced competition. Dow contends that the proposed rules must be clarified and expanded in order to fully realize the goal of enhanced competition. Dow explains that the proposed rules are very general, and, in some places, are ambiguous. Dow also explains that the Board's reluctance to extend the focus of this proceeding beyond just merging carriers ignores a critical piece of the equation for providing enhanced competition.

(1) Dow contends that the Board should clarify that its goal is to ensure enhanced and effective intramodal competition (which Dow refers to as "rail competition"). Dow argues that, because the proposed rules do not clearly refer to enhanced intramodal competition, the proposed rules may be interpreted as indicating that intermodal, geographic, or product competition could substitute for intramodal competition and still satisfy the Board's goal.

(2) Dow, which notes that NPR § 1180.1(c) indicates that the enhanced competition requirements will apply only if both merger applicants are "financially sound," contends that the Board should cure the uncertainty surrounding the "financial soundness" concept by specifically disavowing "revenue adequacy" as a factor in the determination of "financial soundness." Any other result, Dow warns, would seriously dilute, if not negate, the goal of the proposed rules to enhance competition. Dow explains that, if "financially sound" is equated with "revenue adequate," the requirement that future merger applications include provisions for enhanced competition will not apply to the major carriers most likely to be involved in future rail combinations. Dow further explains that, because the most recent rail mergers have contributed significantly to the "revenue inadequacy" of several Class I carriers, the use of "revenue adequacy" as a measure of "financial soundness" would allow the missteps of past mergers to preclude enhanced competition conditions in future mergers.

(3) Dow contends that, because competition cannot truly be enhanced unless it extends to the entire rail industry, the Board, by focusing purely on rail merger policy to enhance competition, is creating an unlevel playing field that will undermine the overall goal of enhanced competition even as applied to just merging carriers. Dow argues that, because the most recent round of rail mergers resulted in substantial reductions in competition and left the nation with rail duopolies in the Eastern and Western portions of the United States, enhanced competition was a fully justified goal even in those earlier mergers, and, therefore, the lost competition resulting from those mergers also must be remedied. Dow also argues: that very few captive rail shippers have true competition today; that even facilities currently served by 2 rail carriers are not truly

competitive for most movements; that, in order for a rail shipper to enjoy the benefits of 2-carrier competition at a facility, the same 2 carriers either must serve both the origin and destination points or serve only one of those points so that the bottleneck origin or destination carrier is neutral; that, however, the former scenario is largely non-existent today and the latter has decreased dramatically with each prior rail merger; and that these harms must be remedied before competition truly can be enhanced. Dow further argues that the Board's focus on merging carriers may chill future mergers, and thereby prevent shippers from realizing enhanced competition; carriers will be reluctant to merge, Dow explains, if they are required to make their customers more competitively accessible to other rail carriers while they do not have similar access to their competitors' customers. Dow therefore insists that, in order to achieve the full benefits of enhanced competition, the Board, at a minimum, should revise its "competitive access" rules to provide for increased reciprocal switching access. Dow insists, in particular, that the Board should eliminate the "competitive abuse" test and should establish clear and definite procompetitive standards for obtaining reciprocal switching under 49 U.S.C. 11102. And, Dow adds, the Board should institute an expanded or separate proceeding to address ways to enhance competition in the rail industry that is unfettered by the purpose and scope of the Board's merger authority.

(4) Dow contends that the Board, when addressing specific competitive harms, should err on the side of increased competition. Dow explains: that, in prior merger decisions, the Board has refused to grant a full remedy for certain specific harms because the only remedy that would fully restore pre-merger competition levels also would leave the shipper in a better competitive position than it was pre-merger; that, however, this policy, which worked to the advantage of the carriers at the expense of the shipper, is not consistent with the Board's new emphasis on enhanced competition; and that, therefore, the Board should formally reverse this policy in the new merger rules, and, in future mergers, should err on the side of enhancing competition in order to address specific competitive harms that otherwise could not be fully remedied.

Service disruptions. Dow contends that, to protect shippers from merger-related service disruptions, the Board should impose certain minimum service remedies. Dow explains that, although it believes that the proposed Service Assurance Plan is an excellent method to minimize the risk of service disruptions, and although it believes that the proposed Service Council is a helpful means of preserving open lines of communications between shippers and the merging carriers, it also believes that the proposed rules are deficient as they pertain to remedies in the event that service disruptions do occur. Dow contends, in particular, that the Board should require the applicants' service contingency plan to include the right of a shipper to short-haul a carrier, during service disruptions, by requiring a carrier, at the shipper's request, to interchange traffic at the nearest interchange point. This remedy, Dow explains, would minimize a shipper's exposure to service disruptions while diverting traffic off of an overburdened rail system at the earliest possible point; and, Dow further explains, this remedy would not burden the troubled rail system with the trackage rights operations of a second carrier.

The "one lump" theory. Dow contends that the Board has taken a positive step towards preserving competition by requiring merging carriers to present an effective plan to keep open major existing gateways and to preserve separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations. Dow further contends that the latter scenario, which Dow refers to as the "contract exception," is a tacit acknowledgment that the Board will no longer adhere strictly to the so-called "one lump" theory. Dow argues, however, that the Board should go further and should expressly abandon the "one lump" theory altogether.

(1) Dow contends that the "one lump" theory is inconsistent with the "contract exception." Dow explains: that the "one lump" theory holds that, because a monopolist (i.e., a bottleneck carrier) at the end stage of production is in a position to capture the entire monopoly profit, integration backwards upstream normally does not enable it to raise the profit-maximizing price; that, however, the "one lump" theory and the "contract exception" are inconsistent; that, if the "one lump" theory truly reflected reality, preservation of the "contract exception" would not be a procompetitive measure, because the "contract exception" applies in exactly the same circumstances in which the "one lump" theory has been applied; that, however, the Board has clearly recognized the procompetitive nature of the "contract exception"; and that, because the "contract exemption" preserves a competitive benefit, there is no basis for continued adherence to the "one lump" theory. Dow therefore argues that the Board should expressly acknowledge the inconsistency of the "one lump" theory and the "contract exception" by explicitly abandoning the presumptions that underlie the "one lump" theory.

(2) Dow contends that past adherence to the "one lump" theory has eliminated significant levels of competition with each successive rail merger, and that, therefore, the Board should act now to remedy the harms that have resulted from this past adherence to the "one lump" theory. Dow contends, in particular, that the Board should require all merging rail carriers to offer common carrier "bottleneck" rates to shippers regardless whether the bottleneck carrier serves both the origin and destination points. Dow notes, however, that it does not contemplate that a shipper would be able to demand any interchange point that it desires; Dow indicates, rather, that it contemplates that a shipper would be permitted to obtain a bottleneck rate only to a point where traffic was interchanged prior to the proposed merger. And, Dow adds, the condition it contemplates would preserve competition based upon service, because (Dow explains) even if the "one lump" theory is not inconsistent with the "contract exception," a vertical merger of a bottleneck carrier with a downstream non-bottleneck carrier would still deny captive shippers a choice of rail carriers for the competitive segments of their routes (and such competition, Dow argues, is an incentive for carriers to provide good rail service, including safe transportation of hazardous substances).

Mandatory arbitration. Dow contends: that a major deficiency in the Board's proposed rules is the absence of any process for the efficient and expeditious resolution of service and rate disputes; that many of the procompetitive measures in the proposed rules will be severely limited in their effect unless the Board simplifies and expedites the process for resolving such disputes; and that, to remedy this deficiency, the Board should require mandatory binding arbitration of service and rate disputes, at the shipper's discretion. Dow insists that, from a shipper's perspective, arbitration (which, Dow claims, is more affordable and less time-consuming than litigation) would make statutory and regulatory protections more widely available.

(1) Dow contends: that, in connection with the service disruptions that attended the UP/SP and Conrail transactions, shippers were forced to resort to lengthy and expensive court proceedings to obtain redress; that, however, only shippers with the largest losses could justify the expenditure of time, effort, and resources that such litigation involved; that many shippers that had sustained substantial losses were unable to assume the risk and expense associated with litigation of their claims; that, because the carriers knew that most shippers would not or could not pursue litigation, they often refused to offer a reasonable settlement; that only when there is a credible threat of litigation will carriers engage in serious negotiations; and that, if arbitration (which Dow believes is less costly and more expeditious than litigation) were available, more shippers would be able to seek relief. Dow further contends that the Board can address this issue by imposing a merger condition that would require applicants to agree to binding arbitration of service-related loss and damage claims (for both common carriage and contract carriage claims) if the shipper so elects (this condition, Dow notes, would allow the shipper to retain the right to submit its claims to a court if it desired to do so, and would also preserve any contract rights that the shipper preferred to exercise). Dow insists that, although the Board does not have jurisdiction to adjudicate loss and damage claims or contract disputes (and although the Board should not place itself in a position to review the arbitration decisions), the Board does have the legal authority to impose an arbitration condition upon a merger. And, Dow further insists, under the same principle used to promulgate claims processing regulations, the Board also has the authority to adopt a procedural framework for the conduct of "service disruption" arbitration proceedings.

(2) Dow contends that, because most shippers will not benefit from bottleneck relief (including the "contract exception") unless the Board simplifies the complex and costly process for resolving rate disputes, the Board should condition future rail mergers by requiring the applicants to establish bottleneck rates and to arbitrate, upon demand by the shipper, any disputes over the level of those rates. Dow explains: that the current process for resolving rate disputes (which Dow regards as a "bottleneck" standing between most shippers and the benefits of enhanced competition, not to mention basic regulatory protections) requires a shipper to bring an unreasonable rate complaint before the Board under procedures that are extremely complex, require enormous amounts of discovery, take a year or more to complete (not including appeals), and cost hundreds of thousands of dollars to pursue; that, therefore, shippers now file very few rate cases; that, in addition, those cases that are filed typically involve single commodity (e.g., coal) unit-train movements over a single route on a regular basis; that, however, most rail movements (including Dow's) do not have these characteristics; and that the reality of the matter

is that Dow, like most shippers, does not now, and would not under the proposed merger rules, benefit from the "contract exception" or other forms of bottleneck rate relief. Dow further contends that, to broaden the range of shippers that will benefit from any bottleneck relief and from the "contract exception" in particular, the Board, acting under its broad merger conditioning authority, should impose upon merging carriers the Canadian system of Final Offer Arbitration (FOA), which involves procedures that Dow believes are simple, cost-effective, and expeditious. Dow explains: that, under the FOA system, a shipper that is dissatisfied with a rate charged or proposed to be charged by a rail carrier may submit the matter for FOA by a single arbitrator, or, if the carrier agrees, by a panel of arbitrators; that each party sets forth its final offer to the other and the arbitrator must choose one or the other (which, Dow advises, gives both parties a strong incentive to be reasonable); that the parties must exchange all information that they intend to submit to the arbitrator; that the parties may direct interrogatories to each other; that the arbitrator may request additional information on his/her own initiative; that, depending upon the dollar amount of the freight charges at issue, the arbitration must be completed within either 30 or 60 days; and that the decision of the arbitrator is final and binding.

(3) Dow contends that, because many of the enhanced measures proposed by the Board will not benefit shippers due to the costly and time-consuming process of pursuing them, the Board should consider mandatory, binding arbitration as a means to make both existing and proposed competitive benefits available to a broader range of shippers. Dow specifically contends that the Board should require arbitration of "competitive access" disputes. Dow adds: that arbitration could also streamline the resolution of disputes over competitive conditions imposed upon a merger, as well as service-related disputes; that, for example, disputes over the application of a merger condition (except general disputes over the meaning of a merger condition, or other broad policy disputes, which would be resolved by the Board in the first instance) or disputes over rail service arising within a specified time after implementation of a merger could be submitted to binding arbitration; and that the Board could establish the standards and procedures for resolving the disputes and could require that arbitration be completed within a fixed time period. An arbitration remedy, Dow insists, would resolve many of the obstacles that shippers face in their attempts to realize the full benefit of all procompetitive options.

Ratepayer protection mechanisms. (1) Dow contends that, to protect shippers from the consequences of the inflated and/or unsubstantiated claims that merger applicants have been known to make, the Board must do more than simply increase its scrutiny of public interest benefits. Dow explains that it does not understand how the proposed process of scrutinizing merger benefits to ensure that they are well-documented and reasonable will differ from current procedures; Dow indicates that, in any event, it does not believe that merger benefits can be projected and assessed with any reasonable certainty (because, Dow argues, too many variables and assumptions are required, and because the entire process is subject to substantial manipulation by the applicants to achieve any desired result); and Dow argues that, because even increased scrutiny of claimed benefits by the Board will not do much to enhance the reliability of benefit projections, the Board must undertake to protect the public interest from potentially adverse effects if the projected benefits are not fully realized.

(2) Dow contends that the greatest single threat from overstated benefit projections is their use to justify an acquisition premium, which (Dow maintains), if not offset by merger benefits, can adversely affect the rates of shippers. Dow warns that captive shippers are most at risk because they rely upon regulation to ensure that their rates are reasonable. Dow explains: that, whenever assets are sold, the acquisition cost becomes the new book value; that an acquisition premium increases the book value; that these higher book values are used to calculate the jurisdictional threshold for regulation and railroad revenue adequacy; and that the changes to both of these calculations, as a result of an acquisition premium, will adversely affect regulated rates if the premium is not offset by merger benefits. Dow further warns that many contract shippers are also at risk as a result of their rail contracts. Dow explains: that many rail contracts set a base rate that is adjusted periodically; that a common adjustment factor is the Rail Cost Adjustment Factor (RCAF); and that an acquisition premium that is not offset by merger benefits can inflate the RCAF, through the depreciation component, and cause contract rates to rise at a faster pace.

(3) Dow therefore insists that, to protect shippers from the adverse effects of an overstated acquisition premium, the Board should require merger applicants to propose ratepayer protection mechanisms that will assure that shippers are protected from the effects of the acquisition price upon their rates, if the projected merger benefits do not materialize. Dow explains that this solution, which (Dow claims) has already been adopted by the Federal Energy Regulatory Commission, places the risk that benefits will not materialize upon the applicants, where (Dow believes) it belongs.

<u>Alliances and joint ventures</u>. Dow contends: that the ICC/STB have adhered, in recent years, to a narrow concept of "control" that has left many non-merger cooperative agreements outside the scope of ICC/STB review; that, although DOJ/FTC might conceivably review such agreements under the antitrust laws, DOJ/FTC have adhered, in recent years, to a narrow concept of "harm to competition" that has left most such agreements beyond the scope of DOJ/FTC review; that, however, the absence of both ICC/STB and DOJ/FTC review does not automatically mean that non-merger cooperative agreements have no anticompetitive effects, especially in view of the subtle, yet significant, anticompetitive effects that have occurred in previous mergers and that have been compounded by each subsequent merger; and that, although such effects would be addressed by the enhanced competitive measures that the Board would require in the proposed merger rules, the reality of the situation is that, if the Board does not review cooperative agreements under those merger rules, the benefits of enhanced competition will never be realized. Dow argues that, because (in the current regulatory and antitrust environment) rail alliances and/or rail joint ventures that have anticompetitive consequences

might escape all review, the Board should address the level of scrutiny that will be given to rail alliances and rail joint ventures. Dow indicates that it believes that most non-merger cooperative agreements should be subject to Board review, which (Dow suggests) could be accomplished if the Board were to adopt a broader concept of "control."

E. I. Du Pont de Nemours and Company. E. I. Du Pont de Nemours and Company (DuPont), which agrees that new railroad merger rules are needed and that competition must be enhanced and not merely preserved, contends that the rules proposed in the NPR broadly address many of the issues that have concerned rail customers. DuPont argues, however, that the Board should develop additional specificity so that the new rules are clear and do not simply discourage formal mergers while encouraging other forms of rail combinations that could be equally anticompetitive. And, DuPont adds, it is disappointed that the NPR does not address the concentration and loss of competition that already exists.

(1) DuPont contends that the Board should apply its new competitive thinking in a broad way to the entire railroad industry, and should not confine this thinking to the merger context. The rail industry, DuPont insists, has already concentrated to such a degree that broader competitive reform dealing with the entire industry, rather than just the next 2 merging railroads, is now required. DuPont notes, by way of illustration, that, at those of its facilities that are captive to a single railroad, the rates charged for rail transportation are higher, there is little incentive for railroads to provide excellent service, and there are no viable alternatives if and when safety or service falters. DuPont argues that, if balanced and sustainable competition is to be achieved, broad changes are needed in the railroad/customer competitive balance; new merger rules alone, DuPont argues, are not the appropriate way to accomplish balanced and sustainable competition now that the railroad industry has concentrated essentially to 2 monopoly-like systems in each half of the United States.

(2) DuPont agrees: that merger applicants should be required to propose a plan for enhancing competition; that there should be a permanent 5-year oversight period and a Service Council; that applicants should submit Service Assurance Plans and Safety Integration Plans; that existing gateways should be protected; that build-in/build-out options should be preserved; and that new "bottleneck" situations should be prevented.

(3) DuPont insists that the SAPs must include procedures that will allow for the recovery not only of premium transportation costs but also of consequential damages for such costs as lost production, excess labor, etc.

(4) DuPont indicates that the requirement that applicants address potential downstream mergers offers a potential mechanism to impose competitive conditions or alterations that will become effective upon a subsequent merger. DuPont advises that, if crafted carefully, such later changes might be a vehicle to expand competition in a way that is not punitive to the initial

merger applicants. And, DuPont adds, it would also support the use of the 5-year oversight process on previous mergers to "balance" the competitive remedies required for new mergers.

(5) DuPont believes that the concept of ensuring "balanced and sustainable" competition, while laudable, requires clear definition, particularly as it applies to captive rail customers. DuPont explains that, for chemical companies, "balanced and sustainable" competition means rail-to-rail competition that allows for choices, alternatives, and incentives to perform. DuPont argues that it is not enough to "expect" applicants to propose plans for enhanced rail-to-rail competition; rather, DuPont insists, there must be a specific requirement for enhanced rail-to-rail competition. And, DuPont adds, because NPR § 1180.1(d) appears to suggest that enhanced rail-to-rail competition will be imposed as a condition only if proposed by the applicants, the Board should clarify that proposed conditions for enhanced rail-to-rail competition will be imposed if they meet the public interest standard and the requirements of 49 U.S.C 11324(c).

(6) DuPont contends that, to ensure that "balanced and sustainable" competition truly exists, NPR § 1180.1(c)(2) should be revised to require merging rail carriers to provide a bona fide rate (not restricted to a contract) for any new potential bottleneck segments of their combined system, with baseball-type arbitration as a dispute resolution mechanism if agreement on a reasonable rate for a bottleneck segment cannot be reached between the railroad and its customer. DuPont further contends that merger applicants should also be required to address how they will allow for enhanced terminal area reciprocal switching and trackage rights to balance increased market power.

(7) DuPont contends that the Board should not allow marketing alliances to be used to achieve, without regulatory review, anticompetitive consequences that the Board would not allow railroads to achieve by merger. Marketing alliances, DuPont explains, have the potential to create the same monopolistic effects as major mergers, but (at the present time) without regulatory oversight either by the Board or under the antitrust laws.

(8) DuPont contends that, although it supports the NPR's 5-year oversight mechanism, it also believes that, after the 5-year period has passed, some form of continuing oversight of competitive effects is needed to ensure that commitments made by the merging carriers for enhancing competition, preserving gateways, and avoiding new bottlenecks are "sustainable" after the 5-year period.

(9) DuPont contends that, because Canadian and Mexican railroads are now becoming so closely intertwined with U.S. railroads, the transnational approach of NPR § 1180.1(k) is appropriate; a common regulatory framework, compatible operating practices, and a mutual understanding of transnational issues, DuPont explains, are needed throughout North America. DuPont adds, however, that it would prefer that the Board approach this in a more proactive way by establishing a dialogue and ongoing forum with Canadian and Mexican governmental

agencies to pursue this goal. Such coordination of policies, DuPont argues, is needed even if no future mergers occur.

(10) DuPont, which indicates that it generally supports the comments filed by ACC, ARC, and NITL, contends that, if the Board continues to believe that it does not now have the statutory authority to apply remedies that increase competition where it does not already exist, the Board should identify and seek the specific legislative changes needed to enhance competition. DuPont further contends that the Board should seek opportunities to use its influence to bring railroads and their customers together to dialogue and to jointly develop, for the industry, a long-range solution that will provide expanded competition and value for rail customers, create new market opportunities and growth for railroads, and allow for constructive mergers that bring real value to rail customers.

Enterprise Products Operating L.P. Enterprise Products Operating L.P. (EPO) contends that the proposed rules are worded too vaguely, do little to correct the decidedly pro-merger bent of the Board, and offer shippers little in the way of reliable safeguards to preserve, much less enhance, railroad competition. EPO further contends: that the Board has an opportunity to preserve what little intramodal competition remains by promulgating meaningful rules in this proceeding; that, however, in fashioning the rules it proposes to adopt, the Board has squandered that opportunity; that the rules proposed in the NPR would establish no standards that the applicants would need to observe to safeguard the preservation of competition in gaining unconditional agency approval of their future filings; and that the unfettered discretion the Board reserves to itself as to how it will balance the alleged benefits of the railroads' future merger or acquisition proposals with the need for preserving or enhancing rail-to-rail competition renders it doubtful that merger applications will be treated differently in the future than they have been in the past.

(1) EPO contends that, because keeping gateways open is the single most important means for maintaining intramodal competition when railroad mergers or acquisitions are authorized, the Board should condition every merger or acquisition by requiring the merged or controlled and controlling railroads to maintain and keep open all routes and channels of trade via existing junctions and gateways unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest. EPO argues: that the DT&I conditions served to keep connecting railroads competitive; that, given the concentration that now exists in the railroad industry, there no longer is any justification for not imposing the DT&I or similar conditions in any major railroad merger or acquisition hereafter approved by the Board; and that, if it makes sense to keep major gateways open, it must also make sense to keep all gateways open.

(2) EPO contends that, to take appropriate action against bottlenecks, the Board should condition every merger or acquisition by requiring the merged or controlled and controlling

railroads to offer, upon request of a shipper, a local or proportional rate applicable between a point it alone can serve and a point of connection with another railroad, regardless whether the shipper has a contract for service by the connecting railroad, unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(3) EPO contends that, for a shipper served by a merged or controlled and controlling railroad, access to a second carrier within essentially the same switching district or terminal area is essential if rail-to-rail competition is to be enhanced. EPO further contends that the Board should ensure this terminal access by conditioning every merger or acquisition to require the merged or controlled and controlling railroads to provide reciprocal switching or switching at reasonable fees, to be agreed to by the parties or set by the Board, to any shipper seeking to be served by another carrier within or proximate to the switching district or terminal area on the lines of the merged or controlled and controlling railroads unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(4) EPO contends that the Board should ensure that any shipper that as a result of a merger or acquisition suffers a loss of actual or potential competitive railroad service shall be protected by the imposition of a condition affording trackage or haulage rights to another railroad. EPO further contends that, to this end, the Board should condition every merger or acquisition to require the merged or controlled and controlling railroads to provide at reasonable charges, to be agreed to by the parties or set by the Board, trackage or haulage rights to another railroad so as to enable the other railroad to serve a shipper suffering a loss of actual or potential competitive railroad service as a result of the proposed merger or acquisition unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

(5) EPO contends that the goal of rail-to-rail or intramodal competitive enhancement would be well served if the rate base of the merged or controlled and controlling railroads were not inflated by an excessive price paid to effect the proposed transaction or by any extraordinary costs incurred in consummating it. EPO further contends that, to this end, the Board should condition every merger or acquisition so as to disallow any acquisition premium paid to effect the proposed transaction or extraordinary costs incurred in consummating it to be included in the merged or controlled and controlling railroads' rate bases unless the applicants can prove by substantial evidence that the imposition of such a condition would be contrary to the public interest.

PPG Industries. PPG Industries, Inc. (PPG), which applauds the spirit of the NPR regarding competitive access, rail-to-rail competition, and service issues, insists that it is critical that future mergers guarantee substantive rail-to-rail competition and adequate levels of service, and are approved only after due consideration of downstream effects. PPG, which agrees that merger applicants should be required to provide a plan for enhancing competition through rail-to-rail competition (including the granting of trackage rights, establishment of shared or joint access, removal of paper and steel barriers, and other methods), contends, however, that the proposed rules are too general in nature and fall short by failing to outline specific requirements in key areas.

Rail-to-rail competition. PPG contends that the NPR is neither clear enough nor strong enough in addressing the need to establish and maintain rail-to-rail competition. PPG further contends that, because of the critical importance of rail-to-rail competition, it warrants the establishment of a set of specific criteria in and of itself, independent of any others that must be met in order for a merger to be approved. These criteria, PPG argues, should include specific safeguards that would protect and enhance rail-to-rail competition and preclude any degradation of competition. Such measures, PPG further argues, must include: mandatory competitive access in all currently captive situations; requirement of competitive access in mergers where non-captive shippers are likely to become captive; mandatory reasonable rate offerings by railroads on any portion of a movement and elimination of the requirement for the existence of a contract between the shipper and a connecting carrier; mandatory open routings and access to all gateways; and guaranteed rights of shortline and regional railroads to interchange traffic with any other railroad without restriction.

Service. PPG contends that, although the NPR does an admirable job in advocating required service plans as a precondition to merger approval, service assurance is an area of paramount importance that requires stronger and more specific language. More is needed, PPG insists, in establishing mandatory performance requirements and specific, well-defined remedial procedures for service failures; claims filed by harmed parties in recent mergers, PPG explains, have been a confusing array of red tape with ill-defined procedures, oftentimes resulting in stall tactics by the railroads and/or total failure to render reimbursement. PPG contends, in particular, that specific measures must include: provisions outlining mandatory performance standards, as well as follow-up service reporting and contingency plans; provisions for defined and specific penalties for service failures resulting from future mergers; and clear and specific settlement rules and required remedial timelines for service damage disputes resulting from post-merger service disruptions that apply equally to all shippers.

Downstream effects. PPG agrees that "downstream effects" must be accorded consideration in future merger proceedings. PPG insists, however, that allowing the merger applicants to project these potential downstream effects would not provide for an unbiased analysis. PPG therefore argues that, in determining downstream effects, the Board should solicit and consider input from all interested parties as well as independent analysis by an unbiased evaluation entity.

Procter & Gamble Company. The Procter & Gamble Company (P&G) contends that, because the NPR leaves many critical issues (including competition and the delivery of promised public benefits) to be resolved at the discretion of the merging railroads, the proposed rules should be revised to provide maximum direction to the merger applicants relative to the achievement of the "enhanced competition" goal and also relative to other issues such as delivering on promised public benefits (including improved service and greater economic efficiencies). The final rules, P&G insists, should include specific remedies for these types of issues, as well as meaningful objective standards by which a merger application can be evaluated and approved or denied as appropriate. And, P&G adds, the preferred approach to enhancing competition should be to expand this (either in this rulemaking proceeding or in an additional rulemaking proceeding) to the entire rail industry, as opposed to just merging carriers.

<u>NPR § 1180.1(a)</u>. P&G contends that the implication that a transaction that reduces the railroad and other transportation alternatives available to shippers will be approved if "there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved" is not acceptable. P&G insists that competitive harm to one industry or shipper cannot be offset by a competitive advantage to a different industry or shipper, and (P&G further insists) the "substantial and demonstrable public benefits" suggested by merging railroads need to be agreed upon by shippers as opposed to merely being an opinion of the merging railroads. And, P&G adds in connection with the concept of "public benefits," a process to involve shippers in the decision to approve or disapprove a merger should be developed and defined as part of the merger rules.

<u>NPR § 1180.1(c)</u>. P&G contends that the "trade-off" theme suggested by this provision ("The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms.") will not meet its needs as a shipper. P&G further contends: that the regulations should specify the minimum criteria that must be achieved relative to the enhancement of competition in order for the merger to be approved; that, if a merger application fails to meet these criteria, the Board should disapprove the merger rather than approve subject to conditions specified by the Board; that whether or not "both carriers are financially sound" should have no bearing on how the merger rules are applied; that the merger should be disapproved if the public benefits claimed by the merging railroads fail to be agreed upon by shippers or if the benefits can be achieved by means other than a merger; and that the regulations should outline the consequences (to include shipper rate protection) that applicants will bear for a merger that fails to meet the promised public benefits. P&G insists that the merger rules should be framed in such a manner as to place the burden of failure on the applicants, and should not be silent on the consequences for applicants that fail to meet their commitments.

NPR § 1180.1(c)(1). P&G contends that the notion that "[t]o the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies will be shared with shippers and consumers" is an assumption, not a fact. P&G further contends: that, if railroad merger benefits are to be shared with shippers, the rules will need to specifically state how that is to happen; that, for the railroad calculation of the net public benefits, the rules need to identify the specific measurements and data needed, both prior to and after the merger, to support these claims; and that, lacking any specific criteria to measure the validity of these benefits, these benefits need to be judged by shippers as opposed to the Board or the merging railroads. And, P&G adds, the rules should also specify the consequence of failing to meet or share these benefits, as opposed to having the merging railroads propose additional measures for the Board to take if the benefits do not materialize.

NPR § 1180.1(c)(2)(i). P&G contends that the requirement that applicants propose remedies to mitigate and offset competitive harms sounds a "trade-off" theme that contradicts the goal of enhanced competition and that will not meet P&G's needs as a shipper. P&G further contends that the rules: should state that merger applications that result in competitive harms will be disapproved; should mandate gateway requirements, to include pre-merger vs. post-merger pricing; and should mandate requirements for opening terminal areas to reciprocal switching, interswitching provisions, and contracts for the competitive portion of joint-line routes when the joint-line partner has a bottleneck segment.

NPR § 1180.1(c)(2)(iii). P&G contends that it is not clear how the Board will evaluate the likelihood of transitional service problems, and that it is also not clear what criteria will be used to decide if the potential for these types of problems is large enough to lead to the disapproval of the merger. P&G insists that, at a minimum, the approval/disapproval criteria should be stated in the new rules.

NPR § 1180.1(c)(2)(iv). P&G contends that the requirement that, "[t]o offset harms that would not otherwise be mitigated, applicants shall explain how the transaction and conditions they propose will enhance competition," implies that applicants do not need to enhance competition unless it is necessary as a last resort to offset other harms. P&G insists that an important improvement such as this should be stated as a clear requirement as opposed to something that is optional and that is used only if the applicants have no other choices relative to mitigating merger harms.

NPR § 1180.1(d). P&G contends that, although it is appropriate to impose conditions (e.g., conditions that grant trackage rights, require access for other carriers to facilities, or establish interswitching provisions) to provide direct remedies to specific merger harms, the concept of using conditions to offset merger harms in an indirect manner will not meet P&G's needs as a shipper. P&G further contends that, rather than impose conditions to offset these types of merger harms, the merger should be disapproved. And, P&G adds, although

NPR § 1180.1(d) implies that conditions will not be imposed where they would result in "unreasonable operating, financial, or other problems for the combined carrier," it would be better to disapprove the merger rather than harm shippers by protecting the combined carrier from the imposition of appropriate conditions.

NPR § 1180.1(g). P&G contends that NPR § 1180.1(g) should be revised to require that any "merger benefit projections accepted by the Board" be realized within the time period specified by the merging railroads in their application. It is not enough, P&G argues, to require that such benefits be realized "in a timely fashion."

NPR § 1180.1(h). P&G contends that this rule should clarify that the problem resolution teams and the specific procedures for problem resolution must be established and approved by the Board prior to the merger starting, and that failure to meet this requirement will cause the merger to be placed on hold or disapproved. P&G further contends that the rules should also specify the typical types of merger-related damages that are valid for a shipper to recover through the claims process.

NPR § 1180.1(i). P&G contends that, rather than having the applicants anticipate the reaction of the other Class I railroads, the rules should establish a period of time for the other Class I railroads to respond for themselves on this matter. P&G further contends that the rules should also provide that, if the strategic responses of the other Class I railroads include more mergers, the merger proceedings will stop until such time as all of the proposed mergers can be reviewed as a package.

NPR § 1180.6(b)(11). P&G contends that applicants should be required to quantify all net public benefits, and not only those they view as possible to quantify. P&G further contends that benefits described only in general terms such as "more efficient," "improved," "faster," etc., should be viewed as opinions of the applicants as opposed to commitments on the part of the applicants to produce the promised benefits. And, P&G adds, applicants should be required: to describe in measurable terms all public benefits for which they are making a commitment; to submit a detailed plan for each promised benefit outlining how the gap between the current (pre-merger) results and the promised results will be closed; to provide an analysis describing why these benefits cannot be achieved without a merger; and to establish the timeline by which they plan to deliver these benefits so that the Board will be able to better evaluate if the promises are reasonable and to easily determine if the promises are being achieved in the planned timing.

NPR § 1180.7. P&G contends that applicants should also be required: to submit an analysis of the dynamics relative to competition for interline moves that interchange at major gateways; to outline, for representative origin-destination pairs, the projected impact to a shipper's carrier choices at the gateway by virtue of the proposed merger; and to propose solutions to identified problems.

NPR § 1180.8(a). P&G contends that applicants should also be required: to outline their plans relative to increasing the number of engines in the combined fleet as well as their plans for staffing increases for additional crews to support the new system; and to provide projections on the expected timing for these assets to decrease based on the achievement of expected system efficiencies.

NPR § 1180.10(a). P&G contends that, for the route level review, applicants should be required to provide average transit time data for the year prior to the merger for these routes and to describe any expected improvements against this base.

NPR § 1180.10(c). P&G contends that applicants should be required to provide plans for yard consolidations as well as plans for capital improvements to existing yards. P&G further contends that, in addition to dwell time, applicants should be required to provide average yard inventories for the year prior to the transaction for each facility.

NPR § 1180.10(f). P&G contends that applicants should be required to identify any planned post-merger staffing reductions and consolidation of operations.

Reagent Chemical & Research. Reagent Chemical & Research, Inc. (Reagent) contends that the NPR does nothing to address competition. Reagent contends, in particular, that the proposed regulations do not impose standards with respect to gateways, bottleneck pricing, or competitive access, and do not address penalties for non-compliance. Reagent further contends: that, although competition is the engine that drives the American economy, competition in the rail industry has been allowed to disintegrate over the past 20 years; that the rail industry today is capacity constrained, with little or no resources to increase capacity; and that, without regulatory reform and the infusion of public funds, the rail industry will continue to shrink. Reagent warns that, in the near future, although there will be no significant increase in rail capacity, no increase in rail vs. rail competition, and no improvement in service, there will be a significant increase in rates.

Shell Oil Company and Shell Chemical Company. Shell,[159] which believes that increased competition (and not increased regulation) is the answer to the problems that currently plague the railroad industry, contends that the NPR does not adequately address the issues that arise from major rail consolidations. Shell further contends that the wording of the NPR is not clear and specific, leaving many of the critical issues to be handled by requiring the merging railroads to explain the steps they will take to address the impact on competition, to minimize service disruptions, and to ensure the realization of projected public benefits. Past experience,

[159] Shell Oil Company and Shell Chemical Company are referred to collectively as Shell.

Shell argues, would indicate that explanations and pronouncements by the merging parties do not provide adequate safeguards to properly address these important issues.

(1) Shell contends that the decrease in competition for rail transportation business engendered by the mergers of the 1990s has created a situation in which market forces are not sufficient to constrain rates at reasonable levels. Shell further contends that, although the theoretical reasons (e.g., rationalization of duplicative rail properties, creation of longer single-line hauls, reduction of interchange costs, and elimination of redundant administrative functions) cited by merger applicants make good sense, the promise of savings passed on to shippers is rarely fulfilled. Shell explains: that the total savings rarely materialize, because unexpected expenses associated with the integration eat into the benefits; that the savings that do appear accrue more slowly than expected, which means that the immediate impact on the consolidated carrier's cost structure is much less dramatic than anticipated; and that the consolidated carrier discovers that its shippers actually have less access to rail-to-rail competition on one end of the haul or the other, which means that the need to share merger savings is not quite so pressing.

(2) Shell contends that a prerequisite of the approval of another large rail consolidation should be structural changes (particularly interswitching and open gateways, and also effective processes to successfully challenge unreasonable rates) that reduce the concentration of market power and increase competition for all affected rail shippers. Shell further contends: that increased competition might not be a good thing for every railroad; that, however, increased competition would be great for the railroad industry; and that, as competition is injected in the place of the market concentration that now exists, there will be innovative new services, better asset utilization, and increased profits, and also an increase in the investment capital flowing to the railroad industry.

(3) Shell contends that the capacity constraints that now exist in the railroad industry reflect that industry's present lack of competition and concentration of market power. The infrastructure problems that exist in the rail industry today would be alleviated, Shell claims, if barriers to entry into that industry were lowered.

(4) Shell contends that, although the railroads that are still experiencing service problems related to past consolidations should focus on addressing those problems, this does not preclude consideration of further consolidations, particularly (Shell adds) when they involve carriers that do not have current significant service issues. Shell further contends: that the solution to current service difficulties will start with carriers developing a customer focus and taking care of the business they have rather than continuing to look toward consolidation as a cure for all ills; that enhancing competition in the industry will enable the marketplace to operate in a manner that rewards good business decisions and holds accountable those responsible for poorly executed

transactions; and that, without such competition, the market cannot respond in the appropriate manner.

(5) Shell insists that it does not propose reregulation, but rather further deregulation that will allow competition. Shell further contends that, although it does not propose that Open Access be declared tomorrow, it does believe that the current rulemaking proceeding provides an opportune time to begin to reinvigorate the North American railroad industry by slowly introducing rail-to-rail competition. Shell argues, in particular: that the adaptation and introduction of Canadian interswitching rules in the United States would be a small, and not very painful, step toward rail-to-rail competition; that another key element of increasing competition would be to ensure that all viable gateways remain open, both operationally and economically; and that, because (even with these remedies) many captive shipper situations will continue to exist, it is essential that effective mechanisms be available to shippers to challenge unreasonable rates (Shell explains that a significant streamlining of the market dominance and rate reasonableness procedures is essential to ensure that all rail shippers can obtain reasonably priced service from rail carriers that are responsive to their needs). Shell insists that the long-run viability of the North American railroad industry depends on competition, which (Shell believes) would result in a much more vigorous industry while at the same time enhancing the competitiveness of North American refineries, plants, and manufacturing and production facilities.

APPENDIX N: AGRICULTURAL INTERESTS

American Farm Bureau Federation. The American Farm Bureau Federation (AFBF)[160] contends that, although we have apparently recognized the importance of rail-to-rail competition in controlling shipper costs and improving railroads' service performance, we have not proposed meaningful and concrete changes to the procedure we employ to evaluate proposed rail consolidations. AFBF contends, in particular, that our proposed procedural change is deficient in 4 principal areas. (1) AFBF contends that the NPR misses the opportunity to mandate conditions that will improve competitive conditions for captive and near-captive shippers. AFBF insists that, if we have the authority to order a 15-month moratorium on rail merger proposals, we have the authority to impose meaningful competitive remedies if we choose to do so. (2) AFBF contends that, although the NPR requires merging carriers to provide a plan to ensure that levels of service enjoyed by shippers prior to the merger will not suffer as a result of the merger, the NPR gives no indication of how to ensure that these plans actually come to fruition, rather than frustration, for shippers. (3) AFBF contends that, although systemic competition may be beneficial in a global sense, a shipper faced with the loss of 1 of 3 or 2 competitive rail carriers could be facing economic disaster. AFBF insists that we should pay special attention to the problems faced by 3-to-2 and 2-to-1 shippers. (4) AFBF contends that, although we have addressed so-called "transnational effects," we have merely noted that we will include transnational effects among the discretionary factors that we consider in evaluating proposed mergers.

AFBF argues that, although we have adopted new criteria intended to prevent or mitigate unintended anticompetitive consequences of future mergers, we have not put any teeth into these criteria. AFBF explains that there are no anticompetitive or procompetitive thresholds that merging railroads must cross in order to qualify as a merger the Board will approve. AFBF further explains that a failure on the part of a merged railroad to meet its competition enhancement plans will not result in any penalty to that railroad.

AFBF contends that we should add some meaningful objective standards on which we will evaluate, and perhaps reject, future merger applications. AFBF further contends that we should articulate meaningful post-merger performance standards and should accept the responsibility for requiring and enforcing conditions that will improve rather than retard competition.

---

[160] AFBF is a national organization of family farmers and ranchers.

The Fertilizer Institute and The Canadian Fertilizer Institute. The Fertilizer Institute (TFI) and The Canadian Fertilizer Institute (CFI)[161] indicate that they agree that our merger policies must be substantially revised to meet the needs of rail transportation users and providers in light of a substantially-concentrated rail industry. TFI and CFI also indicate that they agree that our approach in future rail mergers must be to "enhance" rather than simply "preserve" competition, and that much more careful attention has to be given in rail merger applications and administration to the assurance of rail service, oversight, monitoring, and other areas. TFI and CFI further indicate, however, that they believe that the rules proposed in the NPR are deficient in a number of key respects.

(1) TFI and CFI applaud the fundamental decision to require "enhanced competition." This fundamental decision is correct, TFI and CFI contend, because application of our current merger policy over the past 5 years has produced a decidedly less competitive rail system. Competitive losses, TFI and CFI claim, have been in 2 primary areas. (i) TFI and CFI contend that shippers have lost competition provided by carriers over part of a rail movement, when (on account, TFI and CFI say, of flawed application of the so-called "one lump" theory) mergers involving the combination of end-to-end routes have been permitted without ameliorating conditions. (ii) TFI and CFI further contend that rail mergers of the size and scope of those approved since 1994 have vastly reduced the amount of potential leverage provided by geographic competition, as carriers with much broader size and scope have begun to serve more and more of the producing and consuming regions for various commodities.

(2) TFI and CFI further contend that, although the fundamental decision to require "enhanced competition" is correct, the proposed rules need to be made substantially more specific in order to provide shippers and carriers with a clear idea of what will be required in future merger applications. TFI and CFI indicate that, although they recognize that the Board is acting at the level of broad policy and therefore needs to provide for a certain amount of flexibility in its rules to cover situations that may arise, they also believe that the proposed rules are so vague as to provide neither shippers nor carriers with clear notice of what is required, and what will be expected, in the area of "enhanced competition." TFI and CFI further indicate that the vagueness of the rules is such that they are extremely concerned that applicant carriers in future mergers might give only lip service to key areas of "enhanced competition" because the vagueness of the proposed rules would permit them to do so.

(3) TFI and CFI contend, in particular, that there are 3 areas upon which we should focus in making the proposed rules more specific. (i) TFI and CFI contend that the proposed rules

[161] TFI (which is the national trade association of the fertilizer industry) and CFI (which represents the basic manufacturers of nitrogen, phosphate, potash, and sulphur fertilizers in Canada, as well as the major retail distributors) filed jointly.

should be revised to specify that the "enhanced competition" that will be required in future merger applications must include enhanced rail-to-rail (i.e., intramodal) competition in the area affected by the proposed merger. Enhanced intermodal competition, TFI and CFI warn, would do nothing to cure such anticompetitive effects as loss of segment competition and loss of geographic competition. (ii) TFI and CFI contend that the proposed rules should be revised to include examples of the enhanced rail-to-rail competition that applicant carriers will be expected to consider when submitting an application. TFI and CFI contend, in particular, that the proposed rules should specify that proposals for enhanced rail-to-rail competition may include: provisions for enhanced reciprocal switching in terminal areas or at interchanges; commitments to provide contract and common carrier rates to interchanges; elimination of existing and future barriers by shortlines to provide competitive rail service; establishment of terminal carriers serving all line-haul railroads serving an area; and similar proposals. (iii) TFI and CFI contend that the wording of NPR § 1180.1(a)'s fourth sentence (which provides, in part, that "the Board does not favor consolidations that reduce the railroad and other transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved") should be revised to clarify what appears to be an unintended ambiguity. TFI and CFI warn that this wording suggests that the Board *would* favor consolidations that reduce railroad and other transportation alternatives where there *are* substantial public benefits that cannot otherwise be achieved. TFI and CFI insist, however, that such an interpretation, although permitted by the proposed wording, would be flatly inconsistent both with sound public policy and with the Board's past practice. TFI and CFI therefore contend that the wording should be clarified, by changing the proposed rule so that it states that the Board "does not favor consolidations that reduce railroad and other transportation alternatives." Such revised wording, TFI and CFI argue, would be consistent with our call for "enhanced competition" and would make clear that reductions in competitive alternatives must be cured before a proposed transaction can be approved.

(4) TFI and CFI contend that approval of any future rail consolidations should include a condition requiring the merging carriers to provide mandatory expedited arbitration to resolve service disputes and disputes over application of the Board's conditions in specific cases. TFI and CFI explain: that the current mechanisms for resolving disputes between shippers and carriers are seriously in need of reform; that, after the service disruptions experienced in connection with the UP/SP and Conrail transactions, shippers had to resort to the courts to obtain redress; that, however, most shippers, and particularly small shippers, simply cannot afford to pursue a "lengthy and expensive" judicial remedy; and that, while American business has moved toward inexpensive private methods (such as mediation and arbitration) for quickly resolving commercial disputes, rail carriers have never generally consented to arbitration of disputes with shippers. TFI and CFI therefore argue that, to provide to shippers an accessible and usable process for resolving problems that might flow from a merger, we should include in our rules a requirement that applicant carriers must agree to mandatory, expedited arbitration, at the shipper's choice, of any disputes over rail service arising within a specified time (e.g., 2 years) of

the implementation of a major merger transaction, and any dispute (regardless of when that dispute arises) over the application of any merger condition in a specific case. TFI and CFI add, however, that general disputes over the meaning of merger conditions, or other broad policy disputes, would be resolved by the Board in the first instance.

(5) TFI and CFI contend that the scope of this rulemaking, which is focused purely on merger policy, is too narrow. TFI and CFI warn that, by focusing purely on conditions in rail mergers, our approach would create a serious disparity between the competitive conditions facing merging versus non-merging carriers, to the detriment of both merging carriers and the shipping public. It would be far better, TFI and CFI believe, if we revised our rules on rail-to-rail competition to provide for a level, procompetitive playing field for all major carriers providing rail transportation service throughout the United States. TFI and CFI contend, in particular, that the approval of any future consolidation should be accompanied by a change in the Board's rules on terminal access through reciprocal switching. TFI and CFI further contend: that significantly-increased rail-to-rail competition should include the right to reciprocal switching within a specified distance of a terminal; and that, to implement this change, we should reevaluate our extremely restrictive competitive access rules, and should provide for such increased reciprocal switching access.

(6) TFI and CFI note that NPR § 1180.1(c)(2)(i) would require merger applicants to explain how they would preserve existing competitive options such as the use of major existing gateways and the opportunity to enter contracts for one segment of a movement as a means of gaining the right to separately pursue rate relief for the remainder of a movement. TFI and CFI indicate that, although they applaud these changes, they believe that our rules should also make clear that carriers must explain how they would preserve the routing over such gateways not just physically (i.e., by permitting routing over the gateway) but also economically (i.e., by ensuring that the rate charged to the gateway permits competition over the remainder of the movement). TFI and CFI add that this could be done, for example, through the merging carriers' promise to preserve existing rate relationships, and agreeing in advance to expedited, mandatory arbitration of rate disputes to the gateway.

(7)(a) *SAPs: in general.* TFI and CFI applaud the requirement that carriers include a service assurance plan in their merger application. TFI and CFI contend, however, that they believe that these SAPs should provide for mandatory, expedited arbitration of any service disputes, at the shipper's election. (b) *SAPS: technical matter.* TFI and CFI further contend that we should clarify that any remedies in a SAP should be in addition to, and should not replace, any remedies that the shipper might have against the carrier as part, for example, of a shipper's contract with the carrier. TFI and CFI explain that they want to ensure that the inclusion of a carrier's SAP as a condition of the merger, combined with the agency's authority to exempt a merger from the force of other law, would not strip a shipper of existing rights.

(8) TFI and CFI indicate that they support the call for increased monitoring and oversight. TFI and CFI further indicate that they believe that the Board is correct in requiring carriers to provide baseline, "benchmark" data, so that shippers may have a clear idea of how a merger is actually progressing. TFI and CFI add, however, that they also believe that, as part of this requirement, applicant carriers should be required to provide information on transit times over major corridors for the year prior to the application, and then should be required to provide that information following the merger. TFI and CFI explain that, whereas transit time information is the most important and direct determinant of the health of a carrier's service, the proposed rules appear to rely too heavily on "indirect" indicia of service such as dwell time, system average train speed, etc.

(9) TFI and CFI indicate that, although they support the call for an examination of "downstream" effects, they also believe that prospective applicants should be given a clearer idea of the extent to which such "downstream" effects should be discussed and the extent to which possible combinations of carriers should be examined. And, TFI and CFI add, we should examine not only "downstream" effects but also so-called "upstream" effects (i.e., the effects of a proposed merger on conditions imposed in prior mergers).

National Grain and Feed Association. National Grain and Feed Association (NGFA)[162] contends: that future rail mergers must be scrutinized with extreme care to ensure that efficiencies and other benefits claimed are realistically obtainable and not otherwise available through alternative strategies; that, if mergers are to be approved, they must be conditioned in certain respects to ameliorate injury to customers and to retain the ability of shippers to move goods throughout the entire national rail system without unreasonable impediments; that a failure to issue meaningful, clearly articulated, and readily enforceable standards will invite further injury to rail customers by encouraging carriers to embark upon potentially disruptive transactions on the basis of unrealistic assessments of public benefits; and that only if carriers know with a high degree of certainty that they will be held accountable and required to make innocent rail users whole will they exercise appropriate care in structuring and implementing future merger transactions.

<u>Enhanced competition</u>. NGFA supports the "enhanced competition" concept, which it regards as a sound concept that is squarely within the prerogatives of the Board. NGFA contends, however, that we should clarify the parameters of "enhanced competition," and should indicate, for example, that a consolidation proposal will not be deemed to satisfy that criterion solely by resulting in a larger railroad better positioned to compete with trucks. Enhanced competition, NGFA explains, should mean enhanced competition between railroads, and not

[162] NGFA, a trade association, represents 1,000+ grain, feed, processing, and grain-related companies.

merely enhanced competition between railroads, on the one hand, and trucks or water commerce, on the other hand; and, NGFA adds, enhanced competition should be understood to mean the ability to provide better service to the railroad's customers without detracting unreasonably from the rate and service options presently available to them. NGFA further contends that the NPR contains too much uncertainty as respects competitive issues. NGFA explains: that it is unclear whether "enhanced competition" and other 49 U.S.C. 11324 considerations are to be measured under past merger standards or under new standards of benefit and harm that the Board may develop; that it is not sufficiently clear how the gateway, bottleneck, and build-out elements will function, or why that determination was left to the applicant railroads; that, because there is a genuine dispute between railroads and shippers regarding the effectuation of gateway, bottleneck, and build-out relief, it is far from "competitive enhancement" to place the resolution of these issues in the railroads' hands initially; and that, without greater clarity, these elements of the NPR will fail to provide an effective benchmark for negotiations between shippers and railroads and for use if and when shippers seek protection in merger proceedings. A better approach, NGFA argues, would be a more firm series of explanatory guidelines. NGFA also contends that we should address the substantive issues (such as whether a 3-to-2 reduction in rail service should be regarded as anticompetitive) with respect to which the ANPR solicited comments.[163]

Gateways. NGFA insists that merger applicants must be required to keep major existing gateways open if future mergers are to avoid a repetition of the market foreclosures brought about when carriers refuse to provide competitive rates from or to off-line destinations. With respect to the NPR § 1180.1(c)(2)(i) requirement that applicants explain how they would preserve competitive options such as those involving the use of major existing gateways, NGFA contends: that, if we indeed intend to require enhanced competition as an element of any future merger, then genuinely open gateways must be a part of that package; that the test of a "major" gateway should be whether it materially affects access to other rail service; that, because a gateway cannot be kept "open" if the merged carrier can block use of the gateway through rate action or inaction clearly designed to deter the movement of traffic over the gateway, gateways must be kept open economically as well as physically; and that the merged carrier should not be permitted to raise its rates over the "open" gateway to any greater extent than the carrier has raised its actual systemwide rates for the same commodities moving in the same quantities to or from the same markets. And, NGFA adds, if we intend to permit "open" gateways to be closed through rate actions intended solely to deter the use of the gateway, we should clearly say so in order that parties not needlessly waste their resources in a quest for merger conditions that we have no intention of imposing.

---

[163] NGFA believes that a 3-to-2 reduction in rail service should be regarded as anticompetitive and should be remediated.

Bottlenecks. With respect to the NPR § 1180.1(c)(2)(i) requirement that applicants explain how they would preserve competitive options such as those involving the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement, NGFA contends that in any situation where a merger eliminates an opportunity that would have existed (geographically) for bottleneck relief under the Board's contract approach, it would be better to require that a rate be quoted to or from an interchange point. A quoted rate, NGFA explains, could then be challenged, if need be, under statutory provisions. It is difficult to see, NGFA argues, how a shipper can challenge the offer of a contract rate.

Reciprocal switching. NGFA disagrees with the argument that changes in our approach to reciprocal switching should be directed by Congress. NGFA insists, rather, that the Board, either under its broad merger-conditioning authority or as a matter of interpreting 49 U.S.C. 11102, can facilitate reciprocal switching; and, NGFA argues, the Board should do so to enhance competition in merger settings. NGFA adds, however, that, if we believe that changes in our approach to reciprocal switching must be directed by Congress, we should identify specifically those changes to the statute that we regard as necessary in order to bring about enhanced competition through reciprocal switching, at least in merger proceedings.

Downstream effects. NGFA contends that, although we should examine the limited possibilities for other Class I mergers as matters related to a pending merger, it is not entirely clear how the examination contemplated by NPR § 1180.1(i) will be implemented. NGFA explains that, although the consideration of downstream effects makes the most sense if it is assumed that a second merger will follow on the heels of the first and that both will be before the Board in a relatively concurrent posture, that scenario may not occur. NGFA therefore argues that we should compensate for any deficiencies resulting from a time lag between an initial merger application and a downstream merger application by stating that we will utilize our 49 U.S.C. 11324 conditioning authority to reserve jurisdiction to impose further conditions in the event that "downstream" transactions sufficiently alter the competitive situation so as to warrant such steps. NGFA adds that, in the next major Class I merger proceeding, it may be appropriate to focus on whether a North American railroad duopoly is in the public interest without requiring the applicants to specifically identify the participants or components of such a duopoly.

Service disruptions. NGFA contends: that, although a Board monitoring system and a Service Council are positive proposals, they do not supplant the need for a more disciplined approach to post-merger service failures; that mere STB monitoring of service failures, or requiring periodic report filing with the Board, will do little or nothing to deter service failures or to make shippers whole for post-merger damages; and that, although it may be difficult to prescribe exact rules that contemplate and compensate adequately and fairly for each discreet form of merger-related damage that may be suffered by shippers as a result of post-merger service failures, we should take steps that provide a persuasive incentive for carriers to avoid repetitions of the service problems that followed the BN/SF, UP/SP, and Conrail transactions. And, NGFA adds, if the merged carriers are to be allowed to recover their service failure costs through rates, they should not also be able to recover them by denying compensation to their customers; shippers, NGFA insists, should not have to pay twice for the same service failure costs. NGFA has therefore made 3 proposals. (a) NGFA proposes that railroads should be compelled to respond to service failure damage claims within 120 days of receipt of the claim (or some other time period that the Board may prefer). (b) NGFA proposes that railroads: should not be allowed to arbitrarily reject claims; should therefore be required to set forth substantive reasons for refusing claims; and should also be required to apply a "market compensation" or similar liability standard in evaluating the payment of damages for service failures. (c) NGFA proposes that applicants should be required to subject themselves to arbitration for the resolution of service failure claims that are not settled voluntarily. And, NGFA adds, we should provide that parties have the right to agree on an arbitration forum or to use arbitration under STB procedures as a fall-back system.[164]

Transnational issues. NGFA contends that NPR § 1180.1(k)'s transnational standards should be expanded to require applicants to a transnational transaction to address cross-border car distribution, marketing, and route rationalization issues. NGFA explains that it does not suffice to require applicants to present evidence only as to the United States rail network. Rather, NGFA insists, a transnational transaction that permits a foreign entity to control a railroad operating in the U.S. should be examined to determine whether the transaction will prejudice the interests of U.S. shippers.

Privately negotiated contracts. NGFA, which notes that NPR § 1180.1(e) provides that the Board will respect the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of such agreements, contends that we should include in our regulations a similar provision regarding privately negotiated contracts between railroads and their customers.

---

[164] NGFA insists that it is not requesting the Board to include in the final rules any determination of carrier liability for particular forms of damages. NGFA contends, rather, that it is urging that the Board establish a framework that will help guide the parties through any private-sector negotiations they wish to undertake, or, alternatively, that will serve as a benchmark for remedial requests if private negotiations fail and these issues are pursued in a merger adjudication. NGFA further contends that the framework it contemplates should include a statement that carriers will be expected to be fully responsible for service failures and should encourage the use of arbitration to resolve disputes. And, NGFA adds, the Board should make it absolutely clear that it does not intend, by addressing these issues, to preempt access to remedies that would exist in the absence of merger rules.

Procedural schedule. NGFA opposes the adoption of a procedural schedule shorter than allowed by 49 U.S.C. 11325 and generally utilized by the Board. NGFA argues that, because any future Class I mergers are likely to start the "final round" of North American rail mergers, the Board owes it to the public to undertake a thorough examination of the facts alleged to justify further consolidations and the consequences of such steps. And, NGFA insists, a meaningful examination of the complexities of a Class I consolidation transaction, including an adequate opportunity for discovery, cannot be accomplished with the "truncated schedule" proposed by BNSF.

The "Wheat, Barley & Grains Commissions" Group. WB&GC[165] contends that the proposed rules do not adequately meet the needs of the rail customer community at large. The rules that we have proposed, WB&GC contends, do nothing to reverse the continuing effects of market abuse by the railroads. The Board, WB&GC insists, has not caught the proper balance between the railroads and the public interest.

Background. (1) WB&GC contends that the history of the past several rail mergers is instructive. These mergers, WB&GC argues, have not significantly improved service, have not increased or even maintained existing levels of competition, have not resulted in lower rates,[166] and have not produced increased efficiency. Rather, WB&GC insists, the past several rail mergers have resulted in service disruptions, closed gateways, and increased transportation costs for rail customers. The past several rail mergers, WB&GC maintains, have generated limited economic benefits but significant economic harms. WB&GC adds: that the costs associated with service disruptions go far beyond the loss of revenue to the rail customer; that loss of business to the rail customer equates to loss of employee wages, lost sales and market share, increased trucking, and attendant local air pollution; and that these increased costs and losses ripple throughout the local economies.

(2) WB&GC contends that the overly consolidated rail industry that exists today is fraught with service problems, customer suffering, and rate gouging. There is today, WB&GC argues, a lack of competition among the nation's railroads; whole states, regions, and industries, WB&GC claims, are captive to a single railroad; and there is, WB&GC maintains, continuing

---

[165] Montana Wheat & Barley Committee, Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Wheat Commission, Oregon Grains Commission, Nebraska Wheat Board, South Dakota Wheat Commission, and Washington Barley Commission are referred to collectively as the "Wheat, Barley & Grains Commissions" group or WB&GC.

[166] WB&GC insists that, despite aggregated revenue per ton mile data that (WB&GC claims) has been erroneously used to suggest that past mergers have resulted in lower rates, the fact of the matter is that past mergers have not resulted in lower rates.

evidence of market power abuse and continuing abysmally poor levels of customer service. And, WB&GC adds, the concentration that exists in the rail industry today has allowed the Class I railroads to discourage economic development and to stifle value-added industrial base drives by agricultural-based states such as Idaho, Colorado, Montana, North Dakota, South Dakota, and Nebraska.

<u>Deficiencies in the NPR</u>. (1) WB&GC contends that, although the NPR sets out a "cookbook" on how to write future merger applications, the regulations that make up the cookbook will not serve to raise the level of competition in future mergers. The proposed rules, WB&GC argues, let the merging railroads decide what they want to merge, let the merging railroads decide what the impacts will be, let the merging railroads identify those that will be hurt by the merger, let the merging railroads decide the level and degree of mitigation, and let the merging railroads develop alternate plans about how they will develop competition for themselves. WB&GC insists that rail customers are not adequately protected by the proposed rules, which WB&GC regards as a recipe for maximum discretion and not for maximum direction.

(2) What is missing from the NPR, WB&GC contends, is an effort by the Board to increase rail-to-rail competition throughout the rail industry. WB&GC argues that, although the Board has announced that "enhanced competition" is its objective, the reality of the matter is that the proposed merger guidelines neither enhance nor even maintain competition. WB&GC contends that, although the NPR asserts that competition will be maintained in future mergers, the NPR does not provide any standards, benchmarks, or remedies that will allow judgments and restitution procedures to rail customers in the event the railroads fail to live up to their promises. WB&GC contends, by way of example, that existing gateways will not be kept open, and therefore existing competition will not be maintained, unless: we require that gateways be kept open economically as well as physically; we impose service standards applicable to such gateways; and we establish penalties that will come into play if the gateways are not kept open.

(3) WB&GC contends that, although the Board is obligated to protect those adversely affected by rail mergers, the Board seems too content after the horse is out of the barn to allow the railroads to propose new standards for keeping the door closed in the future. WB&GC argues that regulatory monitoring cannot mitigate or prevent economic damage to rail customers; once the damage has been done, WB&GC insists, no amount of monitoring is going to undo the damage. WB&GC also argues that allowing the railroads to propose remedies to mitigate and offset competitive harms is not enough; the Board itself, WB&GC insists, should develop such remedies. WB&GC further argues that we should establish penalties or economic disincentives to mitigate the damages incurred by the public; it simply does not suffice, WB&GC insists, to require applicants to provide a detailed service plan addressing transitional service problems.

(4) WB&GC contends that the NPR's summary of participants' ANPR comments is not sufficient. The law, WB&GC insists, requires the Board to respond to the comments submitted by each party.

Recommended approach. (1) WB&GC contends that the Board should respond to what the participants in this rulemaking proceeding have asked for. WB&GC contends, in particular, that the Board should look at the problems of rail consolidations and the market dominance created by past merger policy procedures, and that the Board should adopt rules calculated to lead to a competitive rail transportation system that provides fairly priced, safe, and reliable service. WB&GC insists that, to enhance rail-to-rail competition in the final 2-railroad monopoly system, it will be necessary to open up competitive access for rail customers. (2) WB&GC contends that, rather than allowing merger applicants to develop standards, the Board should itself adopt standards. The complete lack of rail-to-rail competition in this nation and the absence of competing railroads in this country, WB&GC argues, requires maximum direction by the Board. And, WB&GC insists, the standards adopted by the Board should be specific, easily definable, enforceable, and verifiable by all. (3) WB&GC contends that, if rail customers are to be served as promised by the railroads, the Board must establish economic incentives for performance by the railroads and economic penalties for non-performance by the railroads. The Board, WB&GC insists, must require the carriers promising merger benefits to deliver on the benefits or face economic sanctions that will mitigate the losses incurred by rail customers. Rail customers, WB&GC argues, should not have to pay for rail mergers. And, WB&GC adds, the merging carriers that stand to make greater profits due to the merger should be required to mitigate those rail customers that are placed at an economic disadvantage due to the merger.

Specific recommended proposals. (1) WB&GC contends that the Board should adopt merger policies that do not allow any further lessening of rail-to-rail competition. The key merger criterion for measuring adverse effects, WB&GC insists, should be the effect of future rail mergers on the rail customers that pay the freight bills. And, WB&GC adds, rather than merely monitoring post-merger performance, the Board should take more aggressive actions to preserve and promote competitive options and to correct loss of merger benefits.

(2) WB&GC contends that the Board should adopt a policy that provides that, as a matter of national rail policy, all rail customers in future rail mergers should have the right to rail-to-rail competition. WB&GC further contends that, for those rail customers that do not have rail-to-rail competition, the Board should adopt a responsible regulatory relief system. WB&GC argues that, although preserving and fostering rail competition should be preferred to regulatory oversight, reasonable regulatory oversight must be economically available to captive customers in areas where rail competition is not possible.

(3) WB&GC contends that the Board should develop workable rules that provide realistic, reasonable, and fair protection methods for small captive rail customers that today have no competitive rail choice.

(4) WB&GC contends that, to protect the nation's railroad customers and U.S. industry, the Board should adopt a procompetitive stance in every action and decision. WB&GC further contends that, if the Board does not feel it has the authority to act in a procompetitive stance, it should immediately seek such authority.

(5) WB&GC contends that the rules promulgated by the Board should provide maximum direction and minimum discretion to merger applicants.

(6) WB&GC contends that rail mergers should be reopened in the event rail competition is curtailed or lost. WB&GC further contends that clearly defined post-merger conditioning is particularly appropriate in light of recent history that (WB&GC claims) has shown that the nation's railroads have made many promises in past mergers that have never materialized.

(7) WB&GC contends that all future rail mergers should be conditioned to enhance, and not just to maintain, competition. WB&GC further contends that options such as competitive access, bottleneck pricing, terminal access, reciprocal switching, joint running rights, elimination of paper and steel barriers, and arbitration to maintain competition must be available to mitigate anticompetitive effects of mergers.

(8) WB&GC contends that railroads should be held accountable financially for service failures emanating from a merger and that customers should be compensated for economic losses suffered as a result of service diminishments.

(9) WB&GC contends that the Board should support legislative proposals to increase competition in the railroad industry without increasing regulation.

(10) As respects transnational issues, WB&GC contends that, because final offer arbitration (FOA) is available to Canadian rail customers, it should also be made available to American rail customers. WB&GC argues that, if FOA is not made available to American rail customers, the Board will be required to look at the negative effects upon American rail customers where, on a Canadian rate to a U.S. destination, a Canadian rail customer can get an FOA ruling but an American rail customer cannot get such a ruling even though both are competing for the same rail traffic movement.

Ag Processing Inc. Ag Processing Inc. (AGP), a regional cooperative owned by 285 local cooperatives and over 300,000 farmers and ranchers, agrees that "enhanced competition" is a highly necessary goal but views the NPR as wanting because (AGP claims) the

NPR does not sufficiently elaborate the measures that would satisfy the "enhanced competition" criterion. AGP contends that the NPR devotes scant verbiage to explanations of the choices made by the Board between the various specific proposals offered at the ANPR stage and the Board's own choice of proposed rules. AGP further contends that, although the NPR contains several repetitions of the Board's stated preference for private-sector solutions, the NPR contains little in the way of logical explanations for choices made between competing ANPR proposals.

(1) AGP contends that one of the NPR's greatest weaknesses is its failure to recognize and remedy adequately the loss of market access that has followed all recent mergers and that is likely to follow any future mergers. It is literally axiomatic, AGP argues, that merging carriers, by limiting rate options, by failing to quote rates over gateways, and by other devices, foreclose market access to producers of goods and restrict production origination choices for buyers of goods. Rail mergers, AGP insists, have restricted producers to destination markets served by their originating carrier and have restricted buyers to origins served by their destination carrier. Mergers, AGP explains, have eliminated options for both sellers and buyers because the railroad now controls the marketing; and, AGP adds, the NPR offers no clear hope that such market curtailments will be cured through the new requirement of "enhanced competition."

(2) AGP contends that, although NPR § 1180.1(c)(2)(i) requires applicants to explain how they would preserve competitive options such as those involving the use of major existing gateways, the NPR lacks any explanation of how merging carriers would be expected or required to keep major gateways open. Many ANPR commenters, AGP argues, urged the Board to make clear that a gateway would not be considered "open" unless it was "open" economically as well as physically; and some ANPR commenters, AGP further argues, suggested that, because the widespread elevation of rates on a merged system for gateway traffic would have the effect of embargoing the movement of that traffic onto or from a merged system, the Board should impose a requirement against rate increases over existing gateways that are higher than system increases for similar traffic. AGP notes, however, that the Board adopted no such requirement, choosing instead to leave it to the merger applicants to explain how they would keep gateways open. AGP contends: that if the Board does nothing more than require the maintenance of an interchange switch to meet the "open gateway" requirement, and then allows the gateway to be closed through rate adjustments, the "open gateway" requirement will be a sham; and that, therefore, the Board should, at a minimum, make clear that a gateway will not be considered "open" if its use is foreclosed by rate actions. AGP adds that whether, in any given instance, the disuse of a gateway is attributable to a rate action, and not to other market conditions, would be a question of fact.

(3) AGP contends that an interpretation of the "open gateway" condition that would simply require that an interchange be kept in place and that would relegate dissatisfaction with post-merger rate adjustments that deter gateway movement to regulatory proceedings attacking maximum rate reasonableness would defeat the purpose of the open gateway requirement. AGP

further contends: that a gateway should be "open" to all traffic, and not just to traffic that moves at rates that are subject to the Board's maximum rate jurisdiction; that it is just as important to "enhance competition" with respect to traffic moving at, say, 170% of variable costs as it is for traffic moving at 200% of variable costs; and that, if traffic is moving over an existing pre-merger gateway at 170% of variable costs, there is no reason why it should not be able to continue to move over that gateway if the objective of an open gateway provision is to enhance competition.

(4) AGP contends that, although it may not be necessary to mandate the retention of all pre-merger gateways, a strict burden should be placed on the applicant carriers to demonstrate which pre-merger gateways can be closed without visiting harm upon traffic that has moved over those gateways. AGP further contends that, although it is one matter to say that a merged carrier should be permitted to reduce rates where they reflect newfound post-merger operating economies, it is another matter altogether to sanction rate increases aimed solely at foreclosing the movement of interline traffic or rate adjustments designed to favor system-traffic. The Board, AGP insists, should use common sense in fashioning appropriate gateway relief that is realistic and effective, but above all should make clear that actions of a market foreclosing nature will not be countenanced.

(5) AGP contends that bottleneck rate relief is not the proper solution to post-merger market foreclosures. AGP explains that this "solution" would turn every post-merger market foreclosure into a hugely expensive, complicated, and time-consuming rate case. AGP further explains: that the Board's procedures for resolving rate disputes are clearly defined only where the dispute involves high-density, repetitive movements susceptible to treatment under stand-alone cost methodology; that, in all other cases, the available procedures are so uncertain and daunting that they have not been invoked once since they were established 3 years ago; and that, in the more than 20 years since enactment of the Staggers Act, there has been no rate case in which a shipper has prevailed other than where stand-alone costs have been utilized.

(6) AGP contends that the Board should state unequivocally that, in any merger subject to the proposed rules, it will reserve the right to use its 49 U.S.C. 11324 conditioning authority in the event that a "downstream" merger changes competitive relationships. AGP explains that, if the initial applicants are placed on notice that the Board reserves the right to impose further conditions to enhance competition in the light of any subsequent merger transactions that may be proposed and approved, then the initial applicants would have the right to determine whether or not to consummate a merger so conditioned, or to delay its consummation in order to find out what conditions might ultimately be attached as a result of a later transaction that had not procedurally "caught up" with the first transaction. AGP further explains that, in the absence of consensual retroactivity of this nature, the Board would have only two options: it would either have to deny the initial merger because of uncertainty regarding the consequences of the next merger to come before it; or it would have to grant the first merger regardless of the downstream

consequences of that merger. AGP insists, however, that, if the Board takes the latter approach, then its examination of downstream consequences would appear to be an exercise in futility.

Bunge Corporation. Bunge Corporation (Bunge) contends that Class I rail mergers severely foreclose the ability of many shippers to reach their traditional and necessary markets. This market foreclosure situation develops, Bunge explains: when the pre-merger carrier serving a production point does not directly reach a large number of consumption points for the product, and therefore maintains routes over connecting gateways; and when, after a merger, the new system terminates access to those gateways because the merged carrier prefers to hold traffic to its own line. The BN/SF merger, Bunge further explains, completely terminated the ability of Bunge's Emporia plant to market its products to any points other than those on the BNSF system, and thereby wiped out Bunge's market for 25% of the output of a valuable manufacturing facility. Bunge adds that, as a result of trackage rights arrangements between BNSF and other railroads, the BN/SF merger resulted in an expansion of the markets available to Bunge's competitors while Bunge's own markets were being curtailed. Bunge claims that, so far as it can determine from the NPR, Bunge's proposals to address its market foreclosure concerns were ignored in the NPR, without (Bunge insists) any explanation by the Board.

(1) Bunge contends that, in past mergers, the Board has accepted such results on the theory that it is not the Board's function to protect individual competitors, but just to preserve competition. The Board's position, Bunge argues, seems to be that purchasers of products, such as those that Bunge was foreclosed from shipping from Emporia to former SP destinations, would continue to have alternative sources of supply located on the UP/SP system. Bunge insists, however, that this is an extremely narrow and unrealistic concept of competition, because it overlooks the fact that the merger not only has deprived the owner of a major production facility of the full use of that asset, but has also decreased the number of competitive sellers available to buyers of the product.

(2) Bunge further contends that loss of markets, such as that experienced by Bunge at Emporia, also has been countenanced by the Board as advancing the efficiencies of single-line service resulting from mergers. Bunge insists, however, that while single-line service may make a railroad more efficient and more profitable, it does not play out in the form of reduced rates offered to shippers; rather, Bunge argues, it just makes the railroad more profitable.

(3) Bunge maintains that, while the misfortune of one producer may be the good fortune of another, it likewise becomes the misfortune of the marketplace, which (Bunge insists) has now been segmented into two orbits (the BNSF system and the UP system) with little or no interchange between them. Bunge insists that it is difficult if not impossible to see how either competition between railroads or competition to supply a product is enhanced when merging carriers can curtail market access.

(4) Bunge contends that, despite all the talk of "enhanced competition," Bunge is unable to find anything in the NPR that even preserves the competitive marketplace available to a pre-merger production facility, to say nothing about specific rules to actually enhance competition. Bunge argues that, although requiring a truly open gateway system would be a significant step in the direction of preserving markets for shippers, NPR § 1180.1(c) is deficient because it contains no minimum standards for preservation of an open gateway. Rather, Bunge insists, the proposed rule merely invites the applicant carriers to set that standard, which (Bunge argues) is like letting a rabbit take lettuce to market.

(5) Bunge contends that, if a requirement that merging carriers continue to use existing gateways means simply that the switches will be left in place, then the "gateway" condition will fail to either enhance or preserve competition. An open gateway condition, Bunge explains, must be accompanied by minimum economic standards to ensure a useable gateway. Bunge further contends that merely stating that "enhanced competition" is the goal of the new rules will not suffice to ensure such competition. Applicant carriers, Bunge explains, almost surely will suggest, as they have in every recent merger, that competition will be enhanced by a merger that produces a stronger surviving carrier.

(6) Bunge contends that we should adopt an approach that would require merging carriers to retain effective competition over existing gateways. Bunge contends, in particular, that we should adopt an "open gateway" provision that would read as follows: "Applicants shall keep open all gateways between their system and any other railroad. This requirement shall include not merely the retention of facilities for physical interchange of traffic, but shall also mean that: (A) There shall be a rebuttable presumption against rate increases by the applicants for the movement of any traffic over an open gateway if that increase is higher, actually or on a percentage basis, than any rate increase applied by the applicants to like traffic moving between points on the merged system. The presumption against such increases may be overcome by a showing that rate increases on gateway traffic higher than on intra-system traffic are necessary to enhance intramodal or intermodal competition. (B) The applicants may not reduce rates between points on their own system without making similar reductions available, on a percentage basis, from gateways unless the applicants can establish that their system reductions are necessary to retain traffic threatened with diversion or to attract new traffic."

IMC Global. IMC Global Inc. (IMC Global), which indicates that it endorses the comments submitted by ARC, applauds the proposed change in emphasis from promoting mergers to enhancing competition,[167] but questions whether the proposed changes adequately

---

[167] IMC Global insists that the Board's 49 U.S.C. 11324 conditioning authority is not limited to the correction of competitive harms created by the merger. The Board, IMC Global (continued...)

place the focus on enhancement of the rail-to-rail competition that is lost in rail mergers. IMC Global contends: that the proposals fail to address major areas of concern raised by numerous shippers and shortlines; that the proposed rules are exceedingly vague and lacking in accountability; and that, in several key areas, the Board, instead of itself proposing merger remedies, has proposed to leave it to the applicant rail carriers to propose remedies for merger-related failures and harmful effects. Merger applicants, IMC Global insists, will not come forward with the aggressive remedies that would be required in the public interest.

Acquisition premiums. Recent rail mergers, IMC Global contends, have been characterized by bidding wars, in which 2 rail carriers vying to acquire a third have pushed acquisition prices far above what otherwise would be fair value for the acquired carrier; and, IMC Global adds, the merger applicant or applicants that have paid those acquisition premiums have invariably sought to recover them by raising rail rates for captive shippers (as, IMC Global claims, CSX and NS are now doing with respect to the acquisition premium that IMC Global insists they paid in connection with the Conrail transaction). IMC Global argues that, because it is anticompetitive for captive shippers to be gouged with huge rate increases so that a rail carrier having overpaid to acquire another can recover the acquisition premium that it paid, we should adopt a regulation that would prevent acquiring rail carriers from recovering acquisition premiums by raising captive shipper rates.

Competitive harms caused by recent rail mergers. IMC Global contends that, in addition to looking at the "downstream" effects of rail mergers, the Board should also look at their "upstream" effects and should consider the entire competitive picture. IMC Global further contends that the Board should take into account numerous anticompetitive situations in the rail industry that exist in large part as a result of Board or ICC action in rail merger cases or other proceedings. IMC Global argues, in particular: that numerous competitive gateways already have been officially or commercially closed as a result of concerted rail carrier action that was expressly sanctioned by the ICC; that shippers have been frustrated by the Board's restrictive position on rail carrier competitive access, as typified by the Midtec decision; that shippers have viewed the Board's decision that rail carriers are not required to establish bottleneck rates as inimical to enhancement of rail competition; and that the Board's lack of commitment to enhancing rail competition in merger cases was demonstrated in the UP/SP case when it refused Montana Rail Link's request for divestiture of one of the merged company's parallel Central

---

[167](...continued)
argues, has authority under 49 U.S.C. 11324 to impose a condition to authorization of a merger that would enhance rail competition (rather than merely preserve rail competition that would be directly affected by the merger) as long as (1) imposition of the condition is appropriate to the public interest determination being made by the Board, and (2) the condition is not arbitrarily imposed.

Corridor transcontinental routes. IMC Global insists that, if the Board has now truly "seen the light" on the need to enhance rail competition in merger cases, it should make aggressive use of its 49 U.S.C. 11324 divestiture and competitive access powers to enhance existing rail competition as well as competition that would be affected by the proposed merger.

Sanctions for failure to achieve promised service improvements. IMC Global contends: that the regulations must recognize that rail service is required to improve as a result of a merger, not worsen or stay the same; that it is essential to protect against the harmful service disruptions that occurred following the UP/CNW, UP/SP and Conrail transactions; that, although applicants routinely claim that mergers will result in significant service improvements, there is a distinct need for performance measures by which pre-merger and post-merger service can be compared; that, therefore, applicants should be required to show the manner and extent to which rail service will be improved as a result of a proposed merger; and that, most importantly, there should be meaningful and enforceable penalties if the promised service improvements do not materialize. IMC Global further contends that NPR § 1180.6(b)(11), which allows applicants themselves to suggest the "additional measures" that might be taken if anticipated public benefits fail to materialize in a timely manner, is insufficient and inappropriate.

Meaningful protection for shortlines. IMC Global contends that, although effective rail competition for much shipper traffic is provided by shortlines rather than by 2 or more Class I carriers, the proposed regulations do not provide for meaningful protection for shortlines. IMC Global further contends that ASLRRA's "Bill of Rights" should be incorporated into the proposed rules; adoption of those "rights," IMC Global explains, would go a long way toward the goal of enhancing rail competition. Rail competition, IMC Global claims, would be enhanced: if shortlines were entitled to compensation for merger-related failures; if shortlines were freed of routing constraints; if shortlines were entitled to competitive and nondiscriminatory pricing; and if shortlines were to enjoy unrestricted interchange rights.

Corresponding amendment of competitive access rules. IMC Global contends that, if more liberal competitive access is to be provided as a condition to rail mergers in order to enhance rail competition, more liberal competitive access should also be provided in the nonmerger setting. Otherwise, IMC Global explains, shippers served by a carrier that has received competitive access as a condition to a rail merger would have an unfair competitive advantage over shippers served by a carrier that has not received competitive access. IMC Global insists that, in order to prevent such unfair treatment and to enhance rail competition generally, the Board should liberalize its 49 CFR 1144.5 competitive access regulations, which (IMC Global argues) are not now in keeping with the emphasis on competitive enhancement in the proposed rail merger regulations.