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SERVICE DATE – FEBRUARY 15, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34839

NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY  
COMPANY–CONTROL AND CONSOLIDATION EXEMPTION–ALGERS, WINSLOW  
AND WESTERN RAILWAY COMPANY

Decided: February 13, 2007

By petition filed on February 14, 2006, Norfolk Southern Railway Company (NSR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323, et seq., to acquire control of Algiers, Winslow and Western Railway Company (AWW) and to consolidate AWW into NSR following the acquisition. Indiana Southern Railroad, Inc. (ISRR), Indianapolis Power and Light Co. (IPL), PSI Energy, Inc. (PSI) (collectively, respondents), and Solar Sources Underground, LLP (Solar) filed replies opposing the petition and requesting the imposition of conditions.

On April 3, 2006, the Board issued a decision granting NSR leave to amend its petition for exemption to add Norfolk Southern Corporation (NSC), NSR's parent corporation, to the petition and to file a reply on or before April 11, 2006, to the filings made by ISRR, IPL, PSI and Solar. On April 11, 2006, NSR and NSC (collectively, NS) filed their reply.<sup>1</sup> On April 24, 2006, the Board issued a decision permitting the parties to reply to the arguments and evidence presented in NS's April 11 filing, on or before May 1, 2006. ISRR, IPL, PSI and Solar filed replies on May 1, 2006. By letter filed on August 3, 2006, Solar notified the Board that it had reached an agreement with NS and withdrew its opposition to NS's petition.

By decision served on May 15, 2006, a proceeding was instituted to consider NS's petition and the subsequent pleadings filed by the parties.<sup>2</sup> In this decision, we grant the exemption, subject to standard employee protective conditions and the condition that NS adhere to its pledge to preserve the Oakland City, IN interchange and to honor existing contracts involving AWW.

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<sup>1</sup> NS filed both a confidential version pursuant to a protective order issued by the Board on April 10, 2006, and a public version.

<sup>2</sup> ISRR's request for oral argument and ISRR's request that the Board establish a procedural schedule were denied in that decision.

## BACKGROUND

NSR is a Class I railroad that operates a rail system extending 21,300 miles in the United State and Canada.<sup>3</sup> NS owns 50% of AWW, a Class III railroad that operates an approximately 19-mile rail line in southern Indiana. NS seeks to acquire the remaining 50% of AWW from American Metals and Coal International, Inc. (AMCI). By acquiring the 50% interest in a cash-for-stock transaction, NS would become the sole owner of AWW, and would then consolidate AWW into NS.

In March 1974, the Board's predecessor, the Interstate Commerce Commission (ICC), granted authority to Southern Railway Co. (Southern), which later became part of NS, to acquire 50% of AWW's outstanding stock.<sup>4</sup> According to NS, at the time of the ICC decision, Southern was also negotiating with another party to acquire the remaining 50% of AWW and asked the ICC not to limit its approval to the acquisition of the purchased 50%. The ICC declined the request and decided that additional authorization would be necessary.<sup>5</sup> Southern was unable to acquire the remaining 50% of AWW at that time.

Since NS's predecessor acquired the 50% interest in 1974, the remaining 50% of AWW has been owned by various coal interests. Recently, Horizon Natural Resources' family of companies (Horizon) owned the 50% interest along with the two coal mines and loading facilities located on AWW's line. One of the mines (formerly known as Kindill # 1 and now known as Pike #1) has been closed for years, and the other one (formerly known as Kindill #2 and now known as Pike #2) was closed in October 2004 after Horizon went bankrupt. Thus, AWW has moved little traffic and no coal since October 2004.<sup>6</sup>

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<sup>3</sup> NSR operates in the District of Columbia, the Province of Ontario, Canada and in the following states: Alabama, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia and West Virginia.

<sup>4</sup> See Southern Railway Co.–Control–Algers, Winslow and Western Railway Co., Finance Docket No. 27542 (ICC served Mar. 11, 1974).

<sup>5</sup> In its petition, NS states that the current transaction may qualify as an exempt transaction pursuant to 49 CFR 1180.2(d)(3) (corporate family transactions) because NS already owns 50% of AWW. NS states that it filed a petition for exemption instead of a notice of exemption in this proceeding because the ICC's 1974 decision left some uncertainty over what type of approval would be needed subsequently to acquire an additional interest in AWW.

<sup>6</sup> Railroad workers have been laid off but are called on an "as needed" basis to switch cars into and out of a plant that makes industrial ties located on the AWW line.

In October 2004, Lexington Coal Company (Lexington) acquired both mines and the 50% interest in AWW from Horizon during Horizon's bankruptcy proceeding. In September 2005, Indiana Land and Mineral Company, LLC (IL&M), a joint venture of AMCI and T&T Washington Company, purchased the two coal mines and loading facilities as well as the 50% interest in AWW from Lexington. On January 23, 2006, IL&M transferred the 50% interest in AWW to AMCI. IL&M recently sold one of the coal mines along the AWW (Pike #2) to Solar, and has arranged for the sale of the other mine (Pike #1) to James River Resources (James River). Solar and James River intend to reopen the mines and loading facilities.

### POSITIONS OF THE PARTIES

In its petition for exemption, NS indicates that it will wholly own AWW after this transaction and that mining interests will own the mines and loading facilities. According to NS, public benefits will flow from these transactions because NS will be able to focus on its core competency – providing rail service – and the mining interests will no longer have to divert attention from their principal business in order to operate a railroad. Furthermore, NS, with its rail operating expertise, will be available to provide transportation services directly to the mines and loading facilities on AWW's line when they reopen. NS asserts that this will help create jobs and provide another source of coal to meet the nation's energy demands. NS will also be able to use the 3-mile segment of AWW's line that parallels its main line to generate additional capacity for other NS traffic. Additionally, NS states that it will benefit from administrative efficiencies by consolidating AWW into NS after the acquisition.

NS states that it participates in all of the rail activity that currently occurs on the AWW line and that it has had substantial involvement in AWW's business operations since 1974. Presently, AWW handles sporadic shipments from the industrial tie plant on the line, but interchanges traffic with NS. NS also stores multi-level rail cars on the AWW line for Toyota. Additionally, NS indicates that it uses AWW track to interchange some coal and carload traffic with ISRR that does not originate on the AWW line. Historically, AWW has interchanged traffic at Oakland City, IN, with NS and ISRR, and with CSX Transportation, Inc. (CSXT) via CSXT's trackage rights over ISRR.<sup>7</sup> As a result of this transaction, NS asserts that some rail customers will gain single-line service from NS when the mines and loading facilities reopen. Others will continue to have joint-line service, with NS stepping into the shoes of AWW, via the interchange with CSXT and ISRR at Oakland City. NS states that it will preserve this interchange and will also honor any existing contracts.

Respondents oppose the transaction and urge the Board to impose certain competition-related conditions should the Board approve the petition. They argue that the proposed transaction, if unconditioned, would have anticompetitive effects. The crux of respondents' concern is that NS will favor its long-haul customers for coal originating at Pike #1 and #2 and

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<sup>7</sup> However, NS also states that CSXT had not interchanged traffic with AWW in some years even before the last mine closed in 2004.

attendant transloading facilities, and will no longer offer favorable interchange rates for short-haul destinations not served by NS. Respondents contend that the merger would reduce the competitive options available on the AWW line due to the loss of AWW as a neutral railroad for purposes of interchanging traffic originating on that line. But, they also maintain that these consequences could be ameliorated by the imposition of conditions.

If the transaction is approved, respondents request that the Board condition its approval upon NS/AWW providing ISRR<sup>8</sup> with local trackage rights over the AWW line from the Oakland City interchange to Pike #1 and #2 and to the loading facilities. ISRR argues that the requested trackage rights are warranted in order to preserve rail competition and to protect shippers. ISRR states that the request satisfies the criteria for the imposition of pro-competitive conditions because the trackage rights would be operationally feasible, would ameliorate or eliminate the competitive harm threatened by the proposed transaction, and would produce net public benefits. In the alternative, they request a condition requiring NS/AWW to establish negotiated switch charges at the Oakland City interchange that would maintain competitive options for shippers.<sup>9</sup>

Respondents argue that NS has not presented sufficient evidence to demonstrate that the transaction satisfies the exemption criteria or that it satisfies the requirements of the underlying statute.<sup>10</sup> ISRR asserts that this is a classic two-to-one situation, where shippers that can currently receive service from two rail carriers will only have access to one rail carrier after the transaction. Furthermore, respondents argue that NS will favor single-line service to NS customers, and thus, will not preserve, from a commercial standpoint, the existing interchange at

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<sup>8</sup> ISRR is a Class III railroad subsidiary of RailAmerica, Inc. that operates a 176-mile rail line in Indiana. ISRR serves a number of coal-burning utility plants in single-line or joint-line service. They include three owned by IPL (Petersburg Station served by ISRR, Eagle Valley Station served by ISRR, and Harding Street Station served by The Indiana Rail Road Company (INRD)), two owned by PSI (Cayuga Station served by CSXT and Wabash River Station served by Canadian Pacific Railway Company (CP)), one owned by Hoosier Energy Rural Electric Cooperative, Inc. (Hoosier Energy) (Merom Station served by INRD), and one owned by Alcoa, Inc. (Warwick Station served by NSR and ISRR).

<sup>9</sup> ISRR attached to its reply the verified statement of Harold Leitze, Department Manager of Hoosier Energy, who states that Hoosier Energy also opposes the transaction and supports respondents' request for conditions.

<sup>10</sup> Because this transaction does not involve the merger or control of two or more Class I railroads, absent exemption, it would be governed by 49 U.S.C. 11324(d), under which the Board must approve the transaction unless it finds: (1) that, as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) that the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Oakland City. In addition, they contend that, by removing AWW's independence, NS will have market power after the transaction and will be able to set rates at whatever level it chooses. According to respondents, the transaction will have the effect of foreclosing competitive options and harming shippers.

In rebuttal, NS argues that respondents' contention that there will be a lessening of competition as a result of this transaction is contrary to well established Board precedent.<sup>11</sup> NS states that this transaction is a routine end-to-end consolidation of a small short line railroad with one of its connecting rail carriers. NS asserts that this is not a two-to-one situation because only AWW operates on the line currently and, after the transaction, there will continue to be one railroad (NS instead of AWW) serving the same locations. Furthermore, NS contends that the Board has found that merging end-to-end railroads will generally not be inclined to foreclose interline movements in favor of their own, longer single-line movements. NS argues that requiring it to provide ISRR with trackage rights over the AWW line would amount to governmental interference with a freely negotiated marketplace transaction and that the Board has consistently found that it is inappropriate to impose conditions simply to give shippers access to more railroads than they had before the transaction.

NS also states that the facts in this case prove that the transaction will not have an adverse impact on shippers or on competition. NS indicates that it has been substantially involved in AWW's business over the past 30 years, during which time AWW has interchanged substantial amounts of coal traffic with ISRR and CSXT.<sup>12</sup> NS states that it will continue to have incentive to participate in movements, including interline movements, that generate profit for it. Moreover, NS argues that there are a variety of competitive transportation options available in southern Indiana. NS states that there are approximately 60 coal mines and several truck transload facilities within 100 miles of the AWW line. NS claims that most of the plants receive coal by truck as well as by rail. Finally, NS argues that the transaction will improve rail service for many coal shippers by giving them direct, single-line service and eliminating the inefficiencies of the interchange at Oakland City.

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<sup>11</sup> Among others, NS cites: Burlington Northern et al.–Merger–Santa Fe Pacific et al., 10 I.C.C.2d 661, 751-52 (1995) (BNSF), aff'd sub nom. Western Resources, Inc. v. STB, 109 F.3d 782 (D.C. Cir. 1997) (Western Resources); CSX Corp. et al.–Control–Conrail Inc. et al., 3 STB 196 (1998), aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437 (2d Cir. 2001); and Kansas City Southern–Control–The Kansas City Southern Railway Company, Gateway Eastern Railway Company, and the Texas Mexican Railway Company, STB Finance Docket No. 34342 (STB served Nov. 29, 2004) (KCS-TM).

<sup>12</sup> According to Doug Evans, Director, Utility North, of the Coal Business Group of NSR, train operations have been performed by AWW employees and usually with AWW equipment. For some movements, NS personnel have acted as the marketing agent for both railroads. For some AWW-NS movements, AWW has acted solely as a switching carrier for NSR and has not appeared as a separate line haul carrier in the tariff or contract pertaining to the movement.

Respondents argue that NS's characterization of the transaction as end-to-end is misplaced. They argue that the transaction does not qualify as a typical end-to-end combination because AWW is not a major railroad able to exploit its market power as the sole-serving origination or destination carrier. For the same reason, ISRR and PSI argue that the "one-lump" theory,<sup>13</sup> discussed in the cases cited by NS, does not apply to this transaction either. IPL, in particular, argues that NS has admitted that part of the AWW line is actually parallel to its main line and that NS has provided factually inconsistent evidence regarding whether NS or AWW operates the line. Respondents also disagree with NS regarding trucking as a viable competitive option to rail service. They argue that transporting coal by truck is more expensive than transporting it by rail and that the alternative transload facilities are inferior in operation and less efficiently situated.

In addition, respondents argue that Board precedent cited by NS should not apply to this proceeding. Specifically, ISRR argues that the Board decided those cases on the basis of an application, not a petition, and that NS should be required to file an application in this proceeding because it has failed to develop a sufficient factual record. ISRR also notes that the Board imposed pro-competitive conditions in each of the cases NS cites. PSI and IPL further assert that the cases cited by NS predate the new merger rules established by the Board in 2001 (New Merger Rules), which represent a policy shift.<sup>14</sup> They state that the new policy is geared towards enhancing, not just preserving, competition in the aftermath of recent major mergers and the consolidation of the rail industry.

Finally, respondents disagree with NS's characterization of the Indiana utility coal market. IPL particularly takes issue with NS's assertion that trucking coal from mines to a truck-to-rail transload facility in Petersburg, IN, is a viable transportation option. Although IPL concedes that the Petersburg facility may be closer than the mines on the AWW line, IPL argues that it is much more expensive to transport coal by truck than by rail.<sup>15</sup> IPL contends that all of its stations are rail served and that it is more economical to engage in all-rail movements. Furthermore, IPL states that, even if it were to use a transload facility as part of a transportation movement, the transload facility at Pike #1 might be more efficient than the Petersburg transload facility. IPL indicates that the Augusta mine is closer to the Pike #1 transload facility than it is to the Petersburg facility. IPL also argues that the Petersburg facility is operationally inferior to the AWW-served transload facility.

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<sup>13</sup> See BNSF at 749 (a firm with market power in a vertical chain can extract only "one lump" of profit, even though it operates at two or more levels of a vertical chain).

<sup>14</sup> See Major Rail Consolidation Procedures, 5 S.T.B. 539 (2001).

<sup>15</sup> ISRR also argues that it is more economical and efficient for coal to be loaded on trains as close to the mines as possible and for the railroad to carry the coal to destination, rather than trucking coal to a transloading facility closer to destination and loading it on trains for delivery to utility customers.

While both IPL and PSI acknowledge that there are various coal mines in southern Indiana, they assert that there are far less than 60 active mines suitable for coal consumption at their generating stations. IPL argues that NS does not take into account the distance of the mines from the generating plants or the cost and feasibility of transportation. PSI further explains that the active mines produce coal of different quality and that less than half that number of mines are capable of supplying coal suitable for PSI's needs. However, PSI states that it is always looking for new sources of coal and has installed, or will install, scrubbers that will allow it to use the high-sulfur coal produced at the mines on the AWW line. PSI states that its Gibson Station presently has scrubbers at two of its five units, and scrubbers will be installed on the remaining units by 2008. Additionally, PSI indicates that it is installing scrubbers at its Cayuga station and that installation should be complete by 2010.

In order to ensure price competition and a constant supply of coal, PSI argues that diversity and reliability of coal suppliers are important business considerations. Moreover, PSI challenges NS's claim that there are numerous transportation options, including two transloading facilities served by ISRR, that are closer to PSI's power plants than the transloading facility at Pike #2. PSI argues that, unlike the transload facility at Pike #2, neither of the two transloading facilities cited by NS can be used for unit-train movements because they are unable to load 100-car trains at one time. Due to the distances involved, PSI indicates that just a small portion of the coal it receives is delivered by truck. PSI also argues that NS participates in interline movements only because the NS-served mines do not produce enough coal to meet demand. Finally, PSI does not think that customers would benefit from single-line service because NS could work out run-through service arrangements to make its interline service indistinguishable from single-line service.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 11323(a)(3), the acquisition of control of a rail carrier by another rail carrier requires prior Board approval. Similarly, the merger of two rail carriers into one corporation for the ownership, management, or operation of the previously separately owned properties requires prior approval of the Board under 49 U.S.C. 11323(a)(1). As noted, because the proposed transaction does not involve the merger or control of at least two Class I railroads, the proposed transaction is governed by 49 U.S.C. 11324(d). Section 11324(d) requires us to approve the transaction unless adverse competitive impacts are both "likely" and "substantial." Even if there would be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be ameliorated by conditions. See KCS-TM at 16. Finally, under 49 U.S.C. 10502, we are directed to exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Although this matter was initiated through a petition for exemption, a substantial record has already been compiled, and we believe that we have enough information to issue a decision now addressing the exemption criteria while mindful of the substantive mandate of section

11324(d).<sup>16</sup> Thus, we find that detailed scrutiny of the proposed transaction through an application for review and approval under 49 U.S.C. 11323-25 is not necessary to carry out the RTP. Rather, by eliminating the requirement for additional administrative proceedings and, ultimately, administrative delays, an exemption will promote the RTP by minimizing the need for Federal regulatory control over the proposed transaction and reducing regulatory barriers to entry [49 U.S.C. 10101(2) and (7)] and ensuring that a sound rail transportation system will continue to meet the needs of the shipping public [49 U.S.C. 10101(4)]. NS has demonstrated that the transaction will also benefit some shippers by enabling NS to offer improved, single-line service. Moreover, an exemption allowing the swift integration of AWW into NSR, with attendant capital, logistics and administrative support, will foster sound economic conditions, ensure effective coordination among carriers, and encourage efficient management in accordance with 49 U.S.C. 10101(5) and (9). Other aspects of the RTP will not be adversely affected.

We find that additional regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. Contrary to ISRR's contention, this transaction does not represent a 2-to-1 situation. The mines are currently served by one carrier and will continue to be served by only one carrier, NSR, after the transaction.<sup>17</sup> Rather, it is an "end-to-end" transaction connecting two complementary lines at the Oakland City interchange. An end-to-end consolidation of carriers, by its very nature, is not likely to generate the kinds of competitive problems that often arise in connection with a parallel consolidation.<sup>18</sup>

Although some end-to-end consolidations could generate concerns of their own, as discussed later we do not believe that the competitive environment in this case creates a likelihood that a substantial lessening of competition will result from the vertical integration of NS and AWW. And, respondents' concerns are adequately addressed by requiring NS to adhere

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<sup>16</sup> As noted above, respondents have argued that NS has not presented a sufficient factual record in this proceeding. However, we find that NS has presented enough evidence to allow us to decide this case, and we note that respondents have had sufficient opportunity to present their opposition to what would amount to a "minor transaction" under 49 CFR 1180.2(c).

<sup>17</sup> Respondents prefer to have the AWW line owned by a carrier with short-haul economic incentives rather than a Class I carrier that might offer rates favoring its long haul. However, so long as a carrier's rates are not unreasonable, a carrier may select the type of rate it will provide for through transportation and may favor its own long haul. See MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999).

<sup>18</sup> While IPL argues that NS admits that a small portion of the AWW line is actually parallel to NSR's main line, this does not change our classification of this transaction as end-to-end. The only common service point appears to be at Oakland City, and there is no evidence that AWW could provide a competitive alternative to the NS main line.

to the pledges it has made to keep the Oakland City interchange open and to honor existing contracts.<sup>19</sup>

Respondents assert that the Board has only dealt with end-to-end aspects of rail mergers in the context of Class I carriers. Even if true, we see no reason not to apply a similar economic analysis to this transaction. The Board has consistently rejected the notion that new single-line movements created through merger would lead the merged carrier to vertically foreclose competition over efficient routes by refusing to cooperate with unaffiliated carriers. Merged railroads, regardless of whether they have bottleneck facilities or market dominance, have the incentive to encourage full use of the most efficient routing, even when it entails a joint-line alternative to a single-system route.<sup>20</sup> Moreover, the Board has subscribed to the one-lump theory (as a rebuttable presumption) in approving end-to-end mergers. Under the one-lump theory, which generally applies to vertical integration, “there is only one monopoly rent to be gained from the sale of an end product.” Thus, “the monopolist’s upstream vertical integration (even if accompanied by monopolization of prior phases) will normally not affect the end-product consumer adversely.”<sup>21</sup> Respondents have failed to persuade us that this longstanding Board precedent should not apply to consolidations such as the one presented here.

PSI and IPL also argue that the Board precedent cited by NS does not apply to this transaction because the cases were decided before the Board changed its approach to Class I mergers. They contend that the New Merger Rules represent a shift in Board policy by placing a heavier burden on merger applicants and by encouraging competition. However, the New Merger Rules apply only to mergers involving two or more Class I carriers, and thus do not control our analysis of other mergers.<sup>22</sup> Nevertheless, in some cases where the New Merger

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<sup>19</sup> PSI expresses concern that keeping a gateway nominally open does not mean that it will remain open economically. We see no need to add such qualifiers to NS’s pledge at this time. See Major Rail Consolidation Procedures, 5 S.T.B. at 562-64.

<sup>20</sup> See BNSF at 748, citing Traffic Protective Conditions, 366 I.C.C. 112 (1982), aff’d in relevant part, Detroit, Toledo & Ironton R. Co. v. U.S., 725 F. 2d 47 (6th Cir. 1984); Seaboard Air Line Railroad Company–Merger–Atlantic Coast Line Railroad Company (Petition to Remove Traffic Protective Conditions), Finance Docket No. 21215 (Sub-No. 5) (ICC served Mar. 27, 1995).

<sup>21</sup> Western Resources 109 F.3d at 784, quoting Phillip Areeda & Donald F. Turner, 3 Antitrust Law ¶725b, at 199 (1978).

<sup>22</sup> The New Merger Rules encourage competitive enhancements, in part, to offset harm to shippers from the implementation process of combining large rail systems. There is no such potential for harm here.

Rules do not apply, we have conditioned our approval upon applicants' adherence to their procompetitive pledges.<sup>23</sup> We will take the same action here.

The evidence presented in this proceeding indicates that this transaction is not likely to result in the loss of a competitive option for several reasons. First, coal has not been shipped from Pike #1 since it ceased operations in December 1999 and has not been shipped from Pike #2 since October 2004, when Horizon filed for bankruptcy. While we have no reason to doubt that Solar and James River will reopen the plants as intended, at this point Pike #1 and Pike #2 are only *potential* sources of coal. It remains to be seen which utility customers will choose to use significant volumes of higher-sulfur coal from those mines.

Second, NS has been intimately involved in the management and operations of the AWW line since purchasing the 50% interest in 1974. It has already exerted some influence over AWW's selection of interline partners. NS cites examples of quoting single-line rates from the AWW mines and serving as marketing agent for both NS and AWW. The respondents make much of the fact that AWW was 50% owned by two mines that it served. But none of the respondents has offered any evidence that the mines exercised their power as an equal partner with NS to influence AWW to offer prices and services more favorable than those that would be offered by a carrier wholly independent of the customers it served, and AWW's fiduciary duty to its shareholders in all likelihood would have precluded such actions. Moreover, whatever influence the mine owners could have exercised ceased when AMCI acquired the 50% interest in AWW from IL&M and when Solar and James River acquired the two mines and loading facilities. AMCI has no less interest than NS in maximizing profits from rail operations on the AWW line.

Third, the evidence suggests that NS will not foreclose profitable interline movements in the future. NS has participated in various interline movements since it acquired its 50% interest. For example, NS's witness Evans states that NS granted CSXT trackage rights over NS's line between Oakland City and Princeton, IN, to permit CSXT to transport coal from the AWW mines to the power plant of Southern Indiana Gas & Electric Company at Abee, IN. Between 1993 and December 1999, most of the coal at Pike #1 was interchanged with CSXT at Oakland City for delivery to the Abee plant. According to Evans, NS has also recently participated in substantial interline movements of coal to PSI's Gibson Station at Carol, IN, with railroads other than AWW, even though NS can provide single-line service to that plant from coal origins served only by NS. NS also states explicitly in its petition that it will preserve the interchange at Oakland City and will honor any existing contracts. Consistent with its pledge, NS has recently entered into an agreement with Solar, the owner of Pike #2, where NS agrees "to consult with

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<sup>23</sup> See KCS-TM at 18-19, (requiring Kansas City Southern to "adhere" to five pledges, including keeping the Laredo gateway open on commercially reasonable terms, because the gateway was "so significant to rail traffic between the U.S. and Mexico.") See also Canadian National, et al.—Control—Wisconsin Central Transp. Corp., et al., 5. S.T.B. 890, at 902-04 (2001) (declining to impose additional interchange-related conditions beyond those offered by merger parties).

Solar and negotiate in good faith with its customers/shippers” with regard to through rates and interchange.

Fourth, geographic and intermodal competition suggests that this transaction will not have anticompetitive effects on rail competition or on shippers. The prevalence of interline service indicates that competition exists in this market and will not be reduced by the consolidation of AWW and NS. The utility customers, including IPL and PSI, are dispersed throughout northwest, southwest and north central Indiana. Many of the utilities receive coal from various sources via interline service from a single carrier. As previously noted, IPL owns the Petersburg Station served by ISRR, the Eagle Valley Station served by ISRR, and the Harding Street Station served by INRD. PSI owns the Cayuga Station served by CSXT and the Wabash River Station served by CP. Hoosier Energy owns the Merom Station served by INRD. And, Alcoa, Inc. owns the Warrick Station served by NSR and ISRR. We see no reason why NS would choose not to participate in profitable interline movements when it makes economic sense to do so.

The substantial number of nearby mines also suggests a very competitive market. Pike #1 and #2 are 21 and 29 miles, respectively, from the Petersburg Station, 115 and 123 miles, respectively, from the Eagle Valley Station, and 140 and 148 miles, respectively, from the Harding Street Station. In addition, there are approximately 60 coal mines within 100 miles of the AWW mines,<sup>24</sup> and many of them are closer to the power plants than Pike #1 and #2. For example, various mines are closer than Pike #1 and #2 to PSI’s Wabash River and Cayuga Stations, Hoosier Energy’s Merom Station and IPL’s Eagle Valley and Harding Street Stations. Furthermore, hundreds of additional competitive sources of coal lie beyond a 100-mile radius of Pike #1 and #2.<sup>25</sup> The sheer number of coal mines in the region undercuts the notion that all competitors need to be able to source coal from Pike #1 and #2 on an equal basis as NS in order to ensure a competitive market.

We also find that trucks can provide a competitive alternative, at least to a limited extent, to rail service in the area surrounding the AWW line. Many of the utility plants already receive coal by truck. According to PSI, the Cayuga plant receives about 3 million tons of coal annually, with a certain percentage delivered by truck.<sup>26</sup> In addition, PSI’s Gibson plant receives about 10

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<sup>24</sup> While IPL and PSI question that number, they acknowledge the existence of a substantial number of mines in southern Indiana producing coal suitable for consumption at their facilities.

<sup>25</sup> In its initial reply, ISRR appears to recognize the existence of a broader market when it argues that NS did not provide evidence of the product and geographic markets that might be affected by the proposed transaction in its petition for exemption.

<sup>26</sup> The actual percentage was filed under seal as confidential information.

million tons of coal annually, with a certain percentage also normally delivered by truck.<sup>27</sup> Almost all of this coal is trucked from a mine located only 10 miles from the Gibson plant. Moreover, IPL's witness Bentley states that coal is being trucked 25 miles from the Augusta mine to IPL's Petersburg Station. Even ISRR's witness Leitze acknowledges in his verified statement that truck transportation of coal can be a valid alternative to rail transportation.

There are also several truck-to-rail transloading facilities within 30 miles of Pike #1 and #2, including two located on ISRR's line. The Petersburg transload facility, located on the ISRR line, is 21 rail miles closer to all of the plants discussed by respondents than Pike #1 and 30 miles closer than Pike #2. Additionally, the Petersburg facility is less than 10 highway miles away from Pike #2. Coal can be and has been trucked to the Petersburg facility from different mines in the area and transloaded to rail cars for delivery by ISRR to various destinations. The other transload facility on the ISRR is located 15 rail and highway miles north of Petersburg. This facility has been used on a few occasions for shipments to the Gibson Station. Respondents argue that it is not economical to transload coal and that some of these facilities are less efficient and less favorably located for certain mines. Without looking at each facility in isolation, the evidence establishes that these transload facilities are in use and must, therefore, provide some additional pricing constraint, albeit smaller, to rail service in this market.

Along with trucks, we conclude that barges represent another source of competition for rail and truck service. There are more than 20 power plants, located south of Oakland City on the Ohio River, that are potential customers of Pike #1 and #2. All of these power plants can receive coal by barge. In arguing for diversity, PSI notes that its barge-served Gallagher Station located on the Ohio River in southeastern Indiana already receives a substantial amount of its coal from mines owned by one producer.<sup>28</sup> Thus, barges also provide competition for transportation of coal in the region. Finally, the ability of power companies to shift power generation among stations also creates a significant competitive constraint on what coal companies, the railroads and the trucking companies can charge for transportation to plants that are not directly served by barge.

In sum, we find that the consolidation of AWW and NS is not likely to result in anticompetitive impacts given the competitive coal market for this area, the end-to-end nature of the consolidation, and NS's pledge to preserve the Oakland City interchange. Accordingly, we find that regulation – by which we mean here the requirement that NS file a full application – is not necessary to protect shippers from the abuse of market power, and we deny respondents' request that the Board impose a condition requiring NS to provide ISRR with limited trackage rights over the AWW line or, in the alternative, a condition requiring NS to establish a switch charge rate at the Oakland City interchange. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

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<sup>27</sup> The actual percentage was filed under seal as confidential information.

<sup>28</sup> The actual amount was filed under seal as confidential information.

As noted, we will condition the exemption on NS adhering to its pledge to preserve the Oakland City interchange and “any existing contract with a shipper for the remaining duration of the contract.”<sup>29</sup> Some respondents have questioned NS’s level of commitment with respect to these pledges. We expect NS to follow through in good faith in honoring its commitments.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions established in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979).

This transaction is exempt from environmental reporting requirements under 49 CFR 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations or exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5). Similarly, the transaction is exempt from historic reporting requirements under 49 CFR 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt the above-described transaction from the prior approval requirements of 49 U.S.C. 11323, et seq., subject to the employee protective conditions in New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), and the condition that NS adhere to its pledge to preserve the Oakland City interchange and honor existing contracts involving AWW.

2. Notice will be published in the Federal Register on February 21, 2007.

3. This exemption will be effective on March 23, 2007. Petitions for stay must be filed by March 5, 2007. Petitions to reopen must be filed by March 13, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary

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<sup>29</sup> Petition at 5.