

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
— CONTROL AND OPERATING LEASES/AGREEMENTS —
CONRAIL INC. AND CONSOLIDATED RAIL CORPORATION

[GENERAL OVERSIGHT]

Decision No. 17

Decided: October 20, 2004

In the fifth annual round of the Conrail “general oversight” proceeding, the Board finds that, with the conditions imposed, the Conrail Transaction has not resulted in any competitive or market power problems, and the Board concludes, as scheduled, the formal oversight process.

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ACRONYMS USED

AAR	Association of American Railroads
ACC	American Chemistry Council
Amtrak	National Railroad Passenger Corporation
Anacostia & Pacific	Anacostia & Pacific Corporation
A & R	A & R Bulk-Pac, Inc.
Cargill	Cargill, Incorporated
Cemex	Cemex, Inc.
CN	Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated
Conrail or CR	CRR and CRC, and all other entities wholly owned, directly or indirectly, by CRR
CONSOL	CONSOL Energy Inc.
CP	Control Point
CP	Canadian Pacific Railway Company
CPRS	Canadian Pacific Railway Company
CRC	Consolidated Rail Corporation
CRR	Conrail Inc.
CRR Holdings	CRR Holdings LLC
CSAO	Conrail Shared Assets Operations (or Operator)
CSX	CSXC and CSXT and their wholly owned subsidiaries, and also (from 6/1/99 to 8/27/04) NYC
CSXC	CSX Corporation
CSXT	CSX Transportation, Inc.
DaimlerChrysler	DaimlerChrysler Corporation
DCED	Pennsylvania Department of Community and Economic Development
DOT	U.S. Department of Transportation
DRPA	Delaware River Port Authority
DVRPC	Delaware Valley Regional Planning Commission
FCC	Four City Consortium

FRA	Federal Railroad Administration
Green Acquisition	Green Acquisition Corp.
Hub Group	Hub Group, Inc.
IANA	Intermodal Association of North America
IC	Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company
IIC	International Intermodal Corridor
IITC	International Intermodal Transportation Center
ISTEA	Intermodal Surface Transportation Efficiency Act
JVRC	Juniata Valley Railroad Company
Kinder Morgan	Kinder Morgan Liquids Terminals LLC
LAL	Livonia, Avon & Lakeville Railroad
LBCX	Lewisburg and Buffalo Creek Railroad
LTL	Less-than-Truckload
LVRR	Lycoming Valley Railroad Company
Madison	Madison International Sales Company
Mars Industries	Mars Industries, Inc.
MGA	Monongahela Railroad
M&E	Morristown & Erie Railway, Inc.
NBER	Nittany & Bald Eagle Railroad Company
New York	State of New York
NITL	National Industrial Transportation League
NJDOT	New Jersey Department of Transportation
NJIT	New Jersey Institute of Technology
NJSAA	North Jersey Shared Assets Area
NJSLRRA	New Jersey Shortline Railroad Association
NJT	New Jersey Transit Corporation
NJTPA	North Jersey Transportation Planning Authority, Inc.
NJ Transit	New Jersey Transit Corporation
NORAC	Northeast Operating Rules Advisory Committee
Novolog	Novolog Bucks County Inc.
NS	NSC and NSR and their wholly owned subsidiaries, and also (from 6/1/99 to 8/27/04) PRR
NSC	Norfolk Southern Corporation
NSHR	North Shore Railroad Company
NSR	Norfolk Southern Railway Company
NYC	New York Central Lines LLC
NYCEDC	New York City Economic Development Corporation
NYSDOT	New York State Department of Transportation
NYS&W	New York, Susquehanna & Western Railroad
Ohio Central	Ohio Central Railroad, Incorporated

OSHA	Occupational Safety & Health Administration
PANYNJ	Port Authority of New York and New Jersey
PIDC	Philadelphia Industrial Development Corporation
Pinsly	Pinsly Railroad Company
PNBC	Philadelphia Naval Business Center
Port of Virginia	Virginia Port Authority
Port of Wilmington	Port of Wilmington, Delaware
PPL	PPL EnergyPlus
PRPA	Philadelphia Regional Port Authority
PRR	Pennsylvania Lines LLC
PSE&G	Public Service Electric and Gas Company
Rail Management	Rail Management Corporation
RCAF-U	Rail Cost Adjustment Factor unadjusted for productivity change
RCE	Rail Cents Enterprises, Inc.
RWCS	Resources Warehousing & Consolidation Services, Inc.
SAA	Shared Assets Area
Savage	Savage Services Corporation
SEDA-COG JRA	Susquehanna Economic Development Agency—Council of Governments Joint Rail Authority
SEPTA	Southeastern Pennsylvania Transportation Authority
SMS	SMS Rail Service, Inc.
SP	Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company
SRCNJ	Southern Railroad Company of New Jersey
STB	Surface Transportation Board
SUV	sport utility vehicle
SVRR	Shamokin Valley Railroad Company
TRA	trackage rights agreement
UCIR	Union County Industrial Railroad Company
Union County	Union County, NJ
UP	Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company
UTU	United Transportation Union
VMT	vehicle miles traveled
WNY&P	Western New York & Pennsylvania Railroad
WTSE	West Shore Railroad
W&LE	Wheeling & Lake Erie Railway Company

BACKGROUND

Conrail Transaction. In Merger Dec. No. 89 (served July 23, 1998),¹ the Board approved the “Conrail Transaction.” Effective on June 1, 1999 (the Split Date), the assets of Conrail² were taken over by, and divided between, CSX³ and NS.⁴ The transaction contemplated that some of the former Conrail properties would be owned and operated by either CSX or NS alone. But the transaction also contained a substantial procompetitive feature: certain areas that had been served only by Conrail would now be served by both CSX and NS. Thus, as of the Split Date, Conrail’s rail operating properties were divided into two categories: Allocated Assets (which were allocated for operation either by CSX or NS alone) and Retained Assets (which were to be retained and operated by a newly constituted Conrail, acting as a neutral switcher feeding traffic to both CSX and NS). The Retained Assets consist primarily of three “Shared Assets Areas” (SAAs): the North Jersey SAA; the South Jersey-Philadelphia SAA; and the Detroit SAA.

General Oversight. In approving the Conrail Transaction, the Board imposed numerous conditions to ensure that the merger did not result in any competitive or market power problems. In Merger Dec. No. 89, the Board established general oversight for 5 years to monitor the progress of implementation of the Conrail Transaction and the workings of the various conditions imposed, and the Board retained jurisdiction to impose additional conditions and/or to take other action, if necessary, to address harms caused by the Conrail Transaction. See Merger Dec. No. 89, 3 S.T.B. at 217 (item 38), 365-66, 385 (ordering paragraph 1). The Board has issued decisions reporting on each of the four rounds of general oversight that have been held to date.⁵ In those decisions, the Board addressed the progress that CSX and NS had made in

¹ CSX Corp. et al. — Control — Conrail Inc. et al., 3 S.T.B. 196 (1998) (Merger Dec. No. 89).

² Conrail Inc. (CRR) and Consolidated Rail Corporation, and all other entities wholly owned, directly or indirectly, by CRR.

³ CSX Corporation (CSXC) and CSX Transportation, Inc., and all other entities wholly owned, directly or indirectly, by CSXC.

⁴ Norfolk Southern Corporation (NSC) and Norfolk Southern Railway Company and all other entities wholly owned, directly or indirectly, by NSC.

⁵ CSX Corp., et al. — Control — Conrail Inc. et al. [General Oversight], STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 5 (STB served Feb. 2, 2001) (Oversight Dec. No. 5); Decision No. 6 (STB served Dec. 13, 2001) (Oversight Dec. No. 6); Decision No. 10 (STB served Nov. 5, 2002) (Oversight Dec. No. 10); and Decision No. 11 (STB served Jan. 21, 2004) (Oversight Dec. No. 11).

working out, and ultimately resolving, their transitional service problems; and in each decision the Board concluded that the conditions that had been imposed were working as intended, that no problems related to increased market power had been demonstrated, and that CSX and NS had made significant progress in implementing various environmental conditions and settlement agreements. Today's decision concludes the fifth annual round of the general oversight proceeding.

Public Hearings In 2004. To provide a forum for interested persons to express their views on the matters at issue in this proceeding, the Board held two public hearings in 2004. The first hearing, held in Trenton, NJ, on April 2, 2004, focused on the three Shared Assets Areas that were created in connection with the Conrail Transaction. The second hearing, held in Washington, DC, on May 3, 2004, dealt with all other aspects of the Conrail Transaction. In this decision, we consider the issues raised either at the public hearings noted above or in pleadings filed with the Board. We summarize the contents of all submissions in four appendices. In general, however, most of the non-applicant parties that testified contended that the transaction had not provided every benefit they had been promised or hoped for, but also testified that, with few exceptions, they were all better off after the transaction.

In Appendix A, we summarize the opening submissions of CSX, NS, and Conrail at the public hearings.

In Appendix B, we summarize the submissions of those parties that are generally supportive of the Conrail Transaction and, insofar as they have specifically addressed this matter, agree that oversight should be ended. Those parties are: Anacostia & Pacific Corp. (Anacostia & Pacific); A & R Bulk-Pac, Inc. (A & R); CONSOL Energy Inc. (CONSOL); Hub Group, Inc. (Hub Group); the Intermodal Association of North America (IANA); Kinder Morgan Liquids Terminals LLC (Kinder Morgan); Madison International Sales Co. (Madison); Mars Industries, Inc. (Mars Industries); the National Industrial Transportation League (NITL); Novolog Bucks County Inc. (Novolog); the Ohio Central Railroad, Inc. (Ohio Central); Pinsly Railroad Co. (Pinsly); the Port Authority of New York and New Jersey (PANYNJ);⁶ the Port of Wilmington, Delaware (Port of Wilmington); PPL EnergyPlus (PPL); Rail Management Corp. (Rail Management); Savage Services Corp. (Savage); the Southern Railroad Co. of New Jersey (SRCNJ); the State of Maryland; the State of Michigan; the United Transportation Union (UTU); the Virginia Port Authority (the Port of Virginia); and Wheeling & Lake Erie Railway Co. (W&LE).

In Appendix C, we summarize the submissions of those parties that suggest further regulatory involvement or seek affirmative relief of one sort or another. Those parties are: the U.S. Department of Transportation (DOT); the American Chemistry Council (ACC); Cargill,

⁶ PANYNJ neither supports nor opposes termination of the general oversight proceeding.

Inc. (Cargill); Cemex, Inc. (Cemex); DaimlerChrysler Corp. (DaimlerChrysler); the Delaware Valley Regional Planning Commission (DVRPC); the Four City Consortium (FCC, an association of the northwestern Indiana cities of East Chicago, Hammond, Gary, and Whiting); GROWMARK, Inc.; the Lackawanna Coalition, Inc.; Morristown & Erie Railway, Inc. (M&E); the New Jersey Department of Transportation (NJDOT); the North Jersey Transportation Planning Authority, Inc. (NJTPA); the New Jersey Shortline Railroad Association (NJSLRRA); the Pennsylvania Department of Community and Economic Development (DCED);⁷ the Philadelphia Industrial Development Corporation (PIDC);⁸ Rail Cents Enterprises, Inc. (RCE); Resources Warehousing & Consolidation Services, Inc. (RWCS); the SEDA-COG JRA parties;⁹ SMS Rail Service, Inc. (SMS); the State of New York (New York); Union County, New Jersey (Union County); and two other parties (Mr. Arthur B. Shenefelt and Mr. William R. Wright).

In Appendix D, we summarize the responses of CSX and NS to the various requests for affirmative relief.

PRELIMINARY MATTERS

Cargill. Cargill's CARG-4 motion (filed August 5, 2002) for leave to late file its CARG-5 comments will be granted, and its CARG-5 comments will be accepted for filing and made part of the record in this proceeding.

New York. New York's request (filed April 29, 2004) for leave to late file the prepared statement of Mr. John F. Guinan, the Assistant Commissioner of the New York State Department of Transportation, will be granted, and the statement will be accepted for filing and made part of the record in this proceeding.

DISCUSSION AND CONCLUSIONS

Formal Oversight Process Is Concluded As Scheduled. When the Board approved the Conrail Transaction in 1998, it established a 5-year oversight process to assess the progress of implementation of the Conrail Transaction and the workings of the conditions imposed. The

⁷ DCED submitted its comments on behalf of the Commonwealth of Pennsylvania.

⁸ PIDC submitted its comments on behalf of the Commonwealth of Pennsylvania, the City of Philadelphia, and PIDC itself.

⁹ The SEDA-COG JRA parties are: the Susquehanna Economic Development Agency — Council of Governments Joint Rail Authority (SEDA-COG JRA); four shippers (Clark's Feed Mills, Inc., PA Distribution, Keystone Commodities Co., and Brandt Mills Inc.); and two rail line owners (the West Shore Railroad and the Lewisburg and Buffalo Creek Railroad).

oversight process was intended to be transitional, not permanent. The evidence submitted in this fifth annual oversight round, like that submitted in the first four rounds of annual oversight, demonstrates that the conditions imposed are working as intended and that the transaction has not resulted in competitive or market power problems. Not every party is entirely satisfied that it has reaped the precise benefits it had hoped for, and some would like to change things to be more to their advantage. But no party has demonstrated any structural or competitive harm arising from the transaction, or systemic problems with the implementation of the transaction, or failure on the part of CSX or NS to comply with the Board-imposed conditions (including environmental conditions). Therefore, while we will continue to monitor rail operations in the East, and to take measures where appropriate, we are now concluding, as scheduled, formal Board oversight of the Conrail Transaction as scheduled.

In 1998, in Merger Dec. No. 89, the Board found that the Conrail Transaction as proposed by applicants, subject to the conditions imposed, would be “consistent with the public interest” as required by 49 U.S.C. 11324(c). The results over time have demonstrated that the transaction has indeed been consistent with the public interest. There has been significant across-the-board improvement in the rail transportation environment in the territories previously served by CSX, NS, and Conrail. Balanced rail competition has been brought to many points throughout the Eastern United States. Although there have, of course, been bumps in the road, CSX and NS have worked hard to provide the safe and reliable service that the shipping community needs, not only in the territories formerly served by Conrail but throughout their own systems as well. And there is every reason to expect that CSX and NS will continue to work hard to provide safe and reliable service in the future.

Several parties that testified during this last round of oversight expressed some dissatisfaction, but their concerns generally involve situations that are unique to the party voicing them or unique to a limited area. They do not represent the kind of systemic or structural problem that would require a continuation of general Board oversight.

Indeed, the only allegations that suggest the possibility of any systemic or structural problems involve the Shared Assets Areas. We have looked closely at these allegations (principally anecdotal in nature), which concern the North Jersey SAA and, to a lesser extent, the South Jersey-Philadelphia SAA. We conclude that they highlight the kind of day-to-day difficulties that are inherent in any large-scale rail operation, rather than any systemic flaw in the structure of the SAAs. The North Jersey Transportation Planning Authority submitted a report on the North Jersey SAA, prepared by the Rutgers University Voorhees Transportation Center. The report finds that the post-Split Date service provided by Conrail is at least as good as the pre-Split Date service provided by Conrail. Although the report then concludes with a generalized and largely unsubstantiated concern that the SAA operation could destabilize and should therefore be watched, we see no reason for concern that the SAA operations stand on the verge of destabilization. Consequently, we do not believe that continuation of oversight as to the SAAs is warranted.

Reporting Requirements Terminated (With One Exception). With the conclusion of the formal oversight process, we are, with the one exception indicated in the next paragraph, discontinuing all remaining reporting requirements arising out of the main Conrail control proceeding (STB Finance Docket No. 33388) or any of its sub-dockets, including the requirement for CSX and NS to file Quarterly Community Outreach Status Reports. In view of the discontinuance of the formal oversight process, there is no compelling reason to continue these reporting requirements.

The one exception concerns the remaining operational monitoring reporting requirements with respect to the SAAs. The Board originally imposed a broad operational monitoring requirement in Merger Dec. No. 89, 3 S.T.B. at 366-71. Although most of the operational monitoring reporting requirements have since been terminated by the Director of the Board's Office of Compliance and Enforcement (OCE), the reporting requirements with respect to the SAAs remain. See Oversight Dec. No. 10, slip op. at 10-11 & n.14. Because the SAA reporting requirements provide otherwise unavailable data respecting SAA operations, we will keep them in place, for now. The Director of OCE, however, will have discretion to discontinue the SAA reporting requirements, subject to terms and conditions he deems appropriate.

Authority to Enforce Merger Conditions Continues. Although we are concluding the formal oversight process for the Conrail Transaction, we continue to have the authority to enforce the conditions imposed on that transaction. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. Thus, the conclusion of the formal oversight process does not preclude any party from invoking our jurisdiction to address any transaction-related concerns. And we remain available to consider and, where appropriate, address any issues relating to applicants' compliance with the conditions imposed on the Conrail Transaction.¹⁰

Rail Consumer Assistance Program. Notwithstanding the conclusion of the formal oversight process, the Board's OCE will continue its rail industry monitoring activities. OCE's Rail Consumer Assistance Program remains available to consider informal complaints involving railroad service. Any person seeking further information regarding this program may visit the Board's website ("www.stb.dot.gov"), pull down the "Rail Consumers" menu, and click on the "Consumer Assistance" link. At this link, there are instructions as to how to seek assistance from OCE by phone, e-mail, fax, or through the website itself.

¹⁰ See Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al. [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (STB served Dec. 20, 2001), slip op. at 5-6 (concluding "UP/SP" merger oversight process); Canadian National Railway Co., et al. — Control — Illinois Central Corp., et al. [General Oversight], STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 4 (STB served Dec. 27, 2001), slip op. at 3 (concluding "CN/IC" merger oversight process).

Party-By-Party Analysis of Relief Requested. Many parties have requested that oversight be extended, and some have requested additional relief. These requests for additional relief are discussed here.

U.S. Department of Transportation. DOT agrees that we should end formal oversight after giving all complaining parties one additional opportunity to specify any transaction-related commitment(s) or condition(s) that they feel that CSX and/or NS have not met. The parties have had ample opportunity to put their complaints on the record in this and the preceding four rounds of formal oversight, and CSX and NS have responded to each such complaint. Thus, we have, on this record, all the information we require to consider fully these particular concerns. We see no need to solicit, at this late date, yet another round of submissions in this proceeding.

American Chemistry Council. Because creation of the new head-to-head rail competition made possible by the establishment of the SAAs was a crucial feature of the Conrail Transaction, ACC asks us to clarify that any change in the competitive situation in the Shared Assets Areas would require review by the Board. Of course, any change to the SAAs that conflicts with a condition imposed on the Board's approval of the Conrail transaction or that otherwise requires Board approval under our statute cannot be made without first obtaining that approval.

Cargill. Cargill raises concerns regarding rail service to its soybean processing and refining facility at Sidney, Ohio. This facility is a "2-to-1" point, that is, a shipper facility that could have received service from two rail carriers before the Conrail Transaction, but that has access to only one carrier after. The Conrail Transaction did not cause very many 2-to-1 situations, but where it did, CSX and NS tried to work out arrangements to ensure that the affected shippers would continue to have access to two-carrier service. These arrangements are working well in most cases, and indeed, Cargill acknowledges that it is satisfied with the arrangements that are in place today for its Sidney facility. However, because of certain unique operational issues, set out in detail in Appendix C, below, Cargill seeks clarification that we retain authority to address any concerns that might arise in the future that relate to its 2-to-1 status as a result of the Conrail Transaction.

It is clear — as CSX and NS recognize, see Appendix D — that we can address any future transaction-related 2-to-1 issues involving Cargill's Sidney facility.

Cemex. Cemex raises a number of concerns about the rail service it has received from CSX since the Conrail Transaction, and asks that we extend our oversight. As set out in more detail in Appendix C, Cemex is concerned about routing changes that have led to increased transit times for some of its shipments. But absent exceptional circumstances, we do not intrude in railroads' day-to-day operational practices, because a Board-mandated change in a carrier's operational practices designed to benefit one shipper might well have negative impacts vis-à-vis other shippers. With this caution in mind, the situation described by Cemex does not warrant regulatory intrusion here.

Cemex also suggests that CSX has raised its rates as a result of the price it paid in the Conrail Transaction (the so-called “acquisition premium”), and that Cemex is being overcharged because its plants depend on rail service for their transportation needs. CSX, which serves Cemex’s Florida locations, responds that the rates it charges Cemex are based on market conditions (see Appendix D). The Board has previously addressed the acquisition premium issue and found no basis for Board action. See Merger Decision No. 89, 3 S.T.B. at 261-62; Oversight Dec. No. 5, slip op. at 18-19. As before, there is no showing here that CSX’s rates, either before or after the Conrail Transaction, are not market-based. Accordingly, we find no basis for Board action here.

Finally, Cemex requests that we establish an arbitration procedure for small rate cases. We are currently revisiting our small rate case procedures in another proceeding (Rail Rate Challenges in Small Cases, STB Ex Parte No. 646). The issues involved concern shippers generally and are not specifically connected to the Conrail Transaction. No separate action is necessary or appropriate in this proceeding.

DaimlerChrysler. DaimlerChrysler suggests that oversight should be continued to address its concern that recent operational problems it has experienced in the SAAs may indicate that certain commodities are being unfairly impacted by network capacity constraints. However, historically there have been periodic network capacity constraints throughout the railroad industry; as CSX and NS point out, the operational difficulties cited by DaimlerChrysler do not arise out of the Conrail Transaction, but instead represent the kind of day-to-day service issues that railroads and shippers must work through as they arise.

Delaware Valley Regional Planning Commission. DVRPC is the metropolitan planning organization for the South Jersey-Philadelphia region. Its concerns focus on the South Jersey-Philadelphia SAA. As set out in more detail in Appendix C, DVRPC questions whether CSX and NS have fulfilled their commitments and whether the projected benefits of the SAA have been achieved. In particular, DVRPC challenges the levels of investments in the SAA infrastructure; in this regard, it complains that new intermodal facilities have been built outside the SAA rather than within it. DVRPC also seeks more cooperation from SAA personnel with regard to redevelopment of parcels of land owned by Conrail, and DVRPC suggests that Conrail marketing should have its own personnel pursue business development opportunities within the SAA.

Both CSX and NS have made significant infrastructure investments within the SAA, as detailed in Appendix D, and they plan to continue to do so. They also plan to continue with efforts to redevelop underutilized Conrail land parcels in Philadelphia. While DVRPC certainly would like to work with CSX and NS on additional projects, federal regulatory oversight is not necessary to advance those projects. Moreover, we agree with CSX and NS that the South Jersey-Philadelphia SAA is working essentially as it was designed to work. The suggestion that Conrail should have its own marketing staff would be a fundamental change to a critical

component of the Conrail Transaction, in which Conrail is to act as a neutral switcher for its two owners, with CSX and NS doing their own marketing. No justification for such a fundamental change has been shown on this record.

Four City Consortium. The Four City Consortium, an association of the northwestern Indiana cities of East Chicago, Hammond, Gary, and Whiting, does not seek a formal extension of oversight, but it asks us to continue to assist in minimizing the impact of rail operations on rail/highway grade crossings in the region; to facilitate the development of an alternative, high-volume, grade-separated railroad corridor; and to encourage the railroads to move as much of their freight traffic as possible over that corridor when it comes to fruition. In essence, the Four City Consortium wants the Board to act “behind the scenes” as a facilitator of private-sector solutions.

CSX and NS have stated that they intend to have an ongoing dialogue with the Four City Consortium on matters of mutual concern, such as safety, economic development, and rail infrastructure matters. We encourage such dialogue, and in this matter, as in others, we will remain available, where appropriate, to assist the private parties on these sorts of issues.

GROWMARK. GROWMARK, an agricultural cooperative, operates storage facilities on property leased from Conrail at Pier 122 along the Delaware River in Philadelphia, within the South Jersey-Philadelphia SAA. GROWMARK has been compelled to divert its inbound freight arriving by vessel and barge, because Conrail has not made needed repairs to the unloading cranes at Pier 122 and has denied GROWMARK’s claim for the resulting increased shipping and handling costs. GROWMARK therefore asks us to investigate whether Conrail is adequately maintaining its facilities in the South Jersey-Philadelphia SAA, whether CSX and NS are investing in the South Jersey-Philadelphia SAA as required, and whether either CSX or NS is preventing Conrail from performing needed maintenance and making needed repairs within the South Jersey-Philadelphia SAA.

CSX and NS have explained that the expensive repairs needed to make Pier 122 operational are not justified, given that Conrail is presently negotiating with the Philadelphia Regional Port Authority for the sale of the property. Nothing that GROWMARK has said is inconsistent with this explanation. Accordingly, a Board investigation is neither necessary nor appropriate. However, our OCE is available to assist GROWMARK with any assistance it may require as part of our Rail Consumer Assistance Program.

Lackawanna Coalition. The Lackawanna Coalition seeks the preservation and restoration of rail passenger services in Northern New Jersey. It contends that oversight should be continued and that certain NS lines should be divested and transferred to another railroad that will be more amenable to the restoration of rail passenger service. The Lackawanna Coalition also raises generalized and unsubstantiated competitive concerns (see Appendix C).

The Lackawanna Coalition made a similar request in the fourth annual round of this proceeding. Now, as then, the relief it seeks has nothing to do with any purported harm arising from the Conrail Transaction. See Oversight Dec. No. 11, slip op. at 11. There is simply no evidence, and no reason to believe, that the allocation to NS of certain lines formerly operated by Conrail has made restoration of rail passenger service on these lines any more or less likely than it was prior to the Conrail Transaction.

Morristown & Erie Railway. M&E, a New Jersey shortline railroad, suggests that we establish a program that would allow shortline railroads to assume the common carrier obligations on lines that are left unserved after Class I railroads “rationalize” their systems. M&E further contends that, to create competition, we should consider giving shortline and regional railroads the right to connect to multiple carriers.

In fact, the Conrail transaction has given many New Jersey short lines previously having access to only one large railroad the opportunity to obtain access to two. But in any event, the relief M&E seeks has nothing to do with the Conrail Transaction, as it is not addressed to any harms that were caused or exacerbated by the Conrail Transaction. See Merger Dec. No. 89, 3 S.T.B. at 293 (“[W]e will not impose conditions to remedy pre-existing conditions that are unlikely to be exacerbated by the transaction.”).

New Jersey Department of Transportation. Although NJDOT does not request any formal Board-imposed changes with respect to the Conrail Transaction, NJDOT notes certain concerns as to which it hopes to see progress.

NJDOT’s first concern involves the Northeast Operating Rules Advisory Committee (NORAC) Operating Rules. NJDOT asks that we encourage all parties to continue the use of the NORAC Operating Rules on all Conrail lines within the two New Jersey SAAs. A 1998 NJDOT-CSX-NS “Letter of Understanding” required that the NORAC Operating Rules be retained for 3 years from the date of consummation of the Conrail Transaction. NJDOT would like the NORAC Operating Rules to continue to be used, because safety is enhanced when the various railroad operators in the NORAC region use the same operating rules. Rail safety matters fall within the primary jurisdiction of our sister agency, the Federal Railroad Administration. However, the Board also has responsibility for rail safety matters as they relate to transactions we approve. Accordingly, we encourage CSX and NS to coordinate the application of operating rules so as to facilitate the safe and efficient operation of freight and passenger rail service in New Jersey.

NJDOT’s other concerns involve the handling of carload and intermodal traffic in the two New Jersey SAAs, the routing of rail traffic between the Class I carriers and their regional and shortline connections in New Jersey, and the relationship between the Class I carriers and their New Jersey shortline connections. NJDOT has not asked for any specific relief respecting these concerns, and there is no clear indication that these concerns are related to the Conrail

Transaction (i.e., that the problems were either caused or exacerbated by the Conrail Transaction). Under the circumstances, these concerns would be best addressed in NJDOT's ongoing discussions with CSX and NS.

North Jersey Transportation Planning Authority. NJTPA, the metropolitan planning organization for the region encompassed by New Jersey's 13 northern counties, has made a number of requests as to the two New Jersey SAAs, particularly the North Jersey SAA. Certain aspects of the relief sought by NJTPA are described in its comments, and other aspects are described in a report prepared for NJTPA and NJDOT by the Rutgers University Voorhees Transportation Center.

NJTPA suggests that we revisit the operations of the two SAAs in New Jersey by allowing the SAA operator to be active in promoting and growing rail freight business. But this sort of arrangement would amount to a fundamental restructuring of the SAAs. As noted above (in the discussion of DVRPC's concerns), the role of Conrail as a neutral switcher acting as an impartial agent of its two owners was a critical component of the Conrail Transaction that CSX and NS proposed and that the Board approved. The post-Split Date Conrail was created as a neutral switcher to facilitate direct competition between CSX and NS in the SAAs. NJTPA has not shown any systemic flaw in the structure that was approved in 1998, or any reason to believe that an alternative SAA structure would be better.

NJTPA suggests that we require CSX and NS to establish a New Jersey rail economic development fund, to which the two railroads would be required to contribute \$30 million over the next 5 years. However, CSX, NS, and Conrail have made significant investments in the two New Jersey SAAs, and they have sufficient incentive to continue to do so when these investments make operational and commercial sense. Even assuming that we could impose such a requirement at this time, we see no basis for doing so.

NJTPA also suggests that we require CSX and NS to assure that all of New Jersey's shortlines have access to the North Jersey SAA, and thereby to both NS and CSX, even if they previously had access only to Conrail. The implication in the Rutgers report is that CSX and NS have not complied with agreements with New Jersey shortlines to provide interchanges at negotiated locations and to assure "dual access." However, CSX and NS never pledged that every New Jersey shortline would have such dual access, and the Board never imposed any such requirement.

Finally, NJTPA contends that CSX and NS do not always move rail traffic for destinations in the New Jersey-New York-Connecticut metropolitan region to the "forwardmost" rail terminals in the North Jersey SAA. Rather, NJTPA claims, CSX and NS instead move some such traffic to facilities located on their own lines outside the North Jersey SAA, and then truck it into and/or through the NJTPA region, thereby increasing highway traffic and stunting economic development in the area. NJTPA seems to suggest that we impose a requirement that

CSX and NS move all of their traffic to the “forwardmost” interchange or intermodal terminal location. But the problem cited by NJTPA (the great volume of truck traffic moving into and through Northern New Jersey), while serious, was not created or exacerbated by the Conrail Transaction. Thus, for us to impose such a directive would be an unprecedented intrusion into carrier operational practices, a draconian step that is not supported by the record.

New Jersey Shortline Railroad Association. NJSLRRA presents a generally favorable view of the Conrail Transaction, advising that both the North Jersey and South Jersey/Philadelphia SAAs are operating well at present, with few complaints. NJSLRRA states generally that it would like to see CSX and NS do more to increase business opportunities in the SAAs, and take more trucks off the highways. See Appendix C. CSX and NS respond that they are working closely with NJSLRRA and will continue to do so. See Appendix D.

Pennsylvania Parties: PA Department of Community and Economic Development; and Philadelphia Industrial Development Corporation. The concerns raised by DCED and PIDC relate to compliance by CSX and NS with commitments set forth in two letters (one by CSX, one by NS) dated October 21, 1997. These letters, which were addressed to the Governor of the Commonwealth of Pennsylvania and the Mayor of the City of Philadelphia, set forth certain commitments respecting the Conrail Transaction. The commitments in the two letters were largely (although not entirely) identical. See Appendix C.

DCED and PIDC contend that CSX and NS have not entirely fulfilled all of the commitments set forth in the two letters, and, consequently, have violated the “representations condition” that was imposed on the Conrail Transaction.¹¹ They ask us to continue oversight of the compliance with those commitments until such time as compliance is complete or the parties have resolved this issue through a negotiated settlement. See Appendix C.

CSX and NS maintain that they have complied in good faith with the commitments made in the 1997 letters, and have exceeded those commitments in many respects. DCED and PIDC, on the other hand, contend that CSX and NS have not invested as much money in the specific places the railroads represented they would. However, the record shows that both CSX and NS have made substantial investments in Pennsylvania, including substantial investments in areas not previously anticipated. See the summary, in Appendix D to this decision, of the response by CSX and NS to the comments submitted in this proceeding by DCED and PIDC. Though DCED and PIDC acknowledge that CSX and NS have complied with most of their 1997 commitments, they draw our attention to certain specific commitments that they do not believe have yet been satisfied. We will address those points.

¹¹ See Merger Dec. No. 89, 3 S.T.B. at 387, ordering paragraph 19: “Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision.”

First, the letters stated that each carrier would invest substantial sums on rail-related economic development programs in Philadelphia and across the Commonwealth. The letters stated that CSX would expend a minimum of \$1 million per year over 5 years (a total of \$5 million), while NS would expend a minimum of \$15 million in the same 5-year period. DCED and PIDC claim that neither CSX nor NS has yet satisfied their obligations. But both carriers have invested substantial sums in area infrastructure, and they are continuing to do so. Indeed, DCED and PIDC concede that CSX will have exceeded the \$5 million figure once a complex land sale transaction between CSX and the Philadelphia Regional Port Authority (PRPA), valued at \$4,960,000, takes place. And NS, in cooperation with PIDC, is constructing, at an estimated cost of \$16 million, a new intermodal terminal at the Philadelphia Naval Business Center, to be completed and open for business in 2005. Thus, it does not appear that further oversight is necessary to hold the carriers to these financial commitments they made to Philadelphia and the Commonwealth.

Second, both letters stated that, in exchange for contractual obligations for certain levels of rail business, the carrier would work with the Department of Community and Economic Development and the Governor's Action Team and invest substantial sums on incentive programs to encourage rail-oriented industry to locate in Philadelphia and across the Commonwealth. The letters stated that CSX would expend a minimum of \$2 million per year over 5 years (a total of \$10 million), while NS would expend a minimum of \$25 million in the same 5-year period. DCED and PIDC contend that CSX and NS have not fully funded these commitments. The carriers, for their part, point out that they have provided substantial funding to attract new or expanded businesses along their lines in Pennsylvania (see Appendix D), but the projects have been ones that the carriers have initiated themselves.

We do not regard the letters as imposing unqualified funding requirements on the carriers for projects designated by others. Other conditions set forth in the letters — such as the contractual obligations for levels of traffic — must be met. As DCED and PIDC have not even attempted to show that the contractual obligations for levels of rail business and all of the other preconditions to funding were met, they have not demonstrated noncompliance with the carriers' commitments.

Third, the NS letter discussed particular capital improvement expenditures that the carrier identified in its operating plan filed in support of the application filed in the Conrail Transaction. DCED and PIDC contend that NS has commenced only one of the four capital improvement projects to which it committed: an intermodal facility being constructed for NS by the Delaware River Port Authority. NS acknowledges that it has not undertaken, in Philadelphia, the other three capital improvement projects referenced in the operating plan. NS explains that one of the facilities (a Triple Crown facility) was constructed elsewhere in Pennsylvania, for operational reasons; another project (an automobile facility) has not been undertaken because the business necessary to justify the construction of such a facility has not developed; and the fourth project (an interlocking track connection) has not been undertaken because operational circumstances

have rendered that project unnecessary. NS's letter did not state that NS would build the indicated facilities, come what may, but only that the indicated facilities were included in the operating plan that NS filed with the Board.¹² And as the Board has explained before, the details presented in an operating plan are not carved in stone; an applicant is not required to carry out every project and make every expenditure described in an operating plan.¹³

Finally, both letters indicated that the carriers would maintain employment levels in the Philadelphia area at certain levels. PIDC contends, and the carriers concede, that the projected employment levels have not been met. CSX and NS state that, while their 1997 projections were made in good faith, there are not as many railroad jobs in the Philadelphia area now as they anticipated. We do not read the letters as a carved-in-stone commitment to maintain the specified employment levels in the Philadelphia area. Like other businesses, railroads must be able to seek efficiencies; as economic circumstances change, CSX and NS must be able to make operational and financial adjustments, including adjustments in employment levels.¹⁴ In any event, as CSX and NS point out, while the number of rail jobs in Philadelphia may not be at the projected levels, rail jobs in other areas of Pennsylvania are above projected levels (for instance, at NS's new hub in Harrisburg), and other employment increases within Pennsylvania have been spurred by the railroads' investments (for example, the 1,000 new jobs associated with the railroads' combined \$20 million investment in the Philadelphia Navy Yard). See Appendix D.

Rail Cents Enterprises. RCE, a consulting firm, suggests that there are flaws in the current Conrail structure and suggests that the SAAs be restructured (by giving Conrail its own commercial departments, by dividing Conrail between CSX and NS, or by selling Conrail to an

¹² See CSX/NS-20, Vol. 3B at 68-489 (filed June 23, 1997, in STB Finance Docket No. 33388).

¹³ See Oversight Dec. No. 5, slip op. at 24 (noting that the Maryland Department of Transportation was "not correct in its assessment that the operating plans filed by CSX and NS were 'commitments' to achieve proposed service and infrastructure improvements within 3 years after the implementation date that must be enforced without variation."). See also Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al. [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 16 (STB served Dec. 15, 2000), slip op. at 13 ("[T]here is no requirement that a merger applicant actually make investments in the exact places or at the precise dollar amount that it predicts it will spend in its application.").

¹⁴ See CSX Corp., et al. — Control — Conrail Inc., et al., STB Finance Docket No. 33388, Decision No. 198 (STB served Sept. 19, 2001) (Merger Dec. No. 198), slip op. at 6-7 (the "Hollidaysburg" decision). See also CSX Corp., et al. — Control — Conrail Inc., et al., STB Finance Docket No. 33388, Decision No. 200 (STB served Oct. 4, 2001) (Merger Dec. No. 200), slip op. at 3 (denial of stay in "Hollidaysburg").

independent operator). See Appendix C. But RCE has not shown that we should alter one of the fundamental features of the Conrail Transaction by changing the structure of the SAAs.

Resources Warehousing & Consolidation Services. RWCS operates an intermodal terminal facility on a New York, Susquehanna & Western Railroad line in North Bergen, NJ. It reports that CSX and NS prefer to route traffic via their own terminals and that they discourage the routing of traffic via terminals owned by third parties such as RWCS by refusing to quote rates to RWCS. CSX and NS respond that they never promised, and that no condition imposed by the Board requires them, to utilize their investment in Conrail for the benefit of intermodal terminals owned by third parties. RWCS has made similar complaints at several previous stages of this proceeding. See Merger Dec. No. 89, 3 S.T.B. at 490-91; Oversight Dec. No. 5, slip op. at 113; Oversight Dec. No. 6, slip op. at 19. There continues to be no basis for granting relief to RWCS, which is not a shipper and thus is not entitled to a rate for its own benefit.

The SEDA-COG JRA Parties. The relief requested by the SEDA-COG JRA parties involves six commonly controlled Central Pennsylvania shortlines known as the North Shore Affiliates (here referred to simply as the Affiliates), which connect to, and to a limited extent operate over, lines that NS acquired from Conrail in the Conrail Transaction. SEDA-COG JRA owns the non-NS rail lines over which five of the Affiliates operate. Prior to the Conrail Transaction, the Affiliates, whose own lines were spun off or abandoned by Conrail and/or its predecessors, had, in addition to their connections with Conrail, a physical connection with Canadian Pacific (CP) at Sunbury. Because of a contractual restriction, however, they could only handle traffic routed via Conrail; they could not handle traffic routed via CP. In 1997, in anticipation of the Conrail Transaction, Mr. Richard D. Robey, the owner of the Affiliates, entered into an agreement with NS, which provided that five of the Affiliates would be granted the option to interchange certain traffic with CP at Sunbury.

In 2001, following extended negotiations, the Affiliates and NS entered into a trackage rights agreement (the 2001 TRA) to implement the 1997 agreement. Although the 2001 TRA agreement satisfied the Affiliates, it did not satisfy the SEDA-COG JRA parties. The SEDA-COG JRA parties have raised concerns relating to the 2001 TRA in previous Conrail oversight proceedings. They now ask us to continue oversight, order NS to negotiate with them as if they were “third party beneficiaries” of the 1997 agreement, and direct the parties involved to report at least quarterly on the progress of the private negotiations.

The SEDA-COG JRA parties are not parties to either the 1997 or 2001 agreement. They nevertheless claim to be “third party beneficiaries” of the 1997 agreement and claim a right to enforce that agreement for their own benefit. They point to Merger Dec. No. 89, 3 S.T.B. at 422, where the Board took note of the agreement and observed that NS would be required “to adhere to any representations made to the parties in this case,” id. at 306. See Oversight Dec. No. 10, slip op. at 13.

We reject the suggestion by the SEDA-COG JRA parties that the “representations condition” imposed in Merger Dec. No. 89 somehow entitles them to enforce the 1997 agreement. In the decision concluding the first annual round of this oversight proceeding, the Board addressed the Affiliates/SEDA-COG JRA situation as well as a similar situation involving W&LE and the State of Ohio. (W&LE had not made a specific request for relief, but the State of Ohio had made a specific request for relief on behalf of W&LE.) The Board concluded that, in situations of this sort, the railroad party was the real party in interest, and the state/regional/local government simply provided support for the railroad party in interest. Oversight Dec. No. 5, slip op. at 22. Here, because the representations condition was specifically made applicable to the representations NS made in the 1997 agreement, see Merger Dec. No. 89, 3 S.T.B. at 306, the Affiliates would have a right before us to enforce the 1997 agreement. But the SEDA-COG JRA parties do not have that right, as the representations made in the 1997 agreement were made to Mr. Robey, not to the SEDA-COG JRA parties. Therefore, the representations condition does not grant the SEDA-COG JRA parties the right before us either to enforce the 1997 agreement or to challenge the 2001 agreement.

SMS Rail Service. SMS, a New Jersey shortline that connects to Conrail in the South Jersey-Philadelphia SAA, contends that the promised benefits of the Conrail Transaction have not been realized in South Jersey. SMS offers anecdotal evidence to show that CSX and NS have not been vigorously competitive in this area and have encouraged area industries to relocate to nearby points that only one railroad (CSX or NS) can serve. However, nothing in SMS’s testimony refutes the assertion by CSX and NS that they are working with shortlines in New Jersey to achieve competitive and efficient rail service. And it is clear that rail competition has increased in the South Jersey-Philadelphia SAA as a result of the Conrail Transaction. Indeed, SMS itself now has access to two Class I connections; whereas before the transaction it had access to only one.

State of New York. New York contends that CSX and NS have failed to live up to the expectations set by their original application in the key areas of infrastructure improvements, freight service quality enhancements, expansion of marketing opportunities, and a general commitment to the growth of the New York freight rail transportation system. In the Buffalo region, New York contends that CSX does not employ sufficient personnel and has not made sufficient infrastructure investments. New York also complains that neither CSX nor NS has submitted an investment project for tax relief under New York’s Rail Infrastructure Investment Act, and that both carriers have closed New York-based economic development offices, to the detriment of efforts to promote and market expanded rail freight service in New York. The record indicates, however, that CSX has already made substantial investments in New York, and that NS is working closely with New York officials on infrastructure issues. And, as respects economic development efforts, the record clearly indicates that, regardless of where their offices may be located, both CSX and NS are committed to working with New York on economic development matters.

New York also contends that CSX has not complied with the condition that required CSX to negotiate an agreement allowing the Livonia, Avon & Lakeville Railroad (LAL) to operate across Conrail's Genesee Junction Yard to reach a connection with the Rochester & Southern Railroad (R&S). See Merger Dec. No. 89, 3 S.T.B. at 391 (ordering paragraph 56). The record, however, indicates that CSX entered into the mandated arrangement with LAL and further agreed to maintain the yard in FRA Class 1 condition.

New York also questions NS's efforts in rehabilitating the Portage Bridge, and its plans for the future of the Southern Tier Mainline. While those questions are understandable, they do not appear to relate directly to conditions imposed on the Conrail Transaction, nor do they justify a continuation of oversight.

Finally, New York has expressed concerns about accidents and protective device malfunctions at various grade crossings, particularly at CSX grade crossings in the Rochester area. CSX, however, has advised that it is fully cooperating with an FRA investigation of grade crossing warning systems, and that it is implementing an action plan in Rochester and throughout New York. Under the circumstances, and given FRA's involvement in this matter, we do not think that grade crossing matters, serious as they may be, justify a continuation of oversight.

Union County (New Jersey). Union County claims that the North Jersey SAA has not yet experienced the "rail renaissance" that the Conrail Transaction promised, because of certain "systemic flaws" in the structure of the SAAs. Union County argues that a far-ranging restructuring is needed, and it suggests the transfer to PANYNJ of the SAA facilities located within the PANYNJ service area. However, CSX and NS point out that rail traffic within the North Jersey SAA has grown (see Appendix D), and that CSX and NS have already invested substantial resources in North Jersey and will continue to do so when the investments make sense operationally and commercially. Accordingly, we find no justification for Union County's requests for continued oversight or for the restructuring of the North Jersey SAA.

Other Parties. Mr. Arthur B. Shenefelt, on behalf of two local groups, has expressed concerns about aggregates movements, transportation funding, and a transcontinental railroad. And Mr. William R. Wright, an individual, expressed concerns regarding subsidies to other transportation modes. However, none of these concerns are directly related to the Conrail Transaction, and therefore they provide no basis for extending oversight. Mr. Wright also has expressed anecdotal concerns about the structure of the SAAs, but he has not undercut our conclusion that the SAAs have significantly enhanced the competitive environment in the areas they serve and that they are generally working reasonably well.

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

It is ordered:

1. Cargill's CARG-4 motion for leave to late file its CARG-5 comments is granted, and its CARG-5 comments are accepted for filing and made part of the record in this proceeding. New York's request for leave to late file the prepared statement of Mr. John F. Guinan is granted, and the statement is accepted for filing and made part of the record in this proceeding.

2. The formal oversight process for the Conrail Transaction is concluded and discontinued, as scheduled.

3. All remaining reporting requirements arising out of the main Conrail control proceeding (STB Finance Docket No. 33388) or any of its sub-dockets are discontinued, except for the operational monitoring reporting requirements respecting the Shared Assets Areas. The latter requirements will remain in effect until such time as they are discontinued by the Director of the Board's Office of Compliance and Enforcement.

4. The requests for clarification are granted to the extent discussed in this decision. In all other respects, the requests for relief made by the parties to this proceeding are disposed of as indicated in this decision. Any such request that has not been specifically granted is denied.

5. This decision is effective [30 days after date of service].

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

Vernon A. Williams
Secretary

APPENDIX A: CSX, NS, and CONRAIL

CSX. CSX contends that the Conrail Transaction has been implemented successfully. There is, CSX maintains, no need for further oversight.

The Conrail Transaction. (1) CSX states that the Conrail Transaction enabled it to extend its market reach into the Northeast and enhanced its market reach in the Midwest. CSX explains that its new capacity in the Northeast and its enhanced capacity in the Midwest has been pivotal to an important element of CSX's competitive strategy: increased modal conversions, moving traffic from trucks and barges over to rail. As respects the truck side of modal conversion, CSX notes that intermodal traffic will continue to be its biggest growth market for the foreseeable future. CSX adds that the Conrail Transaction has also enabled CSX to reach new markets with new services (CSX cites: municipal solid waste movements from the Northeast to underutilized landfills in the South; TRANSFLO, CSX's integrated provider of logistics management, distribution services, and bulk transloading; and ExpressLane, a CSX/Union Pacific service that moves fruits, vegetables, and other time-sensitive items across the country in temperature-controlled boxcars).

(2) CSX states that the Conrail Transaction enabled CSX and NS to bring balanced rail competition to the East. Such competition, CSX explains, benefits the region as a whole, not just those who see direct rail-to-rail competition (CSX notes, by way of example, that if a retailer seeks to locate a warehouse in the region, the presence of two competitive Class I railroads widens the retailer's options). And, CSX adds, the operational cooperation between CSX and NS in the SAAs has been replicated in other areas (CSX cites, by way of example, the operating agreement it worked out with NS with respect to Conrail's former Monongahela Railroad properties).

(3) CSX states that the Conrail Transaction enabled CSX to increase the efficiency of its railroad operations. CSX explains that the new single-line service made possible by the elimination of interchanges between CSX and Conrail has resulted in reduced costs and reduced transit times, and the development of more direct routes has resulted in increased commercial opportunities for many shippers. CSX also explains that the expansion of its network and the development of more direct routes have made CSX competitive with trucks in the intermodal, TRANSFLO, waste products, produce, and many other markets. And, CSX adds, gateway optimization projects made possible by the Conrail Transaction have enabled CSX to improve its car handlings, by reducing handlings between CSX and its western connections.

(4) CSX states that, to implement the Conrail Transaction, it has made significant capital investments to improve its infrastructure, investing almost \$800 million to integrate its Conrail assets into CSX's own pre-Conrail system. CSX explains that this money was spent on the construction and upgrading of mainline tracks, the construction of connection tracks and sidings, the installation of new signaling systems and control systems, and the expansion and upgrade of

many yards and intermodal facilities. CSX notes that, in the SAAs in particular, CSX and NS have invested \$75 million from 2000 through 2003 to maintain, enhance, and upgrade the shared infrastructure.

(5) CSX states that the Conrail Transaction has allowed CSX to shift traffic from other modes to CSX's railroad, which contributes significantly to the relief of congested highways and diminished air pollution emissions. CSX explains that, as it predicted, the Conrail Transaction has indeed moved traffic from trucks to rail. CSX cites its Load Board initiative as one innovative way to achieve this diversion (CSX explains that Load Board, which allows CSX Intermodal to provide capacity in the spot market for brokered freight, involves on-line bidding to carry freight otherwise destined for truck transport).

Anticipated Investments. CSX contends that, given the competitive market it is in, it will continue to invest in capital infrastructure, improved efficiency, and new products. CSX explains: that it will continue to invest in improved capacity, locomotives, terminals, and line of road; that it will continue to invest in the development of Internet-based customer service tools; that it will continue to invest in new products that allow CSX to reach beyond its track network, such as TRANSFLO and Intermodal; and that it will continue to invest in environmental improvements (CSX cites the development of an innovative system that cuts down on locomotive idling time, thus improving CSX's fuel efficiency and reducing air pollution).

End of Oversight. CSX contends that the Board's 5-year oversight period has achieved its objectives, and that additional oversight is unnecessary. The ordinary authority of the Board, CSX maintains, is more than sufficient to ensure that the public good continues to be served.

Norfolk Southern. NS contends that the Conrail Transaction has been a success. The time has come, NS believes, to end oversight.

The Conrail Transaction. NS states that, as anticipated, the Conrail Transaction resulted in a pro-competitive restructuring of rail service throughout much of the Eastern United States. NS cites, in this respect, the new competition that was created in the three SAAs (this aspect of the transaction, NS notes, brought direct two-carrier, competitive service to shippers in important population and industrial centers) and also in the Monongahela coal fields in Pennsylvania and West Virginia.

The Conrail Transaction, NS explains: greatly expanded the single-line reach of NS and CSX in the Eastern United States; brought new two-carrier service to the SAAs and the Monongahela coal fields; and resulted in two competitively balanced rail systems serving the Eastern United States. NS and CSX, NS reports, are now engaged in strong and vigorous competition not only with each other, but also with other modes of transportation, particularly trucks, a factor that, though important even at the outset, has become much more important due to increasing highway congestion. And, NS adds, the Conrail Transaction has led to

improvements at NS in safety, service, and competition (NS cites: the Safety Integration Plans prepared by NS and CSX; the “best ever” service metrics on NS; and the vigorous new rail-to-rail competition that now exists throughout the former Conrail territory). NS advises that the expanded reach of the NS system and the new rail-to-rail competition brought about by the Conrail Transaction has allowed NS to achieve a variety of noteworthy results in addition to the overall improvement in its service metrics (NS cites: an increase of 230,000 intermodal units handled by NS from 2000 to 2003; an increase in rail traffic in the SAAs of almost 10% over that same period; a steady increase in the number of carloads interchanged with NS’s short line partners in the SAAs from 9,521 in 2000 to 12,228 in 2003; a record number of NS coal trains moved in the Monongahela Valley in February and March 2004; an increase in NS’s north-south intermodal traffic through Hagerstown, MD, from just over 30,000 units in 2000 to 90,000 units in 2003; and an explosive growth of intermodal traffic into and out of the Ohio Valley).

NS emphasizes the importance of understanding that its business has changed in major respects since the Conrail Transaction was approved. NS explains that the economy today is very different from the economy in 1998, and that, because NS’s traffic base has diversified as a result of the Conrail Transaction, NS today has greater flexibility to respond to economic and market changes than it had before the transaction.

Capital Investments. NS notes that, over the last four years, it has made very substantial capital investments in the former Conrail territory. Major projects have included: new intermodal facilities in Rutherford, PA, Maple Heights, OH, and at the former Navy base in Philadelphia, PA; an expansion of NS’s yard in Croxton, NJ; major improvements in coal lines and facilities on the former Monongahela Railroad in central Pennsylvania; other major improvements in NS’s yards at Enola, PA, and in Buffalo, NY; an increase in the weight limits on lines on the Delmarva Peninsula from 263,000 pounds to 286,000 pounds; and a major reconfiguration of NS’s track structure through Cleveland. And, NS adds, it has spent, over the last four years, almost \$95 million annually on program rail, tie and ballast program work on former Conrail lines, and, this year, NS has budgeted an additional \$110 million in those areas.

Present Issues. NS contends that, for the most part, the issues raised by various parties have been the kinds of issues that arise routinely between railroads and their customers. They are, NS advises, concerns about service or problems affecting a particular locality, and, though they are important to the parties, they are not really causally related to the transaction. And, NS adds, they are the kinds of issues that carriers and their customers can, and routinely do, resolve in the normal course of business without the need for Board intervention or oversight.

End of Oversight. NS contends that, because the conditions the Board imposed on the Conrail Transaction have worked as intended and the transaction has not resulted in any major competitive issues, formal oversight should terminate as scheduled and should not be extended. No party, NS argues, has demonstrated any issues that warrant extending the formal oversight period beyond its 5-year term. NS adds that, even without formal oversight proceedings, the

Board retains jurisdiction to address any major problems related to the transaction that might arise in the future.

Conrail. The Conrail Shared Assets Operations (CSAO) — i.e., the post-Split Date operations conducted by CRC within the SAAs — were the focus of testimony submitted by Conrail's representatives at the public hearing held in Trenton, NJ, on April 2, 2004. Conrail maintains that, by virtually every measure, the SAAs have been a success.

Conrail advises: that CSAO involves 3 major classification yards (Oak Island in the North Jersey SAA, Pavonia in the South Jersey-Philadelphia SAA, and North Yard in the Detroit SAA), 25 support yards, 1,200 miles of track, 100 locomotives, and 1,350 employees; that, despite challenging economic conditions, CSAO has experienced substantial traffic growth (from 2000, the first full post-Split Date year, to 2003, the last full year for which statistics are available, carloads increased from 429,000 to 457,000 in the North Jersey SAA, from 163,000 to 175,000 in the South Jersey-Philadelphia SAA, and from 213,000 to 250,000 in the Detroit SAA); and that, as projected, CSAO has experienced a rapid growth in intermodal traffic (from 2000 to 2003, intermodal carloads increased from 272,000 carloads to 342,000 carloads). Conrail also advises that, since 2000, CSAO has delivered solid operating results as respects safety (CSAO has reduced reportable injuries by 13%, and it has reduced derailments by 30%), as respects service (CSAO has improved on-time train departures by 56%, it has maintained 90+% performance in customer switching service, and it has reduced yard dwell hours by 19%), and as respects efficiency (CSAO has enhanced locomotive fleet efficiency by 30%, it has improved crew efficiency by 4%, and it has reduced cost per car handled by 20%).

Conrail notes that, to maintain, enhance, and upgrade the Shared Assets infrastructure, CSAO has invested, in the 2000-2003 period, \$75 million (of which \$40 million was invested in track, \$15.3 million was invested in equipment and facilities, and \$15.1 million was invested in crossing protection and train control). Conrail also notes that CSAO coordinates an active industrial development function with CSX and NS (new side track applications, Conrail reports, have increased 30% since 2000). As respects short lines, Conrail advises: that CSAO meets regularly with CSX and NS to address short line initiatives; that, since the Split Date, CSAO has processed approximately 20 such initiatives, including sales, new short line startups, and enhancement of existing short line arrangements; that the great majority of short line initiatives have been implemented favorably; and that CSAO remains open to new initiatives.

APPENDIX B: GENERALLY SUPPORTIVE PARTIES

Anacostia & Pacific Corporation. Anacostia & Pacific, a short line development and management firm, has three short line affiliates that formerly connected with Conrail and that now connect with CSX and/or NS: the Chicago, SouthShore and South Bend Railroad Company, which connected with Conrail and now connects with CSX and NS; the Louisville & Indiana Railroad Company, a former Conrail line that connects with CSX and NS; and the New York & Atlantic Railway (formerly the freight franchise of the Long Island Railroad on Long Island, NY), which connects directly with CSX and Canadian Pacific (CP) and indirectly with NS. Anacostia & Pacific reports that, although post-Split Date service was marked by a lot of disruption, service has since improved substantially, and is now better in most lanes than it was prior to the Split Date. Anacostia & Pacific advises: that it has had a number of successes working with CSX and NS in developing new business on many routes; that both CSX and NS are committed to short lines (both CSX and NS recognize, Anacostia & Pacific emphasizes, that short lines are critical to their continued growth); and that the SAA has been a useful concept that has brought competition. Anacostia & Pacific further advises that it has also benefitted from CP's east-of-the-Hudson access to Long Island. And, Anacostia & Pacific adds, although it has concerns going forward (such concerns are related to capacity, and to reports of recent service deterioration in the East and the West), it is upbeat about the prospects of working with CSX and NS to increase market share.

A & R Bulk-Pac. A & R, a contract packager handling plastics and other dry bulk materials at its facility in Elizabeth, NJ (in the North Jersey SAA), reports that, in terms of service, economic balance, and competition, its customers have been well served by the Conrail Transaction. Prior to the Split Date, A & R advises, its customers were locked into a single rail provider, which had an outdated system with limited equipment and resources, resulting in an inability to provide timely service. A & R notes, however, that, after the Split Date, there has been an improvement in service, a revamping of service techniques, aggressive funding, and new competition (which, A & R points out, created a choice for its customers, and created an incentive for its customers to route traffic via A & R because of the favorable competition for their business). And, A & R adds, the development of business and the creative thinking and action that have been displayed both by CSX and by NS have been quite noticeable (A & R indicates, by way of illustration, that it is in frequent contact with the chemical marketing groups of CSX and NS, which are always encouraging open dialogue with A & R about prospective customers, various concepts, and other ways to attract new business).

CONSOL Energy. CONSOL, which ships a substantial volume of coal from mines accessed by Conrail's "MGA" (Monongahela Railroad) lines, advises that the Conrail Transaction has had a positive impact on CONSOL's ability to be competitive in the marketplace and to serve the needs of its customers. CONSOL explains that its MGA operations, which prior to the Conrail Transaction had only single-carrier access to Conrail, now have competitive service from both CSX and NS. This competitive service, CONSOL reports, has resulted in an

expansion of the markets for CONSOL's MGA operations and in an improvement in CONSOL's rail rate alternatives. And, CONSOL adds, it has also seen a willingness on the part of both carriers to make investments to improve the service to CONSOL's operations.

Hub Group. Hub Group, a non-asset based freight transportation company providing comprehensive intermodal, truckload, LTL, railcar, airfreight and related logistics and distribution services, advises that, in its view, the Conrail Transaction has been a success. Hub Group explains that improved single-line service between northeast and southeast markets has been beneficial to its customers, that there have been significant service improvements over time, and that new markets have been and will continue to be opened through increased intermodal capabilities.

Intermodal Association of North America. IANA, which represents the combined interests of 500+ intermodal freight transportation companies (including railroads, intermodal drayage and highway motor carriers, intermodal marketing companies, ocean carriers, and industry equipment and service suppliers), advises that the division of Conrail's routes, especially those into the Northeast, has been a contributory factor in the growth of intermodalism over the past five years. And, IANA claims: the actual operational implementation of the transaction was completed years ago; IANA's members have not raised any post-Split Date transaction-related issues; and the Board's oversight of the Conrail Transaction has been a success. IANA advises that, now that the 5-year oversight period is coming to an end, there is no reason to continue regulatory monitoring of the transaction and no need to extend the 5-year oversight period.

Kinder Morgan Liquids Terminals. Kinder Morgan operates a number of rail-served chemical storage facilities. Three of these facilities — at Carteret, NJ, and at Perth Amboy, NJ (both in the North Jersey SAA), and at Philadelphia, PA (in the South Jersey-Philadelphia SAA) — have been directly affected by the Conrail Transaction. Kinder Morgan reports that, since the Split Date, its rail car activity has steadily increased as a result of the Conrail Transaction, and it has experienced improved service, a renewed focus on customer satisfaction, and more responsive pricing to support rail activity versus other modes. Kinder Morgan advises: that tank car shipments are on the rise, and Kinder Morgan's chemical business in the region has continued to grow; that Conrail has responded to Kinder Morgan's growth by expanding its operating hours, and by bringing in more rail cars per shift; that, furthermore, Conrail has assisted in identifying bottlenecks within Kinder Morgan's terminals to improve the operating efficiency of these terminals; and that, in addition, there has been a reduction of rail car backlogs along New Jersey's chemical corridor, which has made the overall experience of Kinder Morgan's customers much more satisfactory. And, Kinder Morgan adds, rail management has had a good focus on safety and customer service, and rail yards are being managed much more proactively with regards to cars that are awaiting access to Kinder Morgan's facilities, allowing for an effective and efficient flow of cars in and out of Kinder Morgan's terminals.

Madison International Sales Company. Madison, which is located at the Penn Warehouse facility in the South Jersey-Philadelphia SAA, reports that the Shared Assets concept has provided a great opportunity for competition. Madison explains that three railroads (CSX, NS, and Canadian Pacific) service the Penn Warehouse facility, and it indicates that the SAA has proved to be a valuable resource. Madison adds that the SAA concept would work even better if a few glitches were ironed out (Madison suggests that its SAA would work better if it were treated as a reciprocal switching area, as opposed to a shared assets area).

Mars Industries. Mars Industries, a scrap recycling company located in Detroit, MI, advises that the majority of its business is handled by Conrail, which (Mars Industries reports) has done an increasingly better job since the Split Date. Conrail, Mars Industries advises, gives Mars Industries the ability to ship via CSX as well as via NS, and therefore allows Mars Industries to reach more markets, and, in situations in which both railroads serve a customer, Conrail fosters CSX vs. NS competition that is good both for the shipper and for the consumer. And, Mars Industries adds, because Conrail is operated locally in the Detroit SAA, problems that arise can be handled on a day-to-day basis on the local level.

National Industrial Transportation League. NITL contends that the SAAs are a true success story for rail competition and a model for future rail policy; the establishment of the SAAs, NITL advises, was a crucial element of the Conrail Transaction because it provided for vigorous rail competition for shippers within the three SAAs. NITL states that, although it believes that vigorous rail competition within the SAAs must remain an enduring legacy of the Conrail Transaction and a priority for CSX, NS, and the Board, it also supports innovative private sector initiatives to foster efficiencies and enhance competition within the SAAs. NITL contends, however: that any operational modifications should be implemented in a way that is transparent to the shippers that will be affected; that CSX and NS should provide substantial notice to shippers, thus allowing shippers to make any necessary changes of their own; and that efficiencies achieved by CSX and NS should result in better service and competitive rates.

Novolog Bucks County. Novolog, which operates a steel distribution facility in Fairless Hills, PA, advises that it has had a good experience with the South Jersey-Philadelphia SAA. Its customers, Novolog reports, have enjoyed the benefits of the CSX vs. NS competition that was made possible by the Shared Assets concept. Novolog maintains that, as respects its Fairless Hills facility, the South Jersey-Philadelphia SAA has been a success story.

Ohio Central Railroad. Ohio Central, which operates 10 short lines (8 in Ohio and 2 in Pennsylvania), contends that the time has come to end the Board's oversight of the Conrail Transaction. Both CSX and NS, Ohio Central reports, have worked to develop their short line relationships, which is why (Ohio Central adds) Ohio Central has been able to chart 6% to 7% annual growth rate on virtually all of its railroads. Such growth, Ohio Central explains, reflects its ability to offer its customers a two-railroad haul, with an Ohio Central short line as the terminator and/or originator and with the Class I as the railroad with the longer reach.

Oversight, Ohio Central maintains, has served its purpose, and, in any event, the Board always has the opportunity to act if other issues arise.

Pinsly Railroad Company. Pinsly reports that the acquisition of Conrail's New England lines by CSX has been a success. CSX's pricing, Pinsly adds, has been much more competitive than Conrail's.

Port Authority of New York and New Jersey. PANYNJ is an agency of the States of New York and New Jersey that is charged with the protection of the commerce of the New York-New Jersey Port District, a more-or-less circle-shaped area that encompasses the portions of New York and New Jersey that lie within a roughly 25-nautical mile radius of the Statue of Liberty. The Port District, PANYNJ notes, includes virtually all of the North Jersey SAA.

Capital Expansion Within the Port District. PANYNJ advises that a great port cannot be operated efficiently unless export/import traffic can move freely from/to terminal facilities. The New York-New Jersey region, PANYNJ explains, is particularly challenged in this regard because of its large population and relatively constricted geographical area. Highway congestion, with its resulting economic and environmental consequences, is a constant problem. PANYNJ adds: that, recognizing the expansion of export/import traffic, with the corresponding highway congestion attendant thereto, PANYNJ, beginning in the early 1990s, began to invest in the expansion of its rail transportation capacity; that the results have been remarkable (the Port's on-dock rail volume has increased from approximately 50,000 rail containers in 1993 to nearly 233,000 in 2003, and, during the 1993 to 2003 period, the Port has handled approximately 1.6 million on-dock rail containers); that, however, such rail volumes could not have been achieved without substantial PANYNJ investment in rail and terminal facilities; and that the even greater rail volumes anticipated for future years will require an even greater investment moving forward (PANYNJ notes that its plans call for the investment of \$438 million between 2002 and 2009 to improve and expand intermodal rail capacity at facilities served by CSX, NS, and Conrail).

Capital Expansion Beyond the Port District. PANYNJ notes that, because its governing statute bars it from making capital investments in projects outside the Port District, it is wholly dependent upon the carriers and others to maintain the efficiency of the inland rail transportation network that lies beyond that District. PANYNJ advises that it must therefore look to the Board to be vigilant in protecting PANYNJ's strategic investments within the Port District, and PANYNJ adds that it also looks to the Board to encourage the railroads to provide timely and reliable service to consumers and businesses in the Port District so that PANYNJ may maximize the return on the rail infrastructure investments made by PANYNJ and its regional partners.

PANYNJ/Carrier Cooperation. It would be, PANYNJ notes, highly imprudent to make plans and expend monies on rail infrastructure investment without the constant cooperation of the rail carriers that will operate over the connections and yards provided and serve the on-dock

terminal facilities constructed. And the carriers, PANYNJ adds, would be ill-advised to tailor their operations, or to make investments within the Port District (particularly when dealing with intermodal traffic), without consulting with PANYNJ. PANYNJ advises that, to this point, all of the involved parties have operated in their own best interests by cooperating and coordinating their activities within the North Jersey SAA. PANYNJ further advises, that, although it assumes that this cooperation and coordination will likely continue into the foreseeable future, events may nullify this assumption. PANYNJ explains that the competitive picture might be dramatically changed, and PANYNJ might be required to seek (either in the general oversight proceeding or in the original control proceeding) the intervention of the Board to protect the commerce of the Port District, if, for example, one or both of the major carriers were to merge with or be acquired by another carrier, or were to adopt a different management philosophy.

The Conrail Transaction. PANYNJ notes that, in the years prior to the Conrail Transaction, PANYNJ consistently sought a second major carrier to serve the Port District and the New York-New Jersey region. In those years, PANYNJ advises, the Port of New York-New Jersey, as the largest port in the nation served by a single rail carrier, was at a serious disadvantage versus competing ports, and the New York-New Jersey region, the largest in the nation served by a single rail carrier, was also at a substantial disadvantage. The acquisition of Conrail by CSX and NS, PANYNJ reports, provided for the intramodal competition at the Port and in the region that had been lacking for so long. And, PANYNJ advises, the head-to-head competition between CSX and NS made possible by the Conrail Transaction has resulted in significant innovation and growth in the Port's rail traffic.

Trouble in the West. PANYNJ advises that it is concerned by recent press reports of trouble brewing on the Union Pacific. PANYNJ warns that, to the extent such operational problems spread to the East as they did during the post Union Pacific-Southern Pacific merger period, the welfare of the Port's rail operation could be prejudiced. PANYNJ indicates, however, that it trusts that the Board will continue active oversight of the rail network, not merely with respect to the Conrail acquisition, but with respect to the entire network. And, PANYNJ adds, to the extent that further Board actions become necessary to prevent service disruptions that threaten to slow traffic growth through the Port of New York-New Jersey and to slow economic growth generally, PANYNJ trusts that the Board will be quick to take such actions.

Neutrality as Respects Continuation of General Oversight. PANYNJ advises that, given the cooperation between PANYNJ and the carriers, and given PANYNJ's right to petition to reopen the underlying docket (i.e., the original STB Finance Docket No. 33388 control proceeding docket), PANYNJ neither supports nor opposes termination of the general oversight proceeding.

Port of Wilmington, Delaware. The Port of Wilmington advises that it has benefitted from the Conrail Transaction and supports the planned termination of the general oversight

proceeding. The Port explains that it is better off because of the transaction; the reach of single-line service from the Port is far more extensive than was the case prior to the transaction, and service has improved. And, the Port adds, there is no need for further oversight of the transaction. The transaction, the Port believes, is fully implemented, and, if future problems develop, these can be brought to the attention of the Board.

PPL EnergyPlus. Each year, PPL burns several million tons of bituminous coal at its three coal-fired generating stations in Pennsylvania. Much of this coal is sourced from mines accessed by Conrail's "MGA" (Monongahela Railroad) lines in western Pennsylvania and northern West Virginia. PPL reports: that, given the large volumes of coal originating at these mines, quality rail service, day in and day out, is an absolute necessity (PPL advises that, without such service, the origin mines would have to start and stop operations, which would have a significant negative effect on production and cost); that, in PPL's experience, both CSX and NS have done a good job to ensure that adequate locomotive power, equipment, and manpower are available to meet the ever growing demand for bituminous coal from the MGA region; that rail service today is consistent and predictable, and both CSX and NS have worked hard to overcome the problems that occurred in the early days of the Conrail split; and that, all things considered, PPL has been satisfied with the rail service it has received. PPL also reports that dual access by CSX and NS to the MGA mines has worked well, and, as a result of dual access, coal from MGA mines has found new markets in generating stations in the Southeast U.S. And, PPL adds, it is also satisfied with the services provided by CSX and NS from origins other than the MGA mines (PPL purchases coal from West Virginia mines served by CSX, and from mines in West Virginia, Virginia, Kentucky, and Central Pennsylvania served by NS), and, overall, it is satisfied with the current transportation contracts with both CSX and NS.

Rail Management Corporation. Rail Management, which owns and operates 14 short line railroads (10 of which connect with CSX), urges the termination of the Board's oversight of the Conrail Transaction. Rail Management explains (with particular reference to CSX) that the CSX/Conrail consolidation is effectively in place, it is working well, the new single-line service is reliable and consistent, and the consolidation has been beneficial to Rail Management's railroads and their customers.

Savage Services Corporation. Savage, which operates a number of Eastern U.S. transload facilities (including several such facilities in or affected by the Shared Assets Areas), advises that its experience with the Conrail Transaction and the related expanded single-line service has been very positive and has allowed Savage to expand and grow its service offerings into areas that otherwise would not have been possible. Savage further advises that it is very much in support of the Board's decision regarding the Conrail acquisition and would support a decision to end formal oversight.

Southern Railroad Company of New Jersey. SRCNJ, which handles only merchandise traffic (and not intermodal freight), reports that its experience with the SAAs has been positive.

SRCNJ explains that, while it still has the benefit of good Conrail local service (which it had even prior to the Split Date), it now also has two Class I carriers competing for its business for traffic moving through the western gateways. And, SRCNJ adds, it has something else it did not have prior to the Split Date: a single-line Class I route from the Virginias to the Carolinas, which allows SRCNJ to secure this relatively short haul business with market competitive rates.

State of Maryland. The State of Maryland advises that, in 1997, it executed, with both CSX and NS, letter agreements that included commitments from both companies as to the actions they would take to preserve and improve rail service in the State following implementation of the Conrail Transaction. The State of Maryland further advises that it is pleased to report that representatives of both CSX and NS continue to work with the State to implement the commitments they made in order to secure the State's support for the transaction. The State of Maryland adds that, although the story is not over (because economic factors and other matters have prevented the railroads from implementing all of the actions described in the 1997 letters within the time frames described), the State will continue to work with CSX and NS to fulfill the obligations under the letter agreements.

State of Michigan. The State of Michigan advises that, on account of improved transportation options for area shippers, rail traffic has grown significantly in the Detroit SAA since 2000 (overall traffic, the State notes, has reportedly grown by 17%, and intermodal traffic by 55%). The State further advises that CSX and NS are working with the State to address intermodal terminal capacity and service issues, and have executed a public/private funding partnership with the Michigan Department of Transportation to double intermodal capacity in the Livernois Yard in the Detroit SAA. Michigan's shippers, the State concludes, appear to have been well served by the acquisition of Conrail and the establishment of the Detroit SAA.

United Transportation Union. UTU reports that it has had a generally positive experience respecting the integration of Conrail lines into CSX and NS. Indeed, UTU adds, it would recommend that CSX and NS give consideration to creating more SAAs.

Virginia Port Authority (The Port of Virginia). The Port of Virginia advises that the Conrail Transaction has been beneficial to ports, the shipper community, and U.S. consumers, and it adds that it supports the planned termination of the general oversight proceeding. The Port explains that, since the Split Date, its rail volume has increased 44%, and, although NS has retained its dominant role at the Port, there has been more competition, with CSX now serving 9 Midwest origins/destinations as compared to just one in 1999. The Port further advises that this added competition, as well as the competition that has been created in the New York market, has resulted in better service and lower prices to shippers moving their cargo via rail. The Port views the Conrail Transaction as having now been fully implemented.

Wheeling & Lake Erie Railway Company. W&LE was scheduled to speak at the public hearing held May 3, 2004. W&LE did not speak, however, because (as NS advised the

Board at the hearing) W&LE and NS were able to reach a tentative resolution of the various issues between these two railroads.¹⁵

¹⁵ That tentative resolution was later finalized. See CSX Corp. et al. — Control — Conrail Inc. et al. [Petition to Approve Settlement Agreement and Exempt Embraced Transactions], STB Finance Docket No. 33388 (Sub-No. 95) (joint petition filed Aug. 6, 2004, by NS and W&LE).

APPENDIX C: PARTIES SEEKING RELIEF

U.S. Department of Transportation. DOT notes that, although complaints about applicants' compliance with the conditions imposed on the Conrail Transaction have diminished over the years, such complaints are still being made. DOT states that complaints of this nature have often focused on alleged non-compliance with one condition in particular: the condition that requires applicants to "adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision." Merger Dec. No. 89, 3 S.T.B. at 387 (ordering paragraph 19). DOT adds that, in recent years, most parties claiming noncompliance with this condition have not sought specific relief from the Board, but, instead, have continued to discuss these issues with the applicants, and, therefore, the Board has not taken definitive action regarding the alleged noncompliance. DOT suggests, however, that now, given the scheduled end of the oversight period, the reduced number and volume of complaints, and the interest of finality, the time has come to resolve the remaining issues at the end of formal oversight.

DOT advises that, given the massive nature of the Conrail Transaction, it is not surprising that the applicants made a great many commitments to a great many parties in the course of the control proceeding. DOT states that the Board, by imposing adherence to these commitments as a condition of approval, relied upon those representations to some extent in its consideration of the public interest. DOT adds that, although the declining number of claims from individual parties indicates that the applicants have by and large fulfilled their obligations in this respect, it is also clear that there are still issues. Such issues, DOT advises, encompass both representations made or commitments imposed for the benefit of individual parties, as well as those of a more fundamental nature, such as whether the structure, funding, and decisional processes of Conrail allow it to function as intended in the SAAs.

DOT states that, although the record compiled to date suggests that the Board's conditions have worked overall, the time has come to resolve any lingering questions and to bring about an appropriate conclusion of any pending issues. DOT would have parties identify the specific representations made or other conditions imposed and allegedly unfulfilled, and present the evidence and arguments on which they rely to support their claims. DOT would then give the applicants an opportunity to submit any rebuttal or other response. Then, in DOT's view, once the public hearings have been held, the written pleadings have been submitted, and the Board's decision has been issued, this proceeding should be closed. And, DOT adds, if any serious concerns arise thereafter, the Board has sufficient authority to take appropriate action without regard to the existence of a formal oversight proceeding.

DOT's Reply Comments. In its DOT-8 reply comments (filed July 30, 2004), DOT advises that, in its view, this oversight proceeding has served its purpose of monitoring the period that followed the acquisition and division of Conrail. DOT notes that the record compiled in the fifth annual round of this proceeding indicates that only a relatively few disputes remain

concerning compliance by applicants with the conditions imposed by the Board. DOT takes the view that the Board should resolve these disputes.

Relief Sought by DOT. DOT suggests: that each complaining party, if it has not already done so, should be required to identify the specific commitment(s) or condition(s) that CSX and/or NS have not met; that this should involve references to, if not production of, particular documents or written materials, as well as any specific conditions imposed by the Board; that CSX and NS should have the opportunity to respond with their own evidence and argument; and that the Board should then resolve any remaining disputes, issue a final decision, and end formal oversight.

American Chemistry Council. ACC is a trade association whose member companies represent more than 90% of the productive capacity for basic industrial chemicals in the United States. As respects the Conrail Transaction, ACC reports that safety, the number one concern of its members, has been good, and that although service, which is also important to its members, may not be perfect, ACC does not have sufficient information to say that service is a problem. Furthermore, ACC advises that competition is critical in terms of looking past the five-year oversight period; the creation of new head-to-head railroad competition, ACC maintains, was a crucial feature of the Conrail Transaction. ACC contends that, although there is no need to have perpetual scheduled formal oversight, it is important to clarify that any change in the competitive situation in the SAAs will require review by the Board.

Relief Sought by ACC. ACC asks the Board to clarify that, even after oversight ends, “the Board will have the power to prohibit any SAA change that conflicts with a condition imposed on the Conrail Transaction or that otherwise requires the approval of the Board under the governing statute.” Suppl. Order Dec. No. 2, slip op. at 6. See also Oversight Dec. No. 10, slip op. at 7.

Cargill. Cargill has requested clarification respecting the 2-to-1 status of its soybean processing and refining facility at Sidney, OH.

Cargill’s Sidney Facility; Its 2-to-1 Status; The 2-to-1 Solution Initially Suggested by CSX and NS (Lima-Sidney Trackage Rights, with Switching at Sidney). Cargill’s soybean processing and refining facility at Sidney is located on an east-west CSX line that was formerly a Conrail line. Prior to the Conrail Transaction, Conrail had direct access to the Cargill facility (via the east-west line) and CSX, which had a nearby north-south line, had access via a reciprocal switch for a charge that Cargill claims amounted to “\$205 per car,” see CARG-5 at 2, and that CSX and NS claim amounted to “a \$390 charge being paid by CSX to Conrail for services physically rendered at Sidney,” see CSX/NS-4 at 2 (Cargill has advised that, although the reciprocal switch rate that Conrail charged CSX may have been \$390, Cargill received a rebate from Conrail that rendered the effective switch rate only \$205, see CARG-8 at 5-6). In connection with the Conrail Transaction, CSX acquired the east-west line, which meant that the

Conrail Transaction, if not appropriately conditioned, would have had a “2-to-1” effect vis-à-vis Cargill (i.e., Cargill, which had previously had access to two railroads, would have ended up with access to only one). However, as noted in Merger Dec. No. 89, “in ‘virtually all of the few’ 2-to-1 situations that the division proposed in the primary application would otherwise have entailed, CSX and NS have agreed to provide one another with trackage and/or haulage rights that will permit the continuation of two rail carrier service.” 3 S.T.B. at 231. See also CSX/NS-18 (filed June 23, 1997) at 74-75 (CSX represented that it “will provide trackage or haulage rights that will allow for alternative rail service to facilities that CSX has identified that otherwise would be solely rail-served by CSX as a result of the transaction.”); CSX/NS-18 at 546, 549 (acknowledging that there would be 2-to-1 customers at Sidney, and representing that “NS will serve all ‘2-to-1’ customers at Sidney via a haulage and trackage agreement on CSX from Lima, OH.”). See also CSX/NS-25, Volume 8B (filed June 23, 1997) at 543-50 (granting NS trackage rights, on the north-south line, between Lima and Sidney, a distance of approximately 32.7 miles); CSX/NS-25, Volume 8C (filed June 23, 1997) at 616-39 (providing that CSX will switch cars to/from the Sidney industries, one of which was Cargill, to which NS would have access on account of the Conrail Transaction).

The 2-to-1 Solution Actually Implemented by CSX and NS; The Rate Structure that Prevailed into the Summer of 2002. Because CSX and NS determined, prior to the Split Date, that the Lima-Sidney trackage rights would not allow for a convenient CSX/NS interchange at Sidney, the 2-to-1 solution actually implemented by CSX and NS features a CSX/NS interchange at Marion, OH (located approximately 60 miles east of Sidney on the east-west line), with the traffic handled by CSX between Sidney and Marion. This arrangement, however, entailed considerable circuitry, because, until recently, the CSX/NS interchange at Marion did not involve simply a 60-mile movement from Sidney east to Marion. Rather, it involved an approximately 100-mile movement west to Anderson, IN, and Indianapolis, IN (for classification), and then an approximately 160-mile movement from Anderson/Indianapolis back east to Sidney and then on to Marion. And the movement of cars to Sidney involved the same circuitry, but in the opposite directions. It would be expected, of course, that the 60-mile Sidney-Marion movement, and the 200-mile round trip between Sidney and Indianapolis, would cost more than the short reciprocal switch by which Cargill had accessed CSX prior to the Conrail Transaction. Until the summer of 2002, however, this was not a matter of concern to Cargill, because, from the Split Date through the summer of 2002, Cargill was allowed to access NS at rates that Cargill believed were competitive to those offered by Conrail prior to the Split Date.

The CSX/NS Cost Analysis; Proposed Rate Increase. In its CARG-5 comments (filed August 5, 2002), Cargill advised that it had recently learned that the Marion interchange fee that had been charged by CSX to NS since the Split Date (which fee had been based on an estimated cost of \$200 per car) was only an initial price that was subject to retroactive adjustment once the railroads completed an actual cost analysis. Cargill further advised that it had also recently learned that the actual cost analysis had recently been completed, and that the actual cost of the

Marion interchange had been determined to be over \$600 per car (adjusted annually by the RCAF-U, i.e., the Rail Cost Adjustment Factor unadjusted for productivity change). Cargill added that, as a consequence of this increase (from \$200 per car to over \$600 per car), NS had announced a rate increase of \$450 per railroad-owned car and \$480 per private car on soybean meal from Sidney, effective October 1, 2002.

Status Quo Preserved; The Current Arrangement. Although the CSX switching charges paid by NS increased substantially following the actual cost analysis, NS never implemented the rate increase that had prompted the CARG-5 comments, but, instead, NS preserved the status quo vis-à-vis Cargill by absorbing the higher switching charges. NS and CSX entertained various proposals to resolve Cargill's grievances, and ultimately (as indicated in the CSX/NS-4 Joint Report, filed June 9, 2003) they agreed that, although the CSX/NS interchange would remain at Marion, the June 1, 1999 agreement governing their exchange of cars to/from Cargill's Sidney plant would be amended to provide that compensation for CSX's movement of NS's traffic (which, under the original terms of the agreement, had been calculated based on the actual cost of the movement) would instead be fixed at a flat rate per loaded car for 5 years (subject to the same annual adjustment mechanism under AAR indices as had applied to the cost-based exchange). The precise dollar amount of the agreed-upon flat rate was submitted in a Highly Confidential version of the CSX/NS-4 report, and, to preserve the confidentiality of this figure, the agreed-upon flat rate will be referred to here as the \$X rate.

Cargill's Analysis of the Situation. Cargill notes that CSX and NS have said that they have agreed upon a flat rate (the \$X rate) that CSX will charge NS for CSX's services in hauling Cargill traffic between Sidney and Marion. Cargill concedes that the \$X rate: is less than the \$600 per car cost that the 2002 cost study had concluded was the actual cost of moving Cargill's cars between Sidney and Marion; and is "comparable" to the pre-Split Date \$390 rate charged by Conrail, see CARG-8 at 5. Cargill argues, however, that there is more to this than CSX and NS have let on. Cargill contends, in particular, that, even accounting for annual adjustments, the \$X rate: is greater than the pre-Split Date \$205 rate that was, from Cargill's perspective, the effective rate charged by Conrail; and is greater than the \$200 rate that CSX charged NS for the first several post-Split Date years (i.e., from June 1, 1999, to some time in 2002). And, Cargill further contends, there is reason to fear that the \$X rate may not remain in place, because the \$X rate was arrived at by amending a June 1, 1999 agreement that apparently has a 5-year term.

Cargill is opposed to any arrangement that leaves Cargill less well off than it would have been if NS had accessed Cargill via the arrangement initially contemplated by CSX and NS (i.e., operation by NS by trackage rights on the north-south Lima-Sidney line at a 29¢ per car-mile trackage rights fee, with switching by CSX at Sidney at a reasonable switching charge). The \$X rate, Cargill notes, does not restore the arrangement initially contemplated by CSX and NS. Rather, the \$X rate continues the present arrangement (with the interchange at Marion) that, though it was never approved by the Board, has been in place since the Split Date. Cargill adds that, although it understands that its cars no longer move 100 miles west to Indianapolis before

returning east to Marion, “there still is some back-tracking,” CARG-8 at 4, and, in any event, this operational change is not part of the agreement respecting the \$X rate.

Cargill notes that CSX and NS have explained that they never implemented the original Lima-Sidney arrangement because, “operationally speaking, a transfer of cars between NS and Cargill is a costly and difficult process. Physical access to Sidney by NS involves substantial cost and operational difficulty.” CSX/NS-3 at 2. This is extremely troubling, Cargill maintains, because it indicates that CSX and NS never performed any analysis of the economic or operational feasibility of their original plan to preserve 2-to-1 competition at Sidney prior to including that plan within their application for control of Conrail. The traffic patterns and volumes at Sidney, Cargill advises, have not significantly changed such that the original plan only became unfeasible after the application. It appears, Cargill argues, that, to induce Cargill’s support for, and the Board’s approval of, the Conrail Transaction, CSX and NS presented a plan that, though it looked good on paper, was never realistic.

Cargill contends that, as a consequence of this “misrepresentation,” CARG-8 at 5, Cargill has become a 2-to-1 shipper without a real 2-to-1 remedy. Prior to the Conrail Transaction, Cargill had access to two carriers (Conrail via direct access, and CSX via a reciprocal switch). Now, though Cargill continues, for the present, to have access to two carriers (CSX via direct access, and NS via something in the nature of a reciprocal switch), Cargill’s access to the second carrier (NS) is uncertain. The \$X rate is for a limited 5-year duration, after which it can be changed by CSX. And, of perhaps even greater concern, although the \$X rate has not yet been passed through to Cargill, because, “[f]or the time being, NS has committed to absorb the higher CSX charge in the NS rates to Cargill,” CARG-8 at 6, NS has not committed to absorb these charges even for the 5-year duration of the \$X rate, and, therefore, Cargill could face a higher shipping rate on short notice (i.e. the notice required to increase common carrier rail rates).

Relief Sought by Cargill. Cargill concedes that, as long as NS continues to absorb the excess portion (from Cargill’s perspective) of the \$X rate, Cargill is not harmed. Cargill contends, however, that, to provide Cargill the protection it will need if and when NS ceases to absorb the excess portion of the \$X rate, the Board should clarify: (1) that it retains jurisdiction and will maintain oversight over the 2-to-1 situation at Sidney to remedy any harm to Cargill caused by the failure of CSX and NS to provide a 2-to-1 remedy at Sidney; and (2) that the original 2-to-1 remedy, apparently proposed by CSX and NS without any analysis of its economic or operational feasibility, and approved by the Board, remains available to Cargill, in the event that the economic and operational issues become more favorable. Cargill advises that, with these clarifications, its immediate concerns will be addressed.

Cemex. Cemex, a cement manufacturer, advises that the financial and operational challenges CSX has faced in connection with the Conrail Transaction have caused significant changes in CSX’s management practices which have adversely affected Cemex. CSX service, Cemex reports, has deteriorated; CSX has reduced service to Cemex’s rail-captive plant in

Brooksville, FL, and has made changes for CSX's operational convenience on the routings of Cemex's traffic that have increased transit times and negatively impacted Cemex's private car costs as well as Cemex's overall supply costs; CSX has forced Cemex to truck to its distribution terminals to avoid stock-outs; and CSX has also imposed rate increases every year. Indeed, Cemex adds, CSX, by imposing large rate increases, has essentially "demarketed" at least two of Cemex's major traffic lanes. Cemex contends that, as a rail-dependent shipper, it has been compelled to pay, and continues to be compelled to pay, for CSX's part of the Conrail Transaction. The rate increases imposed by CSX, Cemex explains, were above the inflation rate, thus demonstrating, according to Cemex, that the increases were not market-based and that CSX was taking advantage of it.

Relief Sought by Cemex. Cemex recommends the extension of the general oversight proceeding beyond the original 5-year term and further recommends that oversight be expanded beyond the SAAs as the repercussions of CSX's overpayment for its portion of Conrail continue to be felt throughout the CSX rail system. Cemex further recommends that the Board take actions to reduce what it considers to be abusive operational and commercial practices by CSX. And, Cemex adds, it would hope that the Board would soon be in a position to create a procedure for small rate cases that would allow shippers such as Cemex to contest rate matters via an arbitration process.

DaimlerChrysler. DaimlerChrysler reports that, in the past year, it has experienced significant operational delays in the SAAs, particularly as respects train service into and out of the North Jersey SAA and railcar assignment and allocation in the Detroit SAA. DaimlerChrysler adds that the greater concern is that operational and customer service levels may not be of a temporary nature, and that certain commodities may be unfairly impacted by network capacity constraints.

Relief Sought by DaimlerChrysler. DaimlerChrysler therefore recommends the extension of the general oversight proceeding beyond the initial 5-year term, at least through the next period of sustained strong level of rail activity in the SAAs, in order to provide a public forum to more clearly and openly address shipper concerns.

Delaware Valley Regional Planning Commission. DVRPC is the metropolitan planning organization for the South Jersey-Philadelphia region. DVRPC, which notes that the South Jersey-Philadelphia SAA covers or directly impacts much of the Delaware Valley's rail freight network, advises that it has five local concerns regarding the South Jersey-Philadelphia SAA. (1) *Transaction Commitments.* DVRPC advises that there is uncertainty respecting whether CSX and NS have fulfilled all of their commitments in the areas of economic development, job creation, capital expenditures, passenger rail, and civic-charitable-corporate citizenship. (2) *Projected Benefits.* DVRPC advises that, although the anticipated benefits of the Conrail Transaction were greater competition, better service, reduced rates, and the removal of trucks from the highway, there is uncertainty whether these benefits have been realized in the

SAAs. One view, DVRPC reports, is that the benefits have not occurred in South Jersey and Philadelphia, and that, in fact, the area has been de-emphasized and rail traffic has been diverted by creating intermodal facilities and locating captive shippers outside the SAA.

(3) *Infrastructure Investment.* Rail infrastructure, DVRPC notes, requires continuous investment (DVRPC notes, in particular, that 286,000-pound cars are becoming the industry standard, which may necessitate strengthened tracks and bridges). DVRPC contends that, while the public sector is increasing funding for rail freight, CSX and NS must not let competition prevent them from making improvements that will maintain the viability of the South Jersey-Philadelphia SAA.

(4) *Real Estate Holdings.* DVRPC reports that, within South Jersey and Philadelphia, Conrail possesses extensive land holdings, some of which are not in active use. DVRPC advises that, with the potential to commit some parcels (such as waterfront locations) to redevelopment, local officials desire more cooperation from SAA real estate personnel. (5) *The Future of Conrail.* DVRPC warns that Conrail has no commercial presence in the SAAs, which (DVRPC fears) may stifle new or expanded business. DVRPC contends that, moving forward, greater utilization of the SAAs should be fostered. One possible approach, DVRPC advises, would be to create sales and economic development staff positions at Conrail to attract and develop business in the SAAs.

Relief Sought by DVRPC. DVRPC recommends that the Board undertake a review of the transaction commitments and projected benefits to assure their fulfillment and achievement within the South Jersey-Philadelphia SAA. DVRPC explains that, because these items formed the basis for the initial approval of the Conrail Transaction, they are worthy of review. And, DVRPC adds, it believes that a review will verify the positive strides made by the railroads since 1999, and will also highlight opportunities for additional gains.

Four City Consortium. As noted in Merger Dec. No. 89, because the Four City Consortium (FCC, an association of the Northwestern Indiana Cities of East Chicago, Hammond, Gary, and Whiting) was concerned that the Conrail Transaction would cause significant increases in rail traffic over certain FCC-area rail lines that have numerous rail/highway grade crossings, FCC asked the Board to impose upon the transaction an Alternative Routing Plan that, it claimed, would: accommodate applicants' planned increases in rail traffic; minimize disruptions to applicants' planned post-transaction rail flows; concentrate, to the extent practicable, rail traffic on lines that are grade separated and/or have a lower incidence of rail/highway grade crossings; result in quantifiable cost savings to the public and also to applicants; and greatly mitigate the safety, socioeconomic, and environmental impacts, including environmental justice impacts, that the Conrail Transaction would otherwise have in the Four Cities region. See Merger Dec. No. 89, 3 S.T.B. at 521-522; Oversight Dec. No. 5, slip op. at 45-48.

FCC has now advised that, although it had initially intended to request a 3-year extension of the oversight period, recent developments have led it to believe that such an extension is not necessary. The recent developments cited by FCC were memorialized in two letters, one by

CSX and one by NS. The CSX letter notes the substantial capital investments CSX has made within the Chicago terminal area, including the Four Cities, to facilitate the smooth and expeditious movement of rail traffic, and states: “We look forward to continuing our meetings and discussions, which have been productive for many years without the need for any intervention by the Board. With the passage of time, our reporting and meetings may have become less formal, but they have been no less beneficial. Even with the end of formal oversight, we will continue to meet with the Four Cities to discuss matters affecting our rail operations and facilities in your area. Continuing cooperation will serve the interests of both CSX and the Four Cities.” The NS letter cites NS’s willingness to continue to be engaged, even after the end of formal oversight, in a voluntary, informal, and cooperative process with the Four Cities, and states: “We believe it important to attend meetings with representatives of the Four City Consortium on matters of mutual concern, and to periodically provide information that may be of use in those discussions. We believe the cooperative spirit that now characterizes our relationship can continue to provide important benefits for each of us in the coming years.”

FCC indicates that, based on the willingness of CSX and NS to agree in writing to continue the dialogue that has developed over the past several years, FCC is not now seeking a formal extension of the oversight period. FCC notes, however, that it reserves the right to return to the Board if the present cooperative spirit changes. FCC advises that it expects that the railroads will cooperate with the Four Cities in their continuing efforts to develop a grade-separated Alternative Freight Corridor through the region. FCC also advises that it believes that the Board has an important role to play in encouraging all interested parties to work together to achieve this solution, including the obtaining of necessary federal and other public funding. And, FCC adds, the development of a grade-separated Alternative Freight Corridor would accomplish two important goals: first, it would alleviate, to some extent, the rail/highway grade crossing problems that now exist in the Four Cities region; and, second, it would facilitate redevelopment of the Lake Michigan waterfront, by allowing the railroads to shift traffic away from the waterfront and onto the Alternative Freight Corridor.

Relief Sought by FCC. FCC advises that, although it is not requesting a formal extension of the oversight period, it does request the continued assistance of the Board: in minimizing the impact of CSX’s and NS’s rail operations in the Four Cities region on vehicular traffic that must use the region’s many rail/highway grade crossings; in facilitating the development of an alternative, high-volume, grade-separated corridor through the region; and in encouraging the railroads to move as much of their freight traffic as possible over the corridor when it comes to fruition. The Board, FCC contends, can act behind the scenes as a facilitator of private sector solutions to problems such as those faced by the Four Cities.

GROWMARK. GROWMARK is a federated, regional agricultural cooperative that provides products and services to member cooperatives and retail dealers in the Midwestern and Eastern United States, and in Ontario, Canada. Local member cooperatives and retail dealers, in turn, provide farmers and others with a variety of products and services, including crop inputs,

energy products, feed and animal health products, grain handling systems, lawn care products, and grain marketing services.

GROWMARK notes that, on the Split Date, GROWMARK, which was then primarily active in the Midwest, was largely unaffected by the Conrail Transaction. GROWMARK adds, however, that, in December 2002, it acquired from Agway Agronomy a number of assets, including (as pertinent to this proceeding) Agway's storage facilities located on property leased from Conrail at Pier 122 along the Delaware River in Philadelphia. Conrail, GROWMARK notes, owns Pier 122 and the cranes located there (which are used to unload vessels and barges), and Conrail also owns the tracks that serve Pier 122 and the storage facilities. GROWMARK also notes that Pier 122 and the adjacent property are part of the South Jersey-Philadelphia SAA. And, GROWMARK adds, during the period of Agway's operations and when GROWMARK took over in December 2002, the Pier 122 facilities received urea, phosphates, and ammonium sulphate by barge and vessel, this freight was unloaded by the use of the cranes, and this freight was then shipped outbound by rail.

GROWMARK advises that its experiences at Pier 122 have not been satisfactory. GROWMARK explains: that, in the Spring of 2003, GROWMARK was advised that Conrail was closing Pier 122, and would no longer be able to accept freight at Pier 122, because the cranes were not in compliance with OSHA regulations; that GROWMARK had a vessel enroute, which it was forced to re-route to another port, where the freight was unloaded and then trucked to GROWMARK's storage facilities at Pier 122; that, subsequently, CSX and NS embargoed Pier 122; and that these embargoes are still in effect. GROWMARK further explains that, in the Fall of 2003, with the cranes not yet repaired by Conrail, GROWMARK was again forced to re-route its freight to other ports, where it was unloaded and then shipped to the Pier 122 storage facilities, where it was held until it was shipped out by rail. GROWMARK adds: that, despite the efforts of GROWMARK and other interested parties, Conrail has not repaired the cranes; that Conrail has also denied GROWMARK's claim for the increased shipping and handling costs GROWMARK has incurred; and that, if the cranes are not repaired soon, GROWMARK will continue to have to divert its inbound freight.

GROWMARK argues that the Shared Assets concept is premised on representations made by CSX and NS that Conrail would have sufficient resources to maintain its facilities within the SAAs, and, if necessary, to make capital improvements. GROWMARK contends that, based on its Pier 122 experiences, it would appear that Conrail is neither able nor willing to maintain its SAA facilities, and it would also appear that neither CSX nor NS is able or willing to maintain these facilities. Although embargoes, GROWMARK argues, are meant to be temporary in nature, neither Conrail nor its ultimate parents have given any indication that they intend to repair the cranes and restore service. Indeed, GROWMARK advises, Conrail has in fact notified GROWMARK that the cranes will not be repaired.

There are, GROWMARK believes, a number of possible reasons for Conrail's refusal and/or inability to repair its cranes. One reason suggested by GROWMARK is that the railroads are realizing increased revenues because, without the cranes, GROWMARK's freight must now move in by rail as well as out by rail. A second reason suggested by GROWMARK is that CSX and NS do not want to invest in the Port of Philadelphia, preferring other ports (such as Baltimore and Norfolk) where they were already providing service prior to the Conrail Transaction. A third reason suggested by GROWMARK is that CSX and NS do not want to invest in Conrail facilities because each is afraid that the other will get an advantage.

GROWMARK argues that, whatever the explanation may be, the fact of the matter is that Conrail and its ultimate parents are not maintaining their promises with respect to the South Jersey-Philadelphia SAA in general, or Pier 122 in particular. GROWMARK contends that the problem it is experiencing at Pier 122 raises the question whether the governing structure established for Conrail and the SAAs allows Conrail to be responsive to the needs of its shippers and the facilities that serve them, or whether that structure inherently inhibits such responsiveness.

Relief Sought by GROWMARK. GROWMARK contends that the Board, before it terminates the formal oversight process, should investigate whether Conrail is adequately maintaining its facilities in the South Jersey-Philadelphia SAA, whether CSX and NS are investing in the South Jersey-Philadelphia SAA as required, and whether either CSX or NS is using its veto power to prevent Conrail from performing needed maintenance and making needed repairs within the South Jersey-Philadelphia SAA.

Lackawanna Coalition. The Lackawanna Coalition, an independent not-for-profit corporation with two classes of members (its Principal Members are the counties and municipalities along New Jersey Transit's Morris & Essex and Montclair-Boonton Lines; its Associate Members are individuals concerned with the quality of the rail passenger service offered on these lines), advocates on behalf of the riders who use existing rail lines, and it also supports extensions of rail passenger service to other rail lines. The Lackawanna Coalition notes that it is concerned solely with passenger rail services in its area.

The Lackawanna Coalition contends that we should not look at economic issues concerning CSX and NS in a vacuum. Rather, the Lackawanna Coalition contends, we should look at the broader picture, and, in particular, we should take into consideration not only freight movements but also passenger movements, and not only the actual mileage of the former Conrail lines but also other railroads. Rail lines, the Lackawanna Coalition argues, are an especially vital resource for passenger transportation in the Lackawanna Coalition's region, because the region is so densely populated, its highways are so severely overcrowded, and its rail lines are often so wastefully underutilized. And, the Lackawanna Coalition adds, the public's right of access to transportation from one place to another is far more vital than the saving of a few dollars on shipping costs.

The Lackawanna Coalition advises that it is directly concerned with proposed rail passenger services on the New York & Greenwood Lake Railway Company line (Glen Ridge to Hoboken, in cooperation with New Jersey Transit) and the former Lackawanna Cutoff Line, which, if rebuilt, could provide rail service between Hoboken and Scranton and could connect with other existing tracks to points as far away as Syracuse and Buffalo. The Lackawanna Coalition adds that other projects for new passenger services that have been proposed include Bound Brook to West Trenton, Raritan Valley Line extension to Phillipsburg and Allentown, and an east-west line in Bergen and Passaic Counties on the New York, Susquehanna & Western Railroad. The Lackawanna Coalition warns, however, that, if only the narrow interests of Class I carriers like CSX and NS are considered, eventual restoration of these services becomes less likely than under a regulatory scheme that considers the right of people to travel to be part of the public interest, convenience, and necessity.

The current arrangement, the Lackawanna Coalition argues, is inherently anticompetitive, and the Board should not continue to condone it. The lack of competitiveness in this region, the Lackawanna Coalition explains, negatively impacts the possibility for restoration of rail passenger service between Hoboken and Scranton on the former Lackawanna Cutoff Line. The restoration of passenger service to this line, the Lackawanna Coalition advises, could be facilitated by allowing CP Rail/D&H to operate over the restored Cutoff Line and the Boonton Line, to the New York metropolitan area. The Lackawanna Coalition argues that, since CSX and NS appear to be acting as a single carrier within the Lackawanna Coalition's region of concern, the standard of encouraging two or more Class I railroads to serve a region should be applied by allowing CP Rail/D&H to enter this market. The Lackawanna Coalition claims that funding from a major freight carrier to rebuild the abandoned Cutoff Line and upgrade it to a standard which could support a viable passenger service, could be combined with the funding already pledged by New Jersey Transit and Monroe and Lackawanna Counties in Pennsylvania. And, the Lackawanna Coalition adds, such combined funding could have a synergistic effect in building a much stronger rail line, both technically and in terms of operational capacity, than funding from either the public or private entities alone could provide.

The Lackawanna Coalition argues that, although CSX and NS claim to be competitors in the Lackawanna Coalition's region, their filings in reply to the Lackawanna Coalition's initial filing in this proceeding indicate otherwise. The Lackawanna Coalition explains that, after it filed (in July 2003) objections to certain practices by NS that could lead to increasing difficulty in reinstating passenger service in the Lackawanna Coalition's region, CSX filed (in August 2003) a reply objecting to the Lackawanna Coalition's complaints about NS. The Lackawanna Coalition contends that the very fact that CSX objected to the Lackawanna Coalition's complaints about CSX's purported competitor shows that the relationship between CSX and NS is not competitive but collusive, at least in the Lackawanna Coalition's region of New Jersey. It makes no sense, the Lackawanna Coalition argues, that any reasonable firm, especially in an oligopolistic industry, would complain that a third party objects to the practices of the firm's competitor. The comments by CSX in its August 2003 filing, the Lackawanna

Coalition maintains, indicate sufficient anticompetitive motive that the Board should keep this proceeding open, with an eye toward eventually forcing the establishment of a truly competitive situation in which at least two Class I railroads serve the Lackawanna Coalition's area.

The Lackawanna Coalition advises that it is also concerned with the recent practices of NS on the Lower Boonton Line, in the area of Bloomfield and Glen Ridge. The Lackawanna Coalition explains: that the New York & Greenwood Lake Railway Company has proposed operating a passenger shuttle service between Hoboken and Benson Street Station in Glen Ridge, in cooperation with New Jersey Transit; that the Lackawanna Coalition has supported this proposal; that NS, however, has torn up one of the tracks in the affected area, making restoration of passenger service more difficult; and that if NS abandons the DB Drawbridge over the Passaic River (and NS, the Lackawanna Coalition claims, has never denied an intent to do so), restoration of this service will become impossible. It is, the Lackawanna Coalition argues, in the public interest, convenience, and necessity that provision should be made for possible restoration of a service that has been proposed and is under active consideration.

The Lackawanna Coalition dismisses the argument that what the Lackawanna Coalition has proposed is the confiscation of NS's assets without payment. NS, the Lackawanna Coalition explains, has actually abandoned the second track in the affected area, and it has not denied that it intends to abandon the drawbridge that links this line to the tracks that provide access to Hoboken Terminal. Under these circumstances, the Lackawanna Coalition argues, the protestations by NS are disingenuous. The Lackawanna Coalition maintains that, if NS does not want to operate these portions of its line, NS should not be permitted to keep these portions, and another operator that wants to operate this line for the direct benefit of persons who reside in the towns along this line should be permitted to do so.

Relief Sought by the Lackawanna Coalition. The Lackawanna Coalition contends that oversight should be continued in this proceeding, and that the Board should give the lines that NS does not wish to operate in the interest of the people of the Lackawanna Coalition's region to another operator that will operate them in keeping with the restoration of passenger service. The Lackawanna Coalition advises that it expresses no opinion about freight operations in the region, except inasmuch as they impact on future passenger operations. The Lackawanna Coalition adds that it strongly supports the restoration of passenger services that once ran in its area, and it advises that it believes that the public interest, convenience, and necessity require policies that promote the eventual restoration of these services.

Morristown & Erie Railway. M&E is a short line operator, and the majority of the lines it operates (some owned, some leased) are located in Morris County, NJ. M&E contends that the Conrail Transaction had, as respects M&E, an adverse impact. M&E explains: that, prior to the Split Date, M&E and Conrail had a good relationship, which helped spur industrial development throughout the Morris County area; that, with the sale of Conrail to CSX and NS, M&E had hoped that further competition for business in New Jersey would result in new traffic

for new shippers and additional traffic for current shippers; but that, because M&E's connection to Conrail was located outside the North Jersey SAA, M&E was given an interchange with only one Class I, which (in M&E's case) was NS. M&E further explains: that this state of affairs has resulted in less competition and less business; that M&E has lost customers due to the fact that some of its customers are located on CSX, so that traffic that would have to move via an M&E-NS-CSX routing has been diverted to trucks; and that, making matters worse, NS sometimes regards its short line connections not as growth/profit partners but, rather, according to M&E, as necessary evils, perhaps even unnecessary evils. M&E advises that short lines that can connect to least two Class I railroads (i.e., any short line whose connection with Conrail was located in what is now a Shared Assets Area) have a greater opportunity for growth and success.

Relief Sought by M&E. M&E argues that the short line network is an important part of the national rail infrastructure, and has an important role to play in providing rail service for shippers that are not located on the main lines of the Class I railroads. M&E contends that, to protect the national rail infrastructure, the Board should establish a program that, though allowing the Class I railroads to "rationalize" their systems, will also allow short lines to assume the common carrier obligations on rationalized lines. M&E further contends that, to create competition, the Board should consider giving short lines and regional railroads the right to connect to multiple carriers.

New Jersey Department of Transportation. NJDOT advises that the State of New Jersey, which recognizes the value of its rail infrastructure in mitigating the environmental, energy usage, congestion, and quality of life issues faced by its citizens, has experienced dramatic growth in freight traffic over the last several years, and has also experienced significant growth on its existing commuter rail services, together with demand for new passenger rail services on the State's rail network. The State, NJDOT further advises, has a genuine interest in ensuring that Conrail operations in the North Jersey and South Jersey-Philadelphia SAAs continue to thrive and to provide all of the public benefits described in the "Control Case" application that CSX, NS, and Conrail filed with the Board in 1997.

The 1998 Letter of Understanding. NJDOT indicates that, on March 20, 1998, CSX, NS, and NJDOT signed a Letter of Understanding that confirmed the understandings that had been reached regarding the transactions contemplated in the Control Case as they affected NJDOT and New Jersey Transit Corporation (NJ Transit or NJT, the statewide transit system operator). NJDOT further indicates that, although the letter covered 10 aspects (NJDOT/NJT statement in support of Conrail merger; coordination with NJDOT/NJT in the Shared Assets Areas; automatic train control/positive train stop; maintenance of way reimbursement; Townley Station; Northeast Corridor discussions; operating rules; new rail starts; the New York, Susquehanna & Western Railroad; and the Bordentown Secondary), NJDOT's comments in the fifth annual round of the general oversight proceeding are principally centered on coordination with NJDOT and NJ Transit in the SAAs in New Jersey.

NJDOT's Comments in Fourth Annual Round. NJDOT notes that, in its comments filed in 2003, in the fourth annual round of the general oversight proceeding, NJDOT expressed its concern about the gap between the promise and the reality in the North Jersey SAA. NJDOT notes that, in those comments, it highlighted the benefits that CSX and NS anticipated as a result of the Conrail Transaction (CSX and NS claimed that shippers in the SAAs would benefit from extended single-line routing opportunities, improved service, and increased competition; CSX and NS indicated that they would compete vigorously for traffic in the SAAs; CSX and NS said that the operating plan for the SAAs took into account increases in traffic both from truck-to-rail diversions and from new marketing opportunities; CSX and NS indicated that both railroads would invest heavily in capital improvements to their systems to assure that they would have the necessary facilities to compete effectively in the SAA market; and NS indicated that it would institute new intermodal and Triple Crown operations that would improve service from/to Northern New Jersey and provide a viable alternative to trucks in several service lanes). NJDOT also notes that, in its 2003 comments, it questioned the degree to which the public benefits anticipated by CSX and NS had come to fruition (NJDOT claimed that the North Jersey SAA had not resulted in the promised pro-competitive effects, and that many shippers had seen no increased competition; NJDOT opined that NS had not used facilities in North Jersey to offer attractive and more competitive single-line services to domestic shippers, but, rather, had opted out of rail service in the North Jersey SAA and had informed shippers of the higher costs of all-rail moves into and out of the North Jersey SAA as compared to truck-rail moves; NJDOT expressed concerns regarding the failure of CSX and NS to provide sufficient resources to the SAAs; NJDOT stated that the CSAO appeared to be understaffed; and NJDOT advised that, although CSX and NS had agreed to implement economic development plans to promote the development of rail traffic within the Port District of PANYNJ, CSX and NS had not yet developed these plans). NJDOT notes that, because CSX and NS agreed to meet and confer with NJDOT regarding the concerns expressed by NJDOT in its 2003 comments, NJDOT did not seek, during the fourth annual round of this proceeding, any Board-imposed changes with respect to the North Jersey SAA.

Meetings Held. NJDOT advises that meetings have been held with NS and CSX. (1) NJDOT advises that, on October 8, 2003, representatives from NJDOT, NJ Transit, and NJTPA met with representatives from NS. The discussions centered on NS industrial development and marketing programs along with NS's short line business development plan for New Jersey. (2) NJDOT advises that, on October 27, 2003, representatives from NJDOT, NJ Transit, and NJTPA met with representatives from CSX. The discussions centered on CSX industrial development and marketing programs, site location processes, and CSX's short line business development plan for New Jersey. A second meeting, held on March 17, 2004, between NJDOT and CSX provided additional information concerning the CSX intermodal business plan and its bulk commodity transload operation, specifically the TRANSFLO Terminal Services facility located in Elizabeth, NJ.

Positive Results. NJDOT advises that it sees a number of positive results that have come from the Conrail Transaction. (1) NJDOT advises that CSX and NS have undertaken significant capital investment at such locations as the PANYNJ ExpressRail facilities at Port Newark-Port Elizabeth, the CSX transload facility in Elizabeth, the NS “E” rail yard in Elizabeth, and NS’s Croxton Yard. (2) NJDOT advises that CSX and NS are also joining with NJDOT in a cost sharing partnership that will see the re-installation of a new second main line track at several critical locations in the north central part of New Jersey. (3) NJDOT advises that CSX and NS have worked diligently with NJ Transit in resolving the passenger line issues consistent with the 1998 Letter of Understanding. NJDOT reports that several projects, such as the new Townley Station on the Lehigh Line and the Bordentown Secondary light rail service project, have been completed. NJDOT adds that, given the complexity of NJ Transit, Conrail, CSX, and NS train operations on the New Jersey rail network, all parties will have to continue to work cooperatively to ensure that the safety and reliability of all rail services in this region continue to be maintained at the highest levels.

Relief Sought by NJDOT; Remaining Areas of Concern. NJDOT advises that, although it does not now seek any formal Board-imposed changes with respect to the North Jersey and South Jersey-Philadelphia SAAs, the State may seek Board-imposed changes with respect to these SAAs if future discussions with CSX or NS prove not to be fruitful. The realization of the full potential of the SAAs, NJDOT argues, is vital if New Jersey is to achieve its transportation, economic, and quality of life goals. And, NJDOT adds, progress must be made on its remaining areas of concern, and NJDOT will continue to foster the coordination and collaboration required to achieve that end.

NJDOT describes four remaining areas of concern. (1) NJDOT asks that the Board encourage all parties to continue the use of the Northeast Operating Rules Advisory Committee (NORAC) Operating Rules on all Conrail lines within the New Jersey SAAs. NJDOT advises that, although the 1998 Letter of Understanding required that the NORAC rules be retained for three years from the date of consummation of the Conrail Transaction, New Jersey believes that the NORAC Rules should continue to be used because there is an added value in having the various railroad operators in this region using the same operating rules. (2) NJDOT contends that the relationship that exists between the Class I carriers and their respective connecting short lines needs to be looked at in more detail. Short line operators, NJDOT believes, have a unique opportunity to support new economic development including job creation in mature urban and suburban areas while helping to ease highway congestion. NJDOT asks that the concerned parties join together and develop a viable public-private business plan that will produce positive results for all the rail carriers. (3) NJDOT asks that the Conrail Shared Assets Operating Plan be reviewed to address carload traffic in addition to new intermodal operations. Carload and intermodal services, NJDOT explains, are integral to many of New Jersey’s manufacturing operations. (4) NJDOT reports that it has concerns respecting the routing and interchange of rail freight traffic between the Class I, regional, and short line operators in New Jersey. NJDOT explains that it has seen anecdotal information showing slow, round-about,

time-consuming movement of cars between various carriers. NJDOT adds that this issue warrants a comprehensive look at the way freight moves today and how it could move better.

North Jersey Transportation Planning Authority. NJTPA is the metropolitan planning organization tasked under TEA-21 with the responsibility for prioritizing federal contributions to major transportation investments in the region encompassed by New Jersey's 13 northern counties.

NJTPA advises: that the North Jersey SAA, with its large rail yards and its proximity to the largest port on the Atlantic Seaboard, is the forward-most intermodal freight distribution infrastructure serving the New Jersey-New York-Connecticut metropolitan region; that using North Jersey SAA terminals to the greatest extent possible helps to reduce long-distance truck vehicle miles traveled (VMT); that, therefore, NJTPA relies on the assurances given by CSX and NS during the Conrail control proceeding that they would commit to diverting long-distance truck movements off the major north-south and east-west highway routes; and that New Jersey has a huge stake in seeing that this is accomplished (New Jersey, NJTPA notes, faces severe constraints in expanding its roadway network, and must therefore optimize the use of its entire transportation infrastructure). NJTPA contends: that it is a cause for concern that CSX and NS are not handling all their rail traffic to the forward-most rail terminals in the North Jersey SAA; that NJTPA has discovered several instances where carload and intermodal traffic are dropped just beyond the New Jersey border and trucked into or through the NJTPA region; that NS, in particular, appears to be building an alternative service infrastructure outside of the core terminal areas that are mostly within the northern New Jersey SAA and is dropping intermodal and carload traffic bound for New Jersey and its metropolitan region (New Jersey, New York, Connecticut) for final truck delivery from out-of-state facilities; that this, in turn, is leading to increasing truck VMT over the highway system of northern New Jersey and is stunting economic development opportunities within the region; that NS, by handling New Jersey and metro-bound customers at its own facilities in Pennsylvania, keeps these customers at its own facilities rather than at the competitive and jointly operated SAA; and that this, in addition to adding greatly to truck traffic on the NJTPA region's roadways, does not fulfill the assurances of NS that one of the benefits of the Conrail Transaction would be the diversion of truck traffic to rail service throughout its system. And, NJTPA adds, there is reason to believe that the organizational structure of the SAA may itself be an impediment to efforts by CSX and NS to provide a strong rail marketing approach.

Report Prepared by Rutgers University Voorhees Transportation Center. NJTPA in its testimony at the public hearing held on April 2, 2004, relied on, and it later submitted for the record, a report — titled “An Assessment of Rail Freight Service Within the International Intermodal Transportation Corridor” — that was prepared by the Rutgers University Voorhees Transportation Center, under contract with the New Jersey Institute of Technology (NJIT). NJTPA advises that the report was commissioned by NJTPA and NJDOT, to review the performance of Class I railroad operations in northern New Jersey before the close of formal

oversight of the Conrail Transaction. NJTPA adds that the report was prepared within the policy framework established by New Jersey Governor James McGreevey, which recognizes that rail freight is an important component of a multimodal freight transportation system and that New Jersey is committed to providing a freight system that supports the needs of its businesses and population.

The report indicates that northern New Jersey is experiencing rapid growth in the movement of freight traffic through its major terminals and on its infrastructure. The report further indicates: that the importance of the region's port and airport facilities as well as New Jersey's leading role in key industries has led federal legislators to establish an International Intermodal Corridor (IIC) where many interlinked activities are concentrated; that this legislation established the International Intermodal Transportation Center (IITC) at NJIT to analyze these activities, to supply the needs of the freight industry as it serves businesses in the IIC, and to find ways to improve the IIC's infrastructure, sustainability, and throughput; and that IITC's interests include the effects in northern New Jersey of the Conrail Transaction, which involved, among other things, the creation of a core terminal area, the SAA, that falls within the geographic and industrial limits of the IIC.

The report also notes that CSX and NS have proposed a set of projects to increase rail capacity in New Jersey. The report further notes that these projects would involve joint State/Federal and corporate investments to increase system capacity, and, therefore, NJDOT and NJTPA have reason to examine railroad practices to ensure that agreements made in connection with the Conrail Transaction are being adhered to. The report warns that, if rail operations are under-serving industry and customers in the region, this may have deleterious effects on the region's economy, its industries, and the various short lines operating in the region, and that these effects may encourage greater reliance on short to medium distance trucking, worsening air quality and increasing congestion. It is therefore, the report advises, a high priority for NJDOT and NJTPA to make sure that the use of shared rail assets in northern New Jersey are maximized and that any incentives not to use them are removed.

The report contains six key findings. (1) The report finds that intermodal rail freight service, along with service for several large customers, has generally been working. CSX and NS, the report indicates, compete aggressively not only for intermodal traffic but also for carload traffic for large corporate customers. (2) The report finds that Conrail, as the Conrail Shared Assets Operator (CSAO), is generally providing as good or better service than it provided prior to the Split Date. The reports advises, however, that the CSAO operation should be watched and could destabilize. CSX and NS, the report explains, regard Conrail as a cost center and not a profit center, and, therefore, the risk exists that CSX and NS may so strip Conrail of resources that it will no longer be able to function effectively. The report warns that, if either CSX or NS were to lose interest in developing a market base in the SAA, investment policy could be stalemated and Conrail might not invest sufficiently in the region to maintain a high quality of service. (3) The report finds that current Class I marketing and pricing practices disfavor use of

the CSAO and may ultimately destabilize the institution. The report explains that shippers have advised that Class I staff, in submitting quotes and invoicing for service, have noted the additional cost of serving locations in the SAA. The report warns that this approach of highlighting CSAO costs creates an incentive to encourage customers to relocate to captive lines outside the SAA where no Conrail costs would be charged. And, the report adds, there is anecdotal evidence that NS has been encouraging shippers and receivers to relocate their operations to its lines in eastern Pennsylvania, offering lower rail service prices as an inducement. (4) The report finds that, in contrast to the very large customers, medium and smaller carload customers have generally not seen increased competition or service. The report adds that it is the short lines, and not the Class I railroads, that have taken the lead role in expanding carload rail freight use by medium and smaller customers in New Jersey. (5) The report finds that CSX and NS have done limited marketing in New Jersey. The report warns that, although rail freight in New Jersey needs to be marketed aggressively by both the short lines and the Class I railroads to reach its full potential, the Class I railroads do not appear to market rail freight carload service aggressively in New Jersey, particularly within the area encompassed by the CSAO. (6) The report finds that CSX and NS have only a limited staff presence in New Jersey. The report notes: that NS has no sales staff based in New Jersey; that neither CSX nor NS has public affairs staff positioned in New Jersey; that the two CSX staff members who are responsible for New Jersey are based in Albany, NY; and that NS staff members responsible for New Jersey are based in Philadelphia, PA. The report warns that, given these out-of-New Jersey locations, it can be difficult to communicate with Class I staff. And, the report adds, Class I sales and marketing staff responsible for New Jersey have only limited knowledge of New Jersey.

As respects New Jersey's short line railroads, the report notes that, although New Jersey's short lines serve an important role in providing modal options and enhancing economic development in New Jersey, the short lines have often found the business behavior of the Class I railroads to be frustrating their pursuit of traffic (the report cites refusals to grant short-distance trackage rights to serve a customer, lack of attention and knowledge from marketing personnel, and paradigmatic competitive behavior to relocate businesses to Class I rail lines). The report identifies three specific issues in the relationship between New Jersey's short lines and the Class I railroads: operational issues; transloading; and customer relocations to captive lines. (1) The report indicates that operational issues include unresolved interchange location agreements that were negotiated as part of the Conrail acquisition and circuitous routing of carload traffic. (2) The report indicates that the Class I railroads appear to be more focused on encouraging shippers, particularly smaller shippers, to use transload or intermodal services rather than direct rail service, either via a Class I or via a short line, to SAA sites. The report notes that, while the Class I approach is consistent with the Class I business model of moving large quantities of freight from point A to point B, the result can be an increase in truck traffic into and through New Jersey. (3) The report indicates that many shippers and short lines believe that the current Class I practices regarding the CSAO have resulted in an uneven playing field, favoring relocations to sites on Class I lines or use of facilities in non-CSAO areas.

The report concludes with three recommendations respecting carload traffic (intermodal traffic, the report notes, appears to be competitive, growing, and moving forward on the enhancements necessary to meet future needs). (1) The report's first recommendation is that, to retain and increase the number of jobs and carloads generated by New Jersey firms, there should be established a New Jersey rail economic development fund with contributions from CSX and NS of \$30 million over the next 5 years. This recommendation provides: that the fund can be used by CSX and NS to help support the presence of their marketing, sales, and economic development staff in New Jersey up to a certain negotiated amount annually; that the recommended Conrail marketing and sales functions, described below, can also be supported by this fund up to a negotiated amount; that each Class I railroad would be eligible for a predetermined and negotiated rebate in its annual contribution to the fund based on its respective accomplishments in terms of increases in net carload traffic (including such traffic moving from/to New Jersey's short lines) and jobs retained/added through the economic-industrial development program; that, at NJDOT's direction, up to certain pre-negotiated amounts, the fund could be used by New Jersey short lines and economic development organizations for projects or activities designed to retain or attract rail freight-related businesses and jobs; that CSX and NS would be required to confidentially submit, on a semi-annual basis, reports documenting the carload traffic and new business development and related jobs added within New Jersey; that CSX and NS would be mandated to supply origin, destination, and routing information on a confidential basis to be used in substantiating rail freight development efforts in New Jersey; and that the fund would be administered jointly by the two Class I railroads and NJDOT, with 50% of the voting power given to CSX, NS, and Conrail, and with the remaining 50% of the voting power given to NJDOT. (2) The report's second recommendation is that Conrail should be empowered to market/sell carload rail freight for its service area, as well as quote rates. The report indicates: that the economic development fund could be used to support sales, marketing, and economic development staff at either of the Class I railroads or at Conrail; that Conrail could work with the short lines and the Class I railroads to build its traffic base and enhance development in the Shared Assets Areas; and that Conrail's knowledge of New Jersey, combined with its current good working relationship with the short lines, could be leveraged to enhance rail freight marketing and sales. (3) The report's third recommendation is that CSX and NS should comply with agreements with New Jersey's short lines to provide interchanges at the negotiated locations, as well as assure dual access. The report indicates that, in some cases, the Class I railroads have not complied with the agreements that they negotiated with New Jersey and the short lines during the Conrail acquisition.

Relief Sought by NJTPA. NJTPA contends that, in view of what it views as lingering problems and unfulfilled promises pertaining to the Conrail Transaction in the State of New Jersey, and especially in the Conrail SAAs, the Board should analyze and revisit the operations of the SAAs in New Jersey, with an eye towards strengthening them and allowing them to be active in promoting and growing rail freight business. NJTPA further contends: that the Board should look at ways that can empower the SAAs to better serve the NJTPA region and that it continue its oversight until the necessary changes are implemented; that the Board should

place additional emphasis on seeing that CSX and NS resolve outstanding differences with New Jersey's short lines in terms of access to the SAA and its interchange points; and that the Board should instruct CSX and NS to improve marketing coordination and service to the short lines to mutually grow their respective businesses. And, NJTPA adds: it seeks firm commitments from CSX and NS that they will reinvigorate their marketing and investment strategies for New Jersey and the crucial SAAs; these commitments should show that CSX and NS will help the region and the State to lower truck VMT by handling traffic to the forward-most interchange or intermodal terminal location; and, furthermore, the Board should consider addressing the structural problems revealed in the current operations of the SAA, instituting arrangements that would allow the SAA and its two parents actively to cultivate new customers and expanded business in the core New Jersey rail market it serves.

New Jersey Shortline Railroad Association. NJSLRRA advises that Conrail is today an extremely well operated railroad, in both North Jersey and South Jersey. Through Conrail, NJSLRRA reports, both shippers and short lines enjoy dual competitive access with no paper barriers, and there have been very few complaints of a continuing nature.

Relief Sought by NJSLRRA. NJSLRRA advises that it would like to see CSX and NS address the perception among some shippers that it costs more to do business in the SAAs. And, NJSLRRA adds, it would also like to see CSX and NS address the question of taking trucks off the highways.

Pennsylvania Department of Community and Economic Development. DCED, which submitted its comments on behalf of the Commonwealth of Pennsylvania, contends that both CSX and NS have failed to comply fully with the representations set forth in two letter agreements (one with CSX, one with NS) dated October 21, 1997, that were addressed to the then Governor of the Commonwealth of Pennsylvania (Thomas Ridge) and the then Mayor of the City of Philadelphia (Edward Rendell). DCED advises that the two letter agreements were negotiated between CSX and NS, on the one hand, and the Commonwealth and the City, on the other hand, to address and alleviate the concerns of the Commonwealth and the City that the Conrail Transaction could have a massive adverse effect on economic development, jobs, railroad capital investment, and corporate citizenship in Philadelphia and across the Commonwealth.

The CSX Letter Agreement. CSX's 10/21/97 letter, which was signed by CSX's then CEO (John W. Snow), was addressed to the Governor of the Commonwealth of Pennsylvania and the Mayor of the City of Philadelphia. The letter states that "we have worked with representatives of the Commonwealth, the City of Philadelphia, SEPTA and the Port on economic development projects that can provide future benefits for the citizens of Pennsylvania. This letter outlines proposals necessary to advance developments of these projects consistent with the Commonwealth's and the City's active support of the acquisition to the Surface

Transportation Board.” The proposals are summarized here (using the numerical headings in CSX’s 10/21/97 letter).

1. Economic Development. CSX’s 10/21/97 letter states that CSX, the Commonwealth, and the City will enter into a public-private partnership to encourage rail-oriented industry to locate in Philadelphia and across Pennsylvania. “This partnership also will benefit the Jones Act trades, in which Sea-Land, a CSX subsidiary, participates. Our respective commitments include:” (A) CSX will provide \$10M in cash investments to supplement the public effort to attract Kvaerner ASA to the Philadelphia Navy Yard. Our payments, which will be directed by the state, will be made in 5 equal annual installments, with the initial installment to be made on July 1, 1998. (B) CSX will expend a minimum of \$1M per year over the five years (a total of \$5M) after merger approval for rail-served economic development programs in Philadelphia and across the Commonwealth. These programs will assist in land acquisition, facility construction, and rail infrastructure improvements with a focus on Philadelphia. (C) To complement these efforts, CSX will establish a new economic development incentive program to encourage rail-oriented industry to locate in Philadelphia and across the Commonwealth. Working with DCED and the Governor’s Action Team, CSX will provide capital through these programs to assist potential rail customers in their costs of land acquisition, facility construction, installation of rail sidings, etc., in exchange for contractual obligations for certain levels of rail business. After STB approval, CSX will make available \$2M per year over a 5-year period (a total of \$10M) for this program. (D) The City of Philadelphia, through the PIDC, and CSX will execute a Marketing Agreement for the City of Philadelphia. (E) The Delaware River Port Authority and CSX will execute an agreement for the development and operation of its intermodal terminal at Greenwich Yard. (F) The Commonwealth will seek, along with CSX, and approve the expenditure of federal funds for clearance improvements on the West Trenton line from Philadelphia to the New Jersey border and approve funding for any such additional Pennsylvania projects as may be subsequently authorized by Congress involving lines owned or operated by CSX. (G) The Commonwealth, the City of Philadelphia, and CSX agree that it is in the Commonwealth’s economic interest to have a strong, well-maintained, and strategically located rail freight infrastructure.

2. Jobs. CSX’s 10/21/97 letter states that job creation “is the principal goal of our combined economic development efforts.” (A) CSX and NS will jointly own Conrail Inc. Philadelphia will remain as the headquarters of Conrail Inc., which, as detailed in our application to the STB, will have 350 positions involved with the operation of the SAAs and other continuing Conrail activities. (B) 35 new rail-related jobs will be created in addition to 150 existing jobs, as a result of CSX commercial and operational activities in the Philadelphia area during the 3 years after STB approval of the Conrail Acquisition. (C) CSX anticipates establishing a regional office in Philadelphia that will include government relations, industrial development, sales, and operations.

3. Capital Expenditures. CSX's 10/21/97 letter states that the operating plan "filed with the STB identifies more than \$27M in capital improvement expenditures by CSX in Pennsylvania with at least \$22M in Philadelphia for three major projects:" (A) Intermodal facility (\$15M). The Delaware River Port Authority has offered to fund the construction of this facility pursuant to the agreement referred to in ¶ 1(E). (B) Track connection at Eastwick interlocking (\$4M). (C) Belmont Siding (\$3M).

4. Passenger Rail. CSX's 10/21/97 letter states that "[f]reight and passenger operations share track in more than half of SEPTA's service territory. Our CSX team has begun to work closely with SEPTA, Conrail and the Norfolk Southern to ensure safe on-time passenger and freight operations. CSX will consent to Conrail extending the SEPTA Trackage Rights Agreement for an additional five years as long as SEPTA provides unqualified liability coverage for CSX and the Conrail Shared Area Operations company (CSAO) backed by broad indemnification language and insurance."

5. Civic and Charitable Giving. CSX's 10/21/97 letter states that CSX along with NS and Conrail "will ensure that all of Conrail's philanthropic obligations as of the date of this letter are met. The three companies will be active members of the civic and charitable community in Philadelphia and throughout the Commonwealth."

6. Regulatory Review. CSX's 10/21/97 letter states that, "[o]n or before October 21, 1997, the Commonwealth of Pennsylvania and the City of Philadelphia will file written statements of support for the Conrail Acquisition with the STB. We anticipate that you will encourage other elected officials and public agencies, including SEPTA and the DRPA, to file timely statements of support and will otherwise continue to support the acquisition."

CSX's 10/21/97 letter concludes by noting that "CSX's authority to acquire Conrail and expand operations in Pennsylvania and, therefore, the terms of our agreement, are expressly conditioned upon approval of the Conrail acquisition by the STB. Of course, CSX obligations contained in this letter are subject to the Commonwealth and the City satisfying their obligations."

The NS Letter Agreement. NS's 10/21/97 letter, which was signed by NS's CEO (David R. Goode), was addressed to the Governor of the Commonwealth of Pennsylvania and the Mayor of the City of Philadelphia. The letter thanks the Governor and the Mayor for the commitment and cooperation that they and their representatives had demonstrated during the past few months regarding the then pending Conrail Transaction, and states that "[a]n agreement about the significant issues has been our objective. I believe this goal is achievable and offer the following proposals toward that end." The proposals are summarized here (using the numerical headings in NS's 10/21/97 letter).

I. Economic Development. NS's 10/21/97 letter states that NS, the Commonwealth, and the City will enter into a public-private partnership to encourage rail-oriented industry to locate in Philadelphia and across Pennsylvania. "Our respective commitments include:" (A) NS will provide \$10 million in cash investments to supplement the public effort to attract Kvaerner ASA to the Philadelphia Navy Yard. Our payments, which will be directed by the state and city, will be made in 5 equal annual installments, with the initial installment to be made on July 1, 1998. (B) NS, working with DCED, the Governor's Action Team, and PIDC, will expend a minimum of \$15 million in the 5 years after STB approval of the Conrail Acquisition for rail-served economic development programs in Philadelphia and across the Commonwealth. These programs will assist in land acquisition, facility construction, and rail infrastructure installation with a focus on the Philadelphia Naval Business Center (PNBC). (C) To complement the prior efforts, NS will pursue additional economic development incentive programs to encourage rail-oriented industry to locate in Philadelphia and across the state. Working with DCED and the Governor's Action Team, NS will provide up front capital through these programs to assist potential rail customers in their costs of land acquisition, facility construction, and rail infrastructure installation in exchange for contractual obligations for acceptable levels of rail business. After STB approval, NS will make available for such projects a maximum of \$5 million annually and will continue this program for a minimum of 5 years, thus making an additional \$25 million available for rail-oriented economic development projects. (D) The City of Philadelphia, through the PIDC, and NS plan to execute a Development and Marketing Agreement that is being developed for the PNBC. (E) The Delaware River Port Authority and NS plan to execute an agreement that is being developed for the location and operation of NS's intermodal terminal, referenced in ¶ III(B), at the AmeriPort Intermodal Terminal. (F) The Commonwealth will approve the expenditure of ISTEA funds for signalization and track improvements on the Chambersburg line and such additional Pennsylvania projects as may subsequently be authorized by Congress involving lines owned or operated by NS, including the Erie track relocation project.

II. Jobs. NS's 10/21/97 letter states that job creation "is one of the principal goals of our combined economic development efforts. Additionally, Norfolk Southern's job creation efforts will include:" (A) A Mid-Atlantic Regional headquarters will be located in Philadelphia. Initially, there will be 75 jobs, including a Regional Vice President, at this site. (B) 150 new rail-related jobs will be created as a result of NS commercial and operational activities in the Philadelphia area during the 3 years after STB approval of the Conrail Acquisition. (C) CSX and NS will jointly own Conrail Inc. Philadelphia will remain as the headquarters of Conrail Inc. for the 350 positions involved with the operation of the Shared Assets Areas and other continuing Conrail activities.

III. Capital Expenditures. NS's 10/21/97 letter states that the operating plan "filed with the STB identifies more than \$235 million in capital improvement expenditures by or on behalf of Norfolk Southern in Pennsylvania. This is the largest expenditure by Norfolk Southern in any single state and includes an investment of more than \$30 million in Philadelphia for four major

projects:” (A) Triple Crown facility (\$4 million). (B) Intermodal facility (\$10 million). (C) Automobile facility (\$16 million). (D) Track connection at Zoo interlocking (\$1.4 million).

IV. Passenger Rail. NS’s 10/21/97 letter states that “[f]reight and passenger rail operations share track in more than half of SEPTA’s service territory. Norfolk Southern, the City and the Commonwealth will recommend to Conrail and SEPTA that the existing Trackage Rights Agreement be extended for five (5) years. Norfolk Southern agrees, subsequent to STB approval of the Conrail Acquisition, to negotiate seriously and in good faith the extension of SEPTA service on the Harrisburg and Morrisville lines, and such other issues as may be appropriate.”

V. Corporate Citizenship. NS’s 10/21/97 letter states that “Norfolk Southern will be an active participant in civic and charitable affairs in Philadelphia and throughout Pennsylvania and, together with CSX, will encourage Conrail to fulfill its philanthropic commitments as of this date.”

VI. Regulatory Review. NS’s 10/21/97 letter states that, “[o]n or before October 21, 1997, the Commonwealth of Pennsylvania and the City of Philadelphia will file written statements of support for the Conrail Acquisition with the STB. Additionally, you have agreed to encourage other elected officials and public agencies, including SEPTA and the DRPA, also to file timely statements of support.”

NS’s 10/21/97 letter concludes by noting that “Norfolk Southern’s commitments in this letter are expressly conditioned upon STB approval of the Conrail Acquisition substantially as it was filed on June 23, 1997, and therefore will take effect only upon closing of the Conrail Acquisition. Norfolk Southern’s commitments also are conditioned upon fulfillment by Pennsylvania and Philadelphia of their reciprocal commitments, reflected in this letter and in the agreements under development.”

Expressions of Support by the Commonwealth and the City. As noted in Merger Dec. No. 89, the Commonwealth of Pennsylvania and the City of Philadelphia filed with the Board written statements in support of the Conrail Transaction. The Commonwealth and the City also filed with the Board the two 1997 Letter Agreements (which, at the time, were filed under seal), and noted that, although the two agreements did not require the imposition of any conditions by the Board, the two agreements might be considered by the Board as constituting representations that applicants would comply with their respective terms. See Merger Dec. No. 89, 3 S.T.B. at 509 (the Commonwealth’s submission is noted under the “Pennsylvania Department of Transportation” heading), 511 (the City’s submission is noted under the “Philadelphia Industrial Development Corporation” heading).

Representations Condition. DCED notes that the Board, in approving the Conrail Transaction, stated that CSX and NS would be required to adhere to all of the representations

they made during the course of the control proceeding, whether or not such representations were specifically referenced in the decision approving the transaction.

Letter Agreements Regarded as Binding Commitments. DCED contends that both CSX and NS have acknowledged that their obligations under the 10/21/97 letter agreements are binding. As respects CSX, DCED cites a CSX letter dated October 29, 2003 (the letter was addressed to the Director of the Governor's Action Team, and was signed by a CSX Assistant Vice President) that cites "the desire of CSX to have certain purchases of railroad property by the Philadelphia Regional Port Authority (PRPA) qualify as eligible under an Economic Development Fund to which CSX had committed funds at the time that Conrail was purchased." As respects NS, DCED cites an NS letter dated April 5, 2001 (the letter was addressed to Governor Ridge, and was signed by NS's Mr. Goode) that states: "While we have not kept you informed on a regular basis, I thought it would be useful to provide you with a current, comprehensive summary of our investments, with a specific focus on those programs agreed upon and committed to by Norfolk Southern and the Commonwealth."

CSX's Failure to Comply Fully. DCED contends that CSX has failed to comply fully with the commitments set forth in the CSX Letter Agreement. DCED cites, in particular, CSX's commitments under ¶¶ 1(B) and 1(C) of that agreement. As respects ¶ 1(B), DCED advises (at pp. 2-3 of its supplemental submission filed May 20, 2004) that, as indicated in the two letters attached to that submission, CSX will be deemed to have fully performed its obligation under ¶ 1(B) upon completion of a complex land sale transaction under an agreement between CSX and PRPA. DCED further advises, however, that, as of May 20, 2004, that transaction had not yet closed (due, DCED claims, to breaches of the agreement by CSX). As respects ¶ 1(C), DCED contends that CSX has funded only \$550,000 of its ¶ 1(C) commitment (this figure is taken from p. 3 of DCED's supplemental submission filed May 20, 2004), leaving \$9.45 million not funded.

NS's Failure to Comply Fully. DCED contends that NS has failed to comply fully with the commitments set forth in the NS Letter Agreement. DCED cites, in particular, NS's commitments under ¶¶ I(B), I(C), and III of that agreement. (a) As respects ¶ I(B): DCED contends that, although NS has made substantial unrelated facility improvements, NS has failed to provide any significant funding for rail-related economic development projects brought to it for funding by the Commonwealth or the City. DCED explains that only one project (for a total of \$40,500.00) has been funded by NS out of the \$15 million for rail-served economic development programs to which NS committed in ¶ I(B). (b) As respects ¶ I(C): DCED contends that NS has not complied with the commitment set forth in ¶ I(C). DCED explains that NS has completely failed to coordinate its projects with the Commonwealth's or the City's economic development efforts. And, DCED adds, even certain completely independent customer-development projects cited by NS in a letter dated April 5, 2001, total at most \$15.7 million, which (DCED notes) is far less than the \$25 million to which NS committed in ¶ I(C). (c) As respects ¶ III: DCED contends that NS has commenced only one of the four

capital improvement projects to which it committed in ¶ III: an intermodal facility being constructed for NS by the Delaware River Port Authority. DCED adds that NS has yet to begin construction of its Triple Crown or automobile facilities or its track connection at Zoo interlocking (and these three not-started projects, DCED notes, add up to \$21.4 million of capital investment commitments that NS has not yet commenced).

Economic Development Projects Require Flexibility and Expedition. DCED advises that the type of economic development projects that are coordinated and supported by DCED, and as to which CSX and NS pledged assistance, typically involve the need to assemble financing from a variety of sources in a limited time frame. DCED further advises that, if financing cannot be assembled during that limited time frame, the project will not come to fruition. DCED claims: that, repeatedly over the past five years, CSX and/or NS have been approached to provide such assistance during the window of time in which such financing will make a difference to the project; but that, in numerous cases, CSX and NS have either refused to provide financing in amounts that would have any material effect on the overall project, or failed to respond to DCED's request to provide a commitment within the necessary time frame, or even committed verbally to provide the financing and then failed to follow up on their commitments. DCED notes that, because economic development projects arise intermittently and irregularly on schedules determined by the needs of the underlying businesses involved in these projects, the general commitments of CSX and NS will achieve meaningful results only if such general commitments can be translated into approval of specific project expenditures during the limited period when DCED is able to bring a specific project to fruition.

Should Projects Not Related to the 1997 Commitments be Considered? DCED contends that CSX and NS appear to be arguing that rail infrastructure improvements that are totally unrelated to their 1997 commitments and that were undertaken for their own business reasons and without any consultation or cooperation with the Commonwealth or the City should be credited to CSX and NS, respectively, when calculating their compliance with their 1997 commitments. This argument, DCED maintains, should be rejected, because it would allow CSX and NS to alter or abrogate unilaterally their commitments to the Commonwealth and the City. And, DCED adds (citing recent financial statistics for CSX and NS), neither CSX nor NS are financially unable to carry out these commitments.

Relief Sought by DCED. DCED asks that the Board: continue oversight of the compliance by CSX and NS with the commitments made in the two 1997 Letter Agreements until such time as compliance is complete or the parties have resolved this issue through a negotiated settlement; set up a schedule under which CSX and NS will be expected to achieve full compliance with the commitments made in the two 1997 Letter Agreements; and establish a means to monitor the progress of CSX and NS in achieving full compliance with the commitments made in the two 1997 Letter Agreements. As respects an extended oversight period, DCED argues that, considering the pace of CSX and NS in adhering to their representations during the initial 5-year oversight period, and considering also the length of time

necessary to plan and construct capital improvements, the Board should extend its oversight for an additional 5-year period of time. As respects the establishment of a means to monitor the progress of CSX and NS in achieving full compliance, DCED contends that, at a minimum, the Board should require CSX and NS to submit quarterly reports documenting their compliance going forward with the economic development funding requirements set forth in the two 1997 Letter Agreements. And, DCED adds, it would be agreeable to submitting quarterly reports of its own.

Supplemental Submission. In a supplemental submission filed August 26, 2004, DCED contends that CSX and NS, in their CSX/NS-6 pleading filed August 2, 2004, have simply repeated the same argument they have made all along — that they should be deemed to have carried out the commitments they made to the Commonwealth and the City because they elected to make other, unrelated investments in the Commonwealth, or, in the alternative, that they should be relieved of their commitments because those commitments are no longer in their best interest. This argument, DCED claims, disregards the nature of the commitments that CSX and NS made in this matter. DCED explains that, to induce the Commonwealth and the City to support the Conrail Transaction, CSX and NS made specific written undertakings to them. DCED further explains that, when the Commonwealth and the City then gave the support that CSX and NS had requested, the commitments of CSX and NS became enforceable obligations under ordinary principles of contract law. And, DCED maintains, the technical assistance and/or financial support that CSX and NS, acting in their own private economic interest, have given for such things as new spurs to serve businesses that promise to generate substantial rail revenues is no substitute for the fulfillment of their specific, voluntary, and binding commitments to assist in supporting the economic development priorities of DCED and the Commonwealth. The Commonwealth, DCED concludes, provided real support in freely bargained-for exchange for real commitments, and it continues to expect CSX and NS to abide by those commitments.

Philadelphia Industrial Development Corporation. PIDC, which submitted its comments on behalf of the Commonwealth of Pennsylvania, the City of Philadelphia, and PIDC itself, contends that it has had a mixed experience respecting compliance with the two 1997 Letter Agreements (these are the same agreements cited by DCED). PIDC explains that, while thousands of rail jobs have been lost in Philadelphia and across Pennsylvania through the acquisition of Conrail, the commitments that CSX and NS made in 1997 to the Governor of the Commonwealth of Pennsylvania and the Mayor of the City of Philadelphia remain only partially realized and not fully documented.

PIDC advises: that the Kvaerner investments have been made, CSX has completed its proposed Philadelphia capital investments, the Delaware River Port Authority has begun one of the four development projects proposed by NS, and the Governor's Action Team has confirmed that CSX has committed \$550,000 in private shipper contracts to encourage shippers to use rail; that, however, although NS has claimed, the Governor's Action Team has been unable to confirm, that NS has committed \$15.7 million in private shipper contracts; that, furthermore, the

Governor's Action Team has identified only one project (for a total of \$81,000) that was approved by CSX and NS out of the proposed \$20 million of rail-served economic development programs, while a \$900,000 clearance improvement project for Northeast Philadelphia was rejected by them (\$20 million is the sum of CSX's \$5 million ¶ 1(B) commitment and NS's \$15 million ¶ I(B) commitment); that, although CSX recently negotiated a land sale to the Port discounted by the remainder of CSX's economic development commitment, PIDC is concerned by the progress of the transaction, because follow-through must occur beyond the Board's original oversight period; that almost the entire \$15 million of the NS commitment to invest in rail-served economic development programs remains unaccounted for (this is a reference to NS's \$15 million ¶ I(B) commitment), as well as the \$21.4 million NS commitment for the three Philadelphia development projects that NS has not begun (this is a reference to NS's ¶ III commitments respecting a Triple Crown facility, an auto terminal, and a track connection at Zoo interlocking); and that \$9.5 million of CSX's \$10 million private shipper contract commitment, and \$9 million of NS's \$25 million private shipper contract commitment, have not been met (this is a reference to CSX's \$10 million ¶ 1(C) commitment and NS's \$25 million ¶ I(C) commitment).

PIDC further advises that CSX, NS, and Conrail, instead of growing their employment in Philadelphia, have radically reduced their employment in Philadelphia. PIDC contends that, according to records compiled by the City Department of Revenue in March 2004, CSX employs 167 employees in Philadelphia, NS employs 6 employees in Philadelphia, and Conrail employs 33 employees in Philadelphia, which (by PIDC's calculations) means that CSX is short by 18 employees, NS is short by 219 employees, and Conrail is short by 317 employees, for a total shortfall of 554 employees. PIDC's calculations relate to: CSX's ¶ 2(B) commitment that 35 new rail-related jobs would be created in addition to 150 existing jobs; NS's ¶ II(A) commitment that there would be 75 jobs at its Philadelphia regional headquarters, and NS's ¶ II(B) commitment that 150 new rail-related jobs would be created; and CSX's ¶ 2(A) commitment, and also NS's ¶ II(C) commitment, that Conrail would have 350 positions involved with the operation of the SAAs and other continuing Conrail activities.

As respects corporate citizenship, PIDC advises that, while the City has attempted to engage CSX in actively participating with the City to increase public access to a new waterfront park that the City is developing along the Schuylkill River right-of-way, and has sought CSX's partnership in devising reasonable safety measures such as state-of-the-art pedestrian grade crossings, it remains to be seen whether CSX will cooperate to make the park a reality.

Relief Sought by PIDC. PIDC asks, on behalf of itself and also on behalf of the Commonwealth of Pennsylvania and the City of Philadelphia, that the Board extend its oversight period during which the commitments made in the two 1997 Letter Agreements must be fulfilled, and that the Board establish metrics to regularly monitor progress by applicants toward full compliance, according to a schedule. PIDC contends that, considering the pace of applicants in adhering to their representations during the initial 5-year oversight period, and considering

also the length of time necessary to plan and construct capital improvements, oversight should be extended for an additional 5 years. PIDC further contends: that undertaking the clearance improvement project for Northeast Philadelphia, at Willets Road on Conrail's Bustleton Branch, would benefit an entire rail-served industrial park and particularly an active rail shipper denied access (by the clearance impediment) to the new larger cryogenically refrigerated boxcars; that this project would make a positive first impression for the Board to exercise oversight of applicants' adherence to their representations; and that monitoring achievement of employment commitments for CSX, NS, and Conrail in the City of Philadelphia would be another important metric, as would completion of capital investments in proposed Philadelphia projects. And, PIDC adds, because the passage of time may have made unnecessary certain of applicants' unmet commitments, the Board should impose alternative conditions (which PIDC would be willing to assist the Board in identifying) to remediate the impacts of the Conrail loss. PIDC insists, however, that, in general, the Board should not accept projects proposed as fulfilling the representations of the two 1997 Letter Agreements (e.g., a regional headquarters established in Harrisburg, or a Triple Crown facility constructed in Rutherford, which lies just east of Harrisburg) if such projects were not specifically noted in those Agreements.

PIDC also asks that the Board address several railroad health and safety issues that currently affect the City of Philadelphia. PIDC cites, in particular: (1) repair of the 25th Street Viaduct, from which chunks of concrete are falling onto vehicles and pedestrians; (2) deferred maintenance of rights-of-way and other property, and accumulation of trash and debris; (3) train damage to overhead street bridges and other structures; and (4) blocking City streets at grade crossings with trains parked for long periods of time.

Rail Cents Enterprises. RCE, which conducts a railroad consultation business, sees three fatal flaws in Conrail's current organizational structure.

(1) RCE contends that the accounting rules for apportioning Conrail's expenses between CSX and NS discourage an ever-increasing volume of profitable business. RCE explains that, because CSX and NS apportion the common pot of Conrail's carload expenses between themselves simply by the ratio of carloads in their respective accounts, each carload is effectively charged back to CSX and NS at the average cost for all Conrail carloads. This, RCE advises, discourages carloads that incur less than average cost, since the rate necessary to cover charged-cost is artificially raised, often above what the traffic will bear, for below-average out-of-pocket-cost moves. And, RCE adds, as cost-efficient or low-cost movements are eliminated, average cost moves ever higher, thus discouraging more and more potentially profitable business.

(2) RCE contends that the lack of commercial responsibility at Conrail preempts most industrial development. Conrail, RCE claims, does not proactively solicit industrial development on its lines. Rather, RCE explains, Conrail relies on CSX and NS to develop new rail infrastructure, even though each of CSX and NS has a vested interest in locating industries

(and also intermodal distribution terminals) on non-Conrail lines served exclusively by CSX or NS, respectively. There is, RCE maintains, no negative consequences within the Conrail organization when industrial development opportunities are ignored.

(3) RCE contends that the lack of a revenue incentive discourages improvement in service quality. Conrail, RCE explains, is only measured economically by CSX and NS on how much it reduces costs, not on how much it increases revenues. And, RCE adds, with no incentive to increase transportation revenues, there is no incentive to improve the quality of Conrail's service offering.

Relief Sought by RCE. RCE suggests that Conrail: could be given its own commercial departments, like the Indiana Harbor Belt Railroad; or could be divided between CSX and NS, with some sort of reciprocal switching arrangements if dual commercial access were deemed essential; or could be sold to independent operators.

Resources Warehousing & Consolidation Services. RWCS operates an intermodal terminal facility on a New York, Susquehanna & Western Railroad (NYS&W) line in North Bergen, NJ. As noted in Oversight Dec. No. 5, slip op. at 113, RWCS's interests vis-à-vis the Conrail Transaction were addressed in the decision approving that transaction. See Merger Dec. No. 89, 3 S.T.B. at 490-491 (footnotes and citation omitted): "RWCS, a freight forwarder with facilities located on an NYS&W line in North Bergen, NJ, supports the CSX/NS/CR transaction but has requested equal access to CSX and NS rail service from/to its facilities. Applicants have indicated, in rebuttal, that RWCS, which can only be served now by NYS&W and which will only be served post-transaction by NYS&W, will be provided the dual access it seeks. 'It will be able to connect to NS via Passaic Junction off the Southern Tier on the Conrail lines allocated to NS; and to CSX via a connection to be built from North Bergen to Little Ferry.'"

In Oversight Dec. No. 5, slip op. at 113, we noted RWCS's claims, made in the first annual round of the general oversight proceeding, "that it does not now have access to competitive intermodal service from CSX because CSX refuses to provide such service; that, although CSX service would be feasible, RWCS's repeated requests to CSX to meet to establish mutually satisfactory intermodal service arrangements between Chicago and RWCS's North Bergen facility have been refused; and that RWCS's efforts to obtain service opportunities or commitments for its North Bergen facility have been frustrated by CSX's denial of service."

In Oversight Dec. No. 6, slip op. at 19, we noted RWCS's complaint "that it does not have access to competitive intermodal service from CSX because CSX refuses to quote rates to and from its North Bergen, NJ facility. RWCS indicates that, since the first general oversight decision, it has attempted to obtain rail service from CSX in order to market its intermodal facility as well as its planned expansion. Without actual CSX rate quotes, RWCS contends that its customers have no basis to route via CSX, or even to choose between CSX and NS." And,

we also noted, RWCS claimed that CSX, by refusing to quote rates, “discriminates against intermodal marketing companies, such as RWCS, and favors its own terminal facilities from which to provide service for RWCS’ customers.”

Now, in the fifth annual round of this proceeding, RWCS has both repeated (as respects CSX) and expanded (as respects NS) the claims it made in the first annual round of this proceeding. CSX, RWCS contends, continues to refuse access to rail service for RWCS’s customers, and CSX refuses to quote rates for service to/from the RWCS facility. And, RWCS adds, based on recent developments it is clear that both CSX and NS prefer direct contracts with shippers (at terminals owned by CSX and NS, respectively) to the exclusion of third party intermodal service providers such as RWCS. Neither CSX nor NS, RWCS maintains, is seriously interested in the economic development opportunities of businesses like RWCS in the North Jersey SAA. RWCS insists that, despite promotion of competitive intermodal rail service as a merger rationale, the promise of competitive intermodal rail service is not yet a reality for RWCS.

Relief Sought by RWCS. Although RWCS did not make a specific request for relief in its comments at the public hearing held on April 2, 2004, the tenor of its comments suggests that RWCS wants the Board to take some action to make the promise of competitive intermodal rail service a reality at RWCS’s North Bergen facilities.

The SEDA-COG JRA Parties. SEDA-COG JRA, four shippers, and two rail line owners are herein referred to collectively as the “SEDA-COG JRA parties.” SEDA-COG JRA is the Susquehanna Economic Development Agency—Council of Governments Joint Rail Authority, a Pennsylvania municipal authority formed by eight central Pennsylvania counties (Centre, Clinton, Lycoming, Mifflin, Montour, Northumberland, Columbia, and Union Counties). The four shippers are Clark’s Feed Mills, Inc., PA Distribution, Keystone Commodities Co., and Brandt Mills Inc.¹⁶ The two rail line owners are the West Shore Railroad (WTSE) and the Lewisburg and Buffalo Creek Railroad (LBCX).

The interests of the SEDA-COG JRA parties concern six Class III railroads that are under the common control of Mr. Richard D. Robey. The six railroads (here referred to as the North Shore Affiliates or, simply, the Affiliates) are: North Shore Railroad Company (NSHR), Juniata Valley Railroad Company (JVRC), Nittany & Bald Eagle Railroad Company (NBER), Lycoming Valley Railroad Company (LVRR), Shamokin Valley Railroad Company (SVRR), and Union County Industrial Railroad Company (UCIR). Five of the Affiliates (NSHR, JVRC, NBER, LVRR, and SVRR) operate lines that are owned by SEDA-COG JRA; the sixth Affiliate (UCIR) operates lines that are owned by WTSE and LBCX. Five of the Affiliates (NSHR,

¹⁶ Two of these shippers — Clark’s Feed Mills and PA Distribution — testified at the public hearing held May 3, 2004.

NBER, LVRR, SVRR, and UCIR) have direct connections to NS's (formerly Conrail's) Buffalo, NY-Harrisburg, PA line; the sixth Affiliate (JVRC) has a direct connection to NS's (formerly Conrail's) Pittsburgh, PA-Harrisburg, PA line. And, aside from limited access to Canadian Pacific (CP) at Sunbury, PA (a point on the Buffalo-Harrisburg line) — access that exists pursuant to two settlement agreements entered into in connection with the Conrail Transaction — the six Affiliates connect only to NS.

SEDA-COG JRA contends that the preservation of rail service on its five lines (i.e., the lines operated by NSHR, JVRC, NBER, LVRR, and SVRR) has been instrumental in economic development activity and expansion of employment in Central Pennsylvania over the past 20 years. SEDA-COG JRA notes that, today, these five lines total 195 route miles and handle approximately 30,000 carloads a year. SEDA-COG JRA advises: that it is mindful that it has a residual common carrier service obligation; that, for this and other reasons, it values an effective working partnership with NS; that it also coordinates closely with Mr. Robey (whom SEDA-COG JRA refers to as its “contract operator”) on economic and industrial development projects; that, although the first year after the Split Date was trying for all concerned, the quality of NS's service has since been generally satisfactory; and that, at this point in time, service issues that arose after the Split Date have been resolved or are being managed to the extent they no longer present serious problems.

SEDA-COG JRA's concern, therefore, is not service by NS but access to CP. SEDA-COG JRA advises that, in connection with and on account of the Conrail Transaction, the North Shore Affiliates have enjoyed, since 1999, a limited degree of direct access to CP, and this access has allowed the SEDA-COG JRA region to compete effectively for new and expanded industrial development. SEDA-COG JRA fears, however, that this direct access to CP may be temporary and not permanent, and SEDA-COG JRA especially fears that this direct access to CP may be ended if the North Shore Affiliates are removed as the operators of the lines over which they now operate. Curtailment of direct access to CP, SEDA-COG JRA warns, would trigger serious economic repercussions in the SEDA-COG JRA region.

The post-Split Date direct access to CP that the North Shore Affiliates have enjoyed and that SEDA-COG JRA values so highly was granted by NS in connection with a June 10, 1997, settlement agreement (the 1997 NS/Robey settlement agreement) that consists of a letter that an NS official sent to Mr. Robey. See CSX/NS-6, Exhibit 18. As noted in the decision that concluded the first annual round of the general oversight proceeding, although the North Shore Affiliates (at least the five Affiliates with direct connections to Conrail's Buffalo-Harrisburg line) had, prior to the Conrail Transaction, overhead trackage rights over Conrail's Buffalo-Harrisburg line between Lock Haven, PA, and Sunbury, PA, those trackage rights were restricted to non-revenue traffic between the Affiliates themselves, and did not permit the Affiliates to interchange traffic with CP at Sunbury. See Oversight Dec. No. 5, slip op. at 143. The 1997 NS/Robey settlement agreement provided, in pertinent part: that the five Affiliates with direct connections to the Buffalo-Harrisburg line (NSHR, NBER, LVRR, SVRR, and UCIR, referred to

in the settlement agreement as the Five Railroads) would be granted overhead trackage rights over the Buffalo-Harrisburg line between Lock Haven and Sunbury, to enable the Five Railroads to connect with each other; and that the Five Railroads would also be granted “the option to interchange traffic, with the Canadian Pacific (CPRS) at Sunbury, Pennsylvania, originating or terminating at local points on the CPRS or at points located on carriers that connect only with CPRS.” As a practical matter, the 1997 NS/Robey settlement agreement provided: first, that the pre-transaction Lock Haven-Sunbury trackage rights would continue to exist (and would perhaps be expanded, if, as seems possible, the “non-revenue traffic” restriction was not to be included in the post-transaction trackage rights); and, second, that the Five Railroads would also have, post-transaction, a new right to interchange traffic with CP, provided that such traffic originated or terminated at local points on CP or at points located on carriers that connect only with CP.

As noted in the decision that concluded the third annual round of the general oversight proceeding, a separate NS/CP settlement agreement, that was also entered into in connection with the Conrail Transaction, grants the North Shore Affiliates indirect access to CP at Sunbury (i.e., the actual NS-CP interchange is at Harrisburg, and NS handles CP traffic between Harrisburg and Sunbury for a fixed handling charge). See Oversight Dec. No. 10, slip op. at 13 n.18. The NS/CP settlement agreement, however, is not now the subject of any dispute.

Although the 1997 NS/Robey settlement agreement was entered into by Mr. Robey (on behalf of the North Shore Affiliates) and NS — and not by any of the SEDA-COG JRA parties — the SEDA-COG JRA parties have claimed, in essence, that they stand in the position of “third party beneficiaries” of the 1997 NS/Robey settlement agreement and therefore have a right to enforce that settlement agreement for their own benefit. They have such a right, they have claimed: (a) because, based on the 1997 NS/Robey settlement agreement, SEDA-COG JRA and various shippers supported the Conrail Transaction; and (b) because, in a pleading submitted in the Conrail proceeding, the North Shore Affiliates asked that the Board “note for the record” the settlement agreement, see Merger Dec. No. 89, 3 S.T.B. at 422, and the Board, in noting this agreement “for the record,” observed that it was requiring NS “to adhere to any representations made to parties in this case,” Merger Dec. No. 89, 3 S.T.B. at 306. See Oversight Dec. No. 10, slip op. at 13.

Immediately following the Split Date, the interests of the SEDA-COG JRA parties vis-à-vis the 1997 NS/Robey settlement agreement coincided (or, at least, appeared to coincide) with the interests of the North Shore Affiliates vis-à-vis the 1997 NS/Robey settlement agreement. Indeed, SEDA-COG JRA, in its comments filed in the first annual round of the general oversight proceeding, argued that NS should fully implement the 1997 NS/Robey settlement agreement, and asked the Board to direct NS to enter into immediate and continuing negotiations with the North Shore Affiliates to conclude a formal trackage rights agreement on terms and conditions consistent with the 1997 NS/Robey settlement agreement and with an NS/Robey “interim” agreement dated June 24, 1999. See Oversight Dec. No. 5, slip op. at 145.

The 2001 NS/Robey TRA. Since 2001, however, the interests of the SEDA-COG JRA parties vis-à-vis the 1997 NS/Robey settlement agreement have not coincided with the interests of the North Shore Affiliates vis-à-vis the 1997 NS/Robey settlement agreement. The divergence occurred in the summer of 2001, when NS and Mr. Robey entered into a trackage rights agreement (the 2001 NS/Robey TRA) that was intended (by NS and Mr. Robey) to implement the 1997 NS/Robey settlement agreement. See CSX/NS-6, Exhibit 19 (a 2003 letter by counsel for Mr. Robey that confirms that, as far as Mr. Robey is concerned, the 2001 NS/Robey TRA implements the 1997 NS/Robey settlement agreement). Although some of the SEDA-COG JRA parties do not know the full details of the 2001 NS/Robey TRA,¹⁷ all of the SEDA-COG JRA parties know enough of the details to object to the 2001 NS/Robey TRA on several grounds: that it is not permanent; that it applies only to the North Shore Affiliates, and not to the owners of, and to any successor operators of, the lines operated by the Affiliates; and that it does not provide all of the access to CP promised by the 1997 NS/Robey settlement agreement (the 2001 NS/Robey TRA, the SEDA-COG JRA parties contend, contains a number of interchange restrictions, car accounting caveats, penalties for interchanging volatile cars, and provisions to close the interchange). See Oversight Dec. No. 10, slip op. at 14. The SEDA-COG JRA parties further contend that the 2001 NS/Robey TRA differs from the expectations of “service users” (i.e., shippers of freight moving via CP from/to points on the North Shore Affiliates), is difficult to administer, and can actually foster the misrouting of cars. And the problem, the SEDA-COG JRA parties warn, has escalated to serious proportions in Central Pennsylvania, and now threatens serious impacts on transportation service accessible to shippers served by the North Shore Affiliates.

Restrictions in the 2001 NS/Robey TRA Not Yet Enforced. The SEDA-COG JRA parties contend that, although the 2001 NS/Robey TRA has been in effect since some time in 2001, the restrictions contained in this TRA — at least as respects the scope of the traffic that can move via the CP connection at Sunbury — have not yet been enforced, at least not fully. The SEDA-COG JRA parties warn, however, that, although enforcement of the restrictions has not yet occurred, the clock is running out, and, unless NS can be persuaded to agree to remove the restrictions, NS will, sooner or later, enforce the restrictions. The SEDA-COG JRA parties maintain that the access to CP that was promised in 1997 and implemented in 1999 (i.e., the access that the 2001 NS/Robey TRA would restrict): has enabled the North Shore Affiliates to attract new shippers that want to be able to connect to more than one Class I carrier; has allowed existing shippers to increase their rail business; and has not taken former-Conrail traffic away from NS, but, rather, has created additional opportunities for NS, which still handles the vast majority of the freight moving from/to the North Shore Affiliates. The SEDA-COG JRA parties

¹⁷ A copy of the 2001 NS/Robey TRA was submitted to the Board under seal. See CSX/NS-6 at 81. See also Oversight Dec. No. 10, slip op. at 14 n.19 (indicating that, although SEDA-COG JRA was given a copy of the 2001 NS/Robey TRA, the relevant confidentiality agreement does not allow SEDA-COG JRA to make that copy available to other parties).

contend that, based on the promise of access to CP, shippers: have developed new buying and shipping patterns;¹⁸ have located on the North Shore Affiliates to take advantage of the access; and have invested in new and enlarged facilities to handle the traffic that they are developing with CP and NS. And, the SEDA-COG JRA parties add, the restrictions contained in the 2001 NS/Robey TRA significantly reduce the value of the promised access: they impose geographic and time limitations; they do not fairly grandfather existing traffic; and they do not recognize the seasonality and geographic shifts of the grain traffic that uses the access.

Goals Sought by the SEDA-COG JRA Parties. The SEDA-COG JRA parties contend that any agreement with NS should reflect five goals related to expectations that (the SEDA-COG JRA parties claim) arise from the commitments made by NS in the 1997 NS/Robey settlement agreement.

(1) First Goal: The SEDA-COG JRA parties contend that the agreement with NS should be made permanent.

(2) Second Goal: The SEDA-COG JRA parties contend that the agreement with NS should apply not only to the North Shore Affiliates but also to the owners of, and to any successor operators of, the lines operated by the North Shore Affiliates. SEDA-COG JRA advises, in this regard, that its agreement with Mr. Robey ends in three years.

(3) Third Goal: The SEDA-COG JRA parties contend that the agreement with NS should fulfill the access to CP promised by the 1997 NS/Robey settlement agreement.

(4) Fourth Goal: The SEDA-COG JRA parties contend that the agreement with NS should provide that the traffic that can be interchanged directly with CP at Sunbury is the same as the traffic that can be interchanged indirectly with CP via Harrisburg (the latter, SEDA-COG JRA advises, references the NS/CP “fixed divisions” agreement whereby NS provides haulage from Harrisburg to an interchange with the North Shore Affiliates at Northumberland, which is located some two miles from Sunbury). The crucial difference here appears to concern the definition of “CP system” points under the 2001 NS/Robey TRA and under the NS/CP “fixed divisions” agreement. The SEDA-COG JRA parties prefer the definition provided by the NS/CP “fixed divisions” agreement, which (they say) defines

¹⁸ The two SEDA-COG JRA shippers that testified at the public hearing held May 3, 2004 — Clark’s Feed Mills (an animal feed manufacturer) and PA Distribution (a building products wholesaler, warehouse, and distributor) — explained that their shipping patterns have changed in reliance on the CP access that was promised in 1997 and implemented in 1999. Clark’s Feed Mills indicated that, since 1999, it has originated the largest two components of poultry feed (corn and soybean meal) at CP origins. PA Distribution advised that 75% of the material it brings into its facility arrives by rail, and almost 75% of that comes in on CP.

“CP system” broadly to include local points on CP, points on railroads that are later spun off from CP, points on railroads that had been spun off from CP over the previous ten years (such past decade spin offs are said to include I&M Rail Line, New Brunswick Southern, Ottawa Valley, Quebec & Gastineau, and Twin City & Western), and also points on certain additional railroads (such additional railroads are said to include the Ontario Northern and the Bangor and Aroostook).

(5) Fifth Goal: The SEDA-COG JRA parties contend that the agreement with NS should provide that all existing traffic should be meaningfully “grandfathered.” The SEDA-COG JRA parties advise that it is their impression that the grandfather clause in the 2001 NS/Robey TRA provides that, if an origin is not used for 12 months, that origin will henceforth not be covered by the grandfather clause. This, the SEDA-COG JRA parties claim, is not “meaningful” grandfathering, particularly as respects agricultural products (the SEDA-COG JRA parties indicate, by way of example, that, because grain brokers go from grain elevator to grain elevator, the grandfather clause as it now stands offers little protection for grain traffic from any origin).

Relief Sought by the SEDA-COG JRA Parties. The SEDA-COG JRA parties note that, although they have appreciated the willingness of NS to engage in private discussions concerning the CP access issue, those discussions have not yet come to a mutually satisfactory conclusion. And, the SEDA-COG JRA parties note, they are concerned that an ending of the Board’s oversight of commitments arising out of the Conrail Transaction could dampen NS’s interest in continuing private discussions with a view to a mutually acceptable resolution of the access issue. The SEDA-COG JRA parties therefore ask that the Board: (a) continue oversight of unresolved issues at least for an additional year; (b) order NS to negotiate in good faith with the SEDA-COG JRA parties; and (c) direct the parties involved in the CP access issue to report at least quarterly on the progress of private negotiations. The SEDA-COG JRA parties contend that a continuation of the Board’s interest in this as yet unresolved transaction-related issue would facilitate resolution in the interest of all concerned.

SMS Rail Service. SMS, a New Jersey short line that connects to Conrail in the South Jersey-Philadelphia SAA, contends that the promised benefits of the Conrail Transaction have not been realized insofar as the South Jersey-Philadelphia SAA is concerned. The Board, SMS notes, said that “[t]he most important public benefit resulting from the transaction will be a substantial increase in competition by allowing both CSX and NS to serve where only Conrail served before,” which (the Board added) “will bring new competition to shippers in such markets as Southern New Jersey/Philadelphia.” Merger Dec. No. 89, 3 S.T.B. at 333. SMS insists, however, that the benefits of new competition have not been realized in the South Jersey area. SMS contends: that CSX and NS have not been vigorously competitive; that, in fact, because CSX and NS have not engaged in competitive rate cutting, traffic that used to move by rail out of the South Jersey-Philadelphia SAA is now being trucked; that, furthermore, CSX and NS have failed to improve rail service in the South Jersey-Philadelphia SAA, and, to the contrary, have encouraged area industries to relocate to nearby points that only one railroad

(CSX or NS) can serve; and that the reality of the situation is that, for CSX and NS, their idea of serving the South Jersey area is via their intermodal facilities in and about the Philadelphia area (which, SMS claims, has resulted in increased congestion on area highways).

Relief Sought By SMS. SMS contends that, at least insofar as the South Jersey-Philadelphia SAA is concerned, the Board: should continue its oversight; should utilize the extension of oversight to allow an impartial body to assess whether the representations made in the control proceeding have been realized; and should remind CSX and NS that it retains jurisdiction to impose such conditions as are necessary to ensure that the South Jersey-Philadelphia SAA receives the vigorous and effective competitive railroad service that it was promised.

State of New York. New York's comments were submitted by the New York State Department of Transportation (NYSDOT).

Conditions Sought In The Control Proceeding. New York notes that it sought, in the Conrail control proceeding, a number of conditions that it believed were required to make the Conrail Transaction consistent with the public interest. Those conditions were: (1) an order requiring CSX to grant trackage rights to New York's carrier nominee over the "east-of-the-Hudson" portions of Conrail's Hudson Line from the Selkirk interchange with Canadian Pacific (CP) to the end of Conrail's Fremont Secondary; (2) a directive that CSX and NS take steps to open the Buffalo area to rail competition and to improve the rail infrastructure in the region; (3) the establishment of an oversight period to monitor the safe co-existence of CSX and NS freight service with commuter and inter-city passenger service throughout New York; (4) the full assumption by CSX and NS of Conrail's continuing obligations under 13 enumerated contracts with New York or its agencies; (5) a commitment by CSX and NS to continue and expand Conrail's cooperation with and participation in the New York High Speed Passenger Rail Program to upgrade infrastructure between Buffalo and Albany and between Albany and New York City, above and beyond passenger-related contract projects; (6) a commitment by CSX and NS to enhance and expand the passenger rail infrastructure in New York, in conjunction with Amtrak; and (7) the imposition of conditions to protect the interests of New York's short line railroads, including the Livonia, Avon & Lakeville Railroad (LAL, which sought the elimination of a restriction on its access to Conrail's Genesee Junction Yard that limited LAL to a single Class I connection). See Merger Dec. No. 89, 3 S.T.B. at 504-507.

Conditions Agreed to by CSX and NS. New York notes that CSX and NS ultimately agreed to assume and fulfill all contracts to which Conrail was a party, and to work in good faith with New York and other States to address issues regarding passenger service efficiency and safety.

Conditions Imposed by the Board. New York notes that the Board imposed a number of conditions for the benefit of New York and its constituents: (1) an order directing CSX to

negotiate unrestricted trackage rights or haulage rights in favor of CP over the Hudson Line from Selkirk to Fresh Pond, see Merger Dec. No. 89, 3 S.T.B. at 388-389 (ordering paragraph 28); (2) a requirement that CSX adhere to its representations regarding intended investments in new connections and upgraded facilities in the Buffalo area, see Merger Dec. No. 89, 3 S.T.B. at 389 (ordering paragraph 35), including (i) upgrading Conrail's existing computer technology and fueling facilities at Buffalo, (ii) maintaining or increasing current employment levels in the Buffalo area, (iii) providing overhead trackage rights to NS through Buffalo to Suspension Bridge, (iv) working with NS and other carriers operating in the Buffalo area to schedule switching and through movements within the area's rail network so as to reduce congestion at points such as CP Draw, and (v) investing substantial funds in network improvements to reduce shipping time and enhance service reliability for rail shippers in the Greater Buffalo area, see Merger Dec. No. 89, 3 S.T.B. at 288 (numbered paragraph 3); (3) a directive that CSX cooperate with New York and the New York City Economic Development Corporation (NYCEDC) in studying the feasibility of upgrading cross-harbor float and tunnel facilities to facilitate cross-harbor rail movements, and, in particular, participate in New York City's Cross Harbor Freight Movement Major Investment Study, see Merger Dec. No. 89, 3 S.T.B. at 389 (ordering paragraph 30); (4a) a requirement that CSX make an offer to the City of New York to establish a committee intended to develop ways to promote the development of rail traffic to/from the City, with particular emphasis on Conrail's Hudson Line, see Merger Dec. No. 89, 3 S.T.B. at 389 (ordering paragraph 29); (4b) a requirement that CSX meet with regional and local authorities in the Buffalo area to establish a committee to promote the growth of rail traffic to and from the Greater Buffalo area; (5a) a directive to CSX to negotiate an agreement that would allow LAL to operate across Conrail's Genesee Junction Yard to reach a connection with the Rochester & Southern Railroad (R&S), see Merger Dec. No. 89, 3 S.T.B. at 391 (ordering paragraph 56); (5b) a directive to CSX and NS to enter into arrangements that would provide that the reach of any "blocking provision" was not expanded as a result of the Conrail Transaction, see Merger Dec. No. 89, 3 S.T.B. at 390 (ordering paragraph 39); and (6) a requirement that CSX and NS adhere to all of the representations they made during the course of the control proceeding, see Merger Dec. No. 89, 3 S.T.B. at 387 (ordering paragraph 19), which (New York says) has the effect of binding CSX and NS to their commitments to assume Conrail's obligations under its various contracts with New York, and which also (New York adds) has the effect of binding CSX and NS to the representations they made in their Safety Integration Plans.

New York's Present Concerns. New York acknowledges that, in many respects, CSX and NS can claim "technical" compliance with the Board's New York conditions (New York explains that its contracts with Conrail were assumed and have been performed, CSX and CP entered into an agreement for unrestricted trackage rights on the Hudson Line, and the Cross Harbor, Buffalo, and New York City study committees were formed and meet as specific issues arise). New York contends, however, that in the key areas of infrastructure improvements, freight service quality enhancements, expansion of marketing opportunities, and a general commitment to the growth of the New York freight rail transportation system, CSX and NS have failed to live up to the expectations set by their original application. Indeed,

New York contends, its experience indicates that the carriers are retreating from the goals and benefits they touted in 1997, even as the State has worked to support their achievement. New York has submitted five “examples” (regarding the Buffalo region, general rail infrastructure, the LAL railroad, the Southern Tier rail lines, and grade crossings) to illustrate what it regards as a disturbing pattern.

New York’s Example #1: The Buffalo Region. New York contends that, following the completion of CSX’s upgrades to computer and fueling facilities and NS’s expansion of Bison Yard, the railroads effectively suspended efforts to enhance infrastructure and improve freight service efficiency in the Buffalo area. New York also contends that CSX eliminated a shift crew at Frontier Yard, and closed the south-of-Buffalo Seneca Yard altogether (although New York notes that Seneca Yard may be resurrected as an intermodal facility, due to a \$4 million capital infusion provided by New York). New York further contends that it is unaware of any projects or specific plans for the carriers themselves to invest in network improvements to reduce shipping times and to enhance service reliability. And, New York adds, the rail workforce appears to have been reduced in the Buffalo area.

New York’s Example #2: General Rail Infrastructure. New York claims that, in response to concerns voiced by CSX and NS that the New York property tax structure, as applied to railroad assets, created a disincentive to new infrastructure investment, New York enacted the Rail Infrastructure Investment Act of 2002, one of many steps (New York advises) by which New York has materially supported rail infrastructure development since the Conrail Transaction was completed (other steps, New York adds, include New York’s expenditure or programming of approximately \$185 million in State and federal funds to improve the New York rail network). New York explains: that the 2002 Act provided significant property tax relief for existing rail property as well as for new railroad infrastructure investment; that, essentially, the law created a 10-year property tax valuation exclusion for new investments in rail facilities and infrastructure improvements; and that, because the program covers the value of the new investment regardless of the source of the invested capital, the railroads can claim the exclusion even where the State provides part or all of the funding for the improvements. New York contends, however, that, despite this extraordinary outreach on its part, neither CSX nor NS has submitted a project for qualification under the program. And, New York adds, both railroads have closed economic development offices in New York, which has adversely impacted efforts to promote and market expanded rail freight service in New York, thereby compounding the apparent lack of follow-through on the commitment to improve and enhance the freight rail infrastructure in New York.

New York’s Example #3: The LAL Railroad. New York acknowledges that CSX entered into an agreement with LAL granting LAL access over Genesee Junction Yard to effect interchange with R&S. New York claims, however, that, according to LAL, CSX’s commitment to the purpose and intent of the Board’s Genesee Junction Yard condition has not extended very far beyond the signing of the agreement. New York explains: that Genesee Junction Yard is

used principally by LAL and R&S, and is used by CSX only to set off and pick up cars to/from LAL; that, however, because the yard is owned by CSX, LAL and R&S must rely on CSX to facilitate a smooth and efficient LAL/R&S interchange; that, therefore, the LAL-CSX agreement provided that CSX would rehabilitate and maintain the yard to FRA Class 1 condition; that CSX performed, in June 2000, a “safety tie” replacement sufficient to reduce the likelihood that the track in the yard would come apart under a train; that, however, according to LAL, this work did not bring the track up to FRA Class 1 standards, and, to this day, CSX has still not brought the track up to FRA Class 1 standards; that, since 2000, track conditions have continued to deteriorate with very little attention from CSX beyond emergency-type repairs; and that the results have been rail spreads, derailments, and the closing of tracks in the yard due to unsafe conditions. And, New York adds, both LAL and R&S have suffered losses because of CSX’s neglect, including lost revenue due to service interruptions and cleanup and re-railing costs following derailments.

New York’s Example #4: The Southern Tier Rail Lines. New York notes that, as a result of the Conrail Transaction, NS assumed control over two rail lines in New York’s Southern Tier: the Southern Tier Mainline, which extends from Buffalo to the Northern New Jersey port area; and the Southern Tier Extension, which runs from Corry, PA, to Hornell, NY (where it connects with the Southern Tier Mainline). (a) As respects the Southern Tier Extension, New York advises that NS is to be commended for its cooperation with New York, and also with the Southern Tier Rail Authority and the Western New York & Pennsylvania Railroad (WNY&P), to complete a sale-leaseback arrangement that resulted in the restoration of local service on the Southern Tier Extension. (b) As respects the Southern Tier Mainline, however, New York advises that it has concerns. New York explains: that, during the Conrail proceeding, the Portage Bridge over Letchworth Gorge between Buffalo and Hornell was identified by FRA as a safety concern; that this segment is used both by NS and by CP (CP operates via trackage rights over the Southern Tier Mainline between Buffalo and Binghamton); that, however, while NS now has an alternate route via the Southern Tier Extension, CP must depend on its trackage rights via the Southern Tier Mainline; that, although FRA found that the Portage Bridge has a limited life without extensive rehabilitation, NS has not announced any plans to address the bridge’s existing condition or any operating plans in the event the bridge becomes unusable; and that this is a matter of great concern to New York and the interest of expanded rail freight service, as loss of the bridge would dramatically reduce CP’s effectiveness as a competitor in the western part of the State. And, New York adds, as long as NS’s intentions regarding the Southern Tier Mainline are not clear (New York notes, in this respect, that the portion of the Southern Tier Mainline between Binghamton and Port Jervis is significantly underutilized, and has been identified by NS as a candidate for sale or lease), New York’s transportation capital and freight rail development plans remain incomplete.

New York’s Example #5: Grade Crossings. New York advises that serious concerns have arisen over the prospect of CSX system downgrades contributing to increased risks at grade crossings, especially in the Rochester area. New York reports that investigations are underway

by FRA and others into the specific causes of accidents and grade crossing protective device malfunctions, and the steps that could or should have been taken to avoid them. New York advises that reducing the number of highway grade crossings was among the programs incorporated in CSX's Safety Integration Plan, and that ensuring that all railroads that operate in New York dedicate the necessary human and financial resources to properly maintain safety devices and other equipment at grade crossings was and is a State priority. And, New York adds, it will continue to monitor the situation, and will report further findings to the Board, FRA, and/or other appropriate federal authorities.

Relief Sought by New York. New York — which maintains that it has worked to fulfill its role by increasing its investment in rail infrastructure and assisting the carriers doing business in New York through initiatives such as the 2002 property tax legislation, and which further maintains that it is prepared to work with CSX and NS earnestly and in good faith to address the matters described above and otherwise to try to realize the promise of expanded rail freight service and enhanced transportation efficiency that was part and parcel of the carriers' Conrail plan — asks that the Board provide continued oversight to assure that the carriers fulfill their commitments to New York.

Union County (New Jersey). Union County, a political subdivision of the State of New Jersey, is located approximately 15 miles southwest of midtown Manhattan and occupies an area of 103 square miles. With a population of about 512,000 persons, Union County is both heavily industrialized and residential. Transportation facilities located in Union County include the Port Newark-Port Elizabeth container terminals, Newark International Airport, the Garden State Parkway, the New Jersey Turnpike, Amtrak's Northeast Corridor, New Jersey's "Chemical Coast" refineries, and major rail routes utilized by CSX, NS, the Conrail Shared Assets Operation (CSAO), and New Jersey Transit (NJT).

Union County contends that, from its perspective, the Conrail Transaction presents a history of marketing failures, service problems, and broken promises. Union County claims that, by contrast to the rosy predictions made by CSX and NS in 1997 and the still optimistic assertions made by CSX and NS in 2004, the fact of the matter is that CSX and NS have fallen far short in making rail freight play a significant policy role in improving traffic congestion and the quality of life in the New York-New Jersey area. Union County insists that the goals that applicants previously referred to as "transaction benefits" (reduction in truck traffic; competitive access to the Port of New York and New Jersey by two Class I railroads; full service industrial development departments working with local agencies to develop and redevelop industrial sites; work with NJT to expand passenger services on freight-only lines where appropriate; New Jersey short lines to have access to both Class I railroads; and construction of new intermodal and transloading facilities to serve off-line customers) are, at best, works in progress.

Union County maintains that the structure of the service provided by applicants in northern New Jersey suffers five endemic problems that will have to be addressed before the

region can experience the sort of “rail renaissance” that will have a significant impact on the movement of freight. The CSAO, Union County explains, is not a traditional terminal railroad; it does not market its operations; it is neither independent from nor neutral as between its joint owners (CSX and NS); and what it is, really, is an invisible switching operation that operates over an extensive terminal area. (1) Union County contends that, because the North Jersey SAA is a cost center, not a profit center, applicants minimize service levels. (2) Union County contends that applicants’ marketing and operating strategies miss significant opportunities for moving traffic by rail between ports and nearby distribution centers. (3) Union County contends that applicants have not marketed their services to industries located in the SAA and have failed to reach out to government and industry groups that can assist with those endeavors. (4) Union County contends that applicants have neglected to use local short line railroads to assist in developing traffic from small and medium size customers. (5) Union County contends that applicants seek to relocate customers and intermodal facilities to points outside the SAAs.

Union County argues: that applicants have disinvested in New Jersey rail facilities in comparison with investments made in other states (Union County indicates, by way of example, that NS has closed its Roadrailer facility at portside in Elizabeth-Newark and has constructed major intermodal facilities in Harrisburg and Bethlehem-Allentown); that, although rail traffic from/to northern New Jersey has indeed increased, there is no reason to believe that this increase is due to the Conrail Transaction instead of regional economic growth, and, likewise, there is no reason to believe that rail traffic is expanding at a greater rate than traffic via other modes; that, similarly, although growth of traffic moving via the Port Newark-Port Elizabeth facilities has exceeded projections, there is no reason to believe that this can be attributed to the Conrail Transaction; that, although applicants once touted a plan to contribute funds on a 50/50 matching basis (along with area government agencies) towards upgrading key routes serving the Port of New York and New Jersey, they have yet to fulfill their commitment; that, although there are, adjacent to rail lines, numerous brownfields and underutilized industrial sites in Union County, applicants’ industrial development efforts (in conjunction with those of economic development agencies in Union County) have been nonexistent; and that, although CSX has made a major investment in converting the former Elizabethport rail yard into a successful transloading facility, NS has not taken comparable actions on facilities located on or along its lines.

As respects the increased competition that was supposed to be a primary consequence of the Conrail Transaction, Union County contends that applicants’ promises have fallen short of reality. Union County explains: that, outside of rail competition at the Port Newark-Port Elizabeth facilities, shippers have not experienced the vigorous competition they were promised; that, rather, CSX and NS appear to prefer to relocate industries to lines located outside the SAAs, i.e., lines solely owned either by CSX or NS; and that, similarly, Union County’s own short line railroad (M&E) lacks direct access to CSX (M&E, Union County reports, has direct access only to NS and to CSAO). CSAO, Union County contends, is flawed because of its high cost, “invisible switching operation” structure. Union County concedes that CSAO generally

functions well as a neutral switching operation, but insists that CSAO does little to advance industrial development and is not suited to serve the small to medium size customer.

Relief Sought by Union County. Union County has made a number of recommendations that bear on the SAA in northern New Jersey.

(1) Union County contends that the Board should continue its oversight role for an additional two years. Union County argues that, without oversight, there is little assurance that CSX or NS will fulfill the pledges and agreements that were made as a condition of their purchase of Conrail. Union County cites, as one example of such pledges, the issue of preserving the former Central Railroad of New Jersey rail line between Elizabethport and Cranford for the reinstatement of passenger service. Union County cites, as another example of such pledges, what it refers to as the “promise” of access to both Class I railroads that was given to all short lines in New Jersey as a condition of the merger (but has not been fulfilled with respect to M&E).

(2) Union County contends that, as part of a broader reevaluation of the SAA, consideration must be given to how the New York Metropolitan Area rail system is integrated into the anti-terrorist and homeland security plans for the region.

(3) Union County contends that the Board should establish a method of monitoring the actual growth in rail freight as compared to the growth or reduction in truck movements as a result of the merger.

(4) Union County contends that, if the Board believes that the solutions to the problems identified by Union County are beyond the jurisdiction of the Board, it may be necessary to establish congressional oversight. Union County has in mind the establishment of a joint select congressional committee on rail freight in the former Conrail Region (Northeast and Midwest).

(5) Union County contends that the Conrail SAA should be restructured and placed under the aegis of a new operating entity. Union County contends, in particular, that CSAO facilities within the service area of the Port Authority of New York and New Jersey should be transferred to that agency for operation; these facilities, Union County explains, can be upgraded, and can be used for the development of the Port Inland Distribution System. Union County advises: that this system is a short haul system for the inland movement of port traffic for unloading and reloading for local distribution; that this short haul system, though outside the realm of the Class I service structure, is very much desired by PANYNJ and the short line operators of northern New Jersey; and that the financial resources of PANYNJ and its experience as an operator or subcontractor of intermodal facilities make PANYNJ the most logical and suitable entity to achieve this goal. And, Union County adds, light density lines should be transferred to area short line railroads (such as M&E, which, Union County claims, is now the only

competitive alternative in markets that are not being served by CSX and NS, and the only alternative to develop rail-based underutilized and former industrial sites).

(6) Union County suggests that the Board should have its initial recommendations ready for presentation at the proposed North American Rail Summit to be held in Chicago in May 2005.

Other Parties. Mr. Arthur B. Shenefelt participated in this proceeding on behalf of The Bucks HUB Conference and as the Director of the Office of Transportation Technology, Strategy, Planning & Development. (1) Mr. Shenefelt advises that some 3,000 households have been put in severe jeopardy because several thousand daily quarry truck movements are destroying local roads. These trucks, Mr. Shenefelt reports, haul an estimated 8 million tons of aggregate each year over small roads from quarries in Bucks County, PA. Yet, Mr. Shenefelt claims, a rail right-of-way exists between the major origins and destinations, all within the South Jersey-Philadelphia SAA. Mr. Shenefelt adds that, although the aggregates deliveries are matched with return loads of sand (which, he suggests, provides an ideal opportunity for a profitable rail operation), and although two short lines and one major railroad have expressed an interest in the move, it will require forcefully expressed federal attention, assistance, and direction to prompt reluctant and often uninformed local, regional, and state government entities to act. (2) Mr. Shenefelt contends that there should be a national mechanism for disbursing transportation funding for projects with impacts that cross state borders. There has been, Mr. Shenefelt argues, too much state-by-state attention to what are really regional, multi-state needs. (3) Mr. Shenefelt contends that CSX and NS are not serving the SAAs, and that many cities in New York and New Jersey have been adversely affected by this lack of service. Mr. Shenefelt also contends that CSX and NS have set rates that effectively obstruct real interchange service with their short line connections. (4) Mr. Shenefelt contends that the time has come to establish the first U.S. transcontinental railroad. Mr. Shenefelt would apparently prefer that the first transcontinental involve a Union Pacific acquisition of one of the two eastern Class I railroads.

Relief Sought by Mr. Shenefelt. Although not explicit, the tenor of Mr. Shenefelt's comments suggests that he supports a continuation of the Board's oversight of the Conrail Transaction.

Mr. William R. Wright, an individual, contends that, although the Conrail Transaction paves the way for two transcontinental Class I railroads to compete against road and air, these competing modes are still heavily subsidized in the form of free infrastructure given on land free from real estate taxes. This hidden subsidy to rail's competition, Mr. Wright argues, must be addressed before any meaningful solution to the railroad problem can take place. Mr. Wright also contends that the SAAs are the serious flaw of the Conrail Transaction. SAAs, Mr. Wright explains, have no sales or industrial development department; their very existence encourages both CSX and NS to locate shippers on their own lines rather than in the SAAs. And,

Mr. Wright adds, existing short lines are hurt as both CSX and NS prefer to encourage on-line freight to the detriment of everyone in the Northeast. NS, Mr. Wright argues in particular, has sought to abandon northern New Jersey, New York City, and Long Island by making this area the outer end of a branch line while seeking to entice all shipments into Pennsylvania with trucking beyond at higher costs.

Relief Sought By Mr. Wright. Mr. Wright suggests that one solution would be to create a full terminal operation from SAAs with marketing and industrial development. Mr. Wright also suggests that the only other equitable solution would be to allow the existing short lines full operations on nearby portions of the SAAs and transit agencies, with the right to connect at key points with both Class I railroads so that neither would control the inbound shipments. And, Mr. Wright adds, oversight should be kept open until all of the relevant issues have been resolved.

APPENDIX D: RESPONSE BY CSX AND NS TO REQUESTS FOR RELIEF¹⁹

CSX and NS contend that the time has come to end the oversight that was established in Merger Dec. No. 89. CSX and NS maintain: that the Conrail Transaction has significantly improved the rail landscape in the eastern United States, and the shipping public is clearly and significantly better off for this transaction having occurred; that, despite the difficulties that took place immediately after the Split Date, the transaction has now been fully and safely implemented; that the various conditions imposed by the Board have worked as intended; and that CSX and NS have complied with the conditions (both general and environmental) imposed by the Board, and have honored their commitments in good faith. CSX and NS further maintain: that no party has demonstrated any structural or competitive harms arising from the transaction; that no party has demonstrated any systemic problem with the implementation of the transaction; that no party has met the standard for justifying the imposition of any new conditions or other Board intervention; and that no party has shown that extension of the formal oversight process beyond the ordinary 5-year term is warranted. And, CSX and NS add, if any party comes to believe in the future that a true transaction-related harm exists that must be brought to the Board's attention, it can do so under the Board's routine processes and the Board can address it as appropriate pursuant to its independently-existing statutory authority.

CSX and NS further contend that there is no basis for the Board to impose any new affirmative relief. In some cases, CSX and NS explain, the issues raised by a party are not the proper object of the Board's attention at all, but are routine business and operational matters that railroads and their stakeholders deal with every day in the ordinary course of business. In some cases, CSX and NS advise, parties have used this proceeding simply as a means of enlisting the Board, not to remedy any concrete and identifiable competitive harm caused by the transaction, but simply to impose that party's vision of what could be done to make things even better. In some cases, CSX and NS claim, parties have alluded to the broad, aspirational goals of the transaction (goals, CSX and NS maintain, that have actually been achieved) as if they were particularized, bargained-for obligations that must be satisfied with respect to, and to the satisfaction of, every individual stakeholder. In some cases, CSX and NS argue, parties have made generalized assertions of "commitments" entered into by applicants without providing evidence that such supposed "commitments" were ever made. And in some cases, CSX and NS claim, parties that assert that applicants have failed to live up to identifiable commitments are simply wrong; applicants, CSX and NS insist, have honored their commitments in good faith and indeed in some instances have gone far beyond what is properly required.

¹⁹ With respect to the requests for relief made by Cargill, these responses were made by NS in its NS-12 pleading (filed Oct. 2, 2003) and by CSX in its CSX-14 letter (filed Oct. 6, 2003). With respect to the requests for relief made by other parties, the responses of CSX and NS were made in their CSX/NS-6 and CSX/NS-7 pleadings (both filed Aug. 2, 2004).

Relief Sought by CSX and NS. CSX and NS ask that the Board: (1) deny all requests for relief by any commenting party; (2) deny all requests to extend the oversight proceeding beyond its intended 5-year term; and (3) discontinue all remaining reporting requirements arising out of the main Conrail control proceeding (STB Finance Docket No. 33388) or any of its sub-dockets. CSX and NS add that, even if oversight is discontinued, the Board will retain its general authority to act in response to specific transaction-related problems should any arise in the future.

Response to DOT. CSX and NS contend that the Board has already provided interested parties ample opportunity to present concerns over the past several months, including through the conduct of two public hearings and the opportunity for written submissions. CSX and NS further contend that the record in this proceeding is complete, and that there is no need for further submissions.

Response to American Chemistry Council. CSX and NS advise that they will continue to strive to provide their chemical customers with safe and reliable rail service in the SAAs and elsewhere.

Response to Cargill. CSX and NS contend that the Board should not issue the clarifications sought by Cargill.

NS's Response to Cargill. NS contends that there is no need for the Board to clarify anything, and that the Board should therefore decline to issue the clarifications sought by Cargill. (1) NS advises that it does not dispute that the Board retains the authority to address possible future concerns about 2-to-1 issues arising from the Conrail Transaction. There is no need, NS argues, for the Board to clarify that undisputed proposition. (2) NS advises that, although it does not agree with a number of Cargill's assertions (including, among others, Cargill's claim that the plan described in the CSX/NS-4 pleading does not preserve adequate two-carrier competition), those matters are entirely academic at the present, given Cargill's admission that it is not presently suffering harm. NS further advises that, if a situation were to develop in the future prompting Cargill to seek Board action to address an alleged actual, present harm (as opposed to a future, speculative harm), the determination of what, if any, relief might be appropriate would necessarily depend upon evidence of the facts and circumstances that exist at the time. It would be, NS contends, inappropriate as well as unnecessary for the Board now to prejudge, or clarify, what relief Cargill might or might not be entitled to should that situation arise.

CSX's Response to Cargill. CSX has advised that it concurs in NS's response to Cargill and agrees that the Board should decline to issue the clarifications sought by Cargill.

Response to Cemex. CSX, which provides service to Cemex's Florida destinations, advises that Cemex was and remains a valued customer.

As respects the rates charged Cemex for freight services, CSX advises that such rates are based on market conditions, which change over time; and, CSX points out, the rate of inflation is only one of many relevant factors. CSX contends: that the Board carefully examined concerns that the carriers would charge higher rates to solely-served shippers in order to recover an alleged “acquisition premium,” and found no basis for those concerns, see Merger Dec. No. 89, 3 S.T.B. at 261-262; that the Board reached essentially the same conclusion in the decision ending the first annual round of the general oversight proceeding, see Oversight Dec. No. 5, slip op. at 18-19; and that Cemex has provided no basis for reexamining that conclusion now. And, CSX adds, if there were any widespread issue as to pricing, surely NITL and ACC — the parties most concerned about the “acquisition premium” in the control proceeding — would have raised the issue, and they have not.

As respects small rate cases, CSX notes that the Board is considering, in a separate proceeding, procedures for handling small rate disputes. See Rail Rate Challenges In Small Cases, STB Ex Parte No. 646.

Response to DaimlerChrysler. CSX and NS contend that the concerns voiced by DaimlerChrysler — service difficulties in the Detroit and North Jersey SAAs — do not arise out of the Conrail Transaction, but are the kind of day-to-day service issues that railroads and shippers must, and do, routinely work through as they arise. CSX and NS advise: that the demand for auto rack cars remains very high, especially for the bi-level cars used to transport SUVs and minivans (both significant parts of Chrysler’s product mix); that, at the Ridgely Heights auto ramp (where DaimlerChrysler vehicles are unloaded), steps have been underway to relieve congestion, including adding more workers and reconfiguring the ramp layout to increase capacity; and that DaimlerChrysler and other customers have also assisted by agreeing to route more vehicles into the Doremus Avenue auto ramp (thereby also saving some drayage costs in some circumstances). The overwhelming weight of evidence, CSX and NS claim, demonstrates that service has been very good as a general matter within the SAAs and particularly strong, with a high on-time performance, in the Detroit SAA. There is, CSX and NS therefore conclude, no need for intervention by the Board or extension of any formal oversight period to address this matter.

Response to Delaware Valley Regional Planning Commission. CSX and NS contend that the SAAs in general, and the South Jersey-Philadelphia SAA in particular, are working well as designed. No basis, CSX and NS maintain, has been provided for any fundamental restructuring of the SAAs.

(1) CSX and NS dispute the notion that they have de-emphasized the SAAs by creating intermodal facilities outside of the SAAs. CSX and NS explain that both CSX and NS have constructed or are constructing new first class intermodal terminals in South Philadelphia. CSX and NS further explain that CSX developed an intermodal terminal at Greenwich Yard at a cost of \$22 million, and that NS is constructing its new intermodal terminal at the Philadelphia Navy

Yard. And, CSX and NS add, NS is continuing to develop the Croxton Yard, E-Rail, and Livernois Yard facilities, within the SAAs, as well as service to its Rutherford Yard and to Bethlehem, both in Pennsylvania.

(2) CSX and NS contend that they agree with DVRPC that they must continue to invest in infrastructure within the SAAs. CSX and NS note, with respect to this matter, that, during the 2000-2003 period, Conrail invested \$75 million to maintain, enhance, and upgrade its infrastructure. And, CSX and NS add, there is no reason to believe that CSX and NS will not continue to invest at an appropriate level to obtain maximum benefit from their investment in Conrail.

(3) As respects the redevelopment of inactive Conrail land holdings in South Philadelphia, CSX and NS contend that they have worked on, and are continuing to work on, redevelopment of a number of Conrail parcels in Philadelphia.

(4) As respects the suggestion that Conrail should have its own sales and economic development staff, CSX and NS contend that this suggestion should be rejected. That structure, CSX and NS explain, would be fundamentally different from the one agreed to by CSX and NS and approved by the Board. And, CSX and NS add, the role of Conrail as a neutral switcher acting solely as an impartial agent of its two owners was a critical component of the Conrail Transaction proposed by CSX and NS, created that way in order to facilitate direct competition in the SAAs by the line-haul carriers.

Response to Four City Consortium. CSX and NS advise that they look forward to continuing a productive, voluntary dialogue with the Four Cities on matters of mutual concern as they arise, such as safety, economic development, and such infrastructure matters as make sense in light of the carriers' operational, business, and financial circumstances and their customers' operational and business needs. CSX and NS add that they agree that the Four Cities' approach to oversight is the correct one. There is, CSX and NS maintain, no warrant for extending the formal oversight period, as the Board has the statutory authority to address any transaction-related issues as may be brought before it in the future independent of this formal proceeding.

Response to GROWMARK. CSX and NS contend that Conrail suspended operations at Pier 122 for safety reasons, that GROWMARK has no contractual right to the continued operation of Pier 122, and that expensive repairs are not justified given that Conrail is presently negotiating with the Philadelphia Regional Port Authority for the sale of the property. And, CSX and NS add, this matter, an operational issue not arising out of the Conrail Transaction, is being addressed through the Board's Office of Compliance and Enforcement (a mechanism, CSX and NS note, that is independent of this proceeding and that will continue to be available even in the absence of formal oversight). GROWMARK's situation, CSX and NS conclude, presents no broad issue that requires extension of oversight or any other action with respect to the SAAs in general.

Response to Lackawanna Coalition. NS contends that the requests for relief now made by the Lackawanna Coalition were previously made by the Lackawanna Coalition and addressed by NS in the fourth annual round of this proceeding, see Oversight Dec. No. 11, slip op. at 6-8, and were rejected by the Board in the decision concluding the fourth annual round. See Oversight Dec. No. 11, slip op. at 11 (“The relief sought cannot be granted because the Coalition has failed to show that the divestiture of NS’ Boonton Line or restoring the Lackawanna Cutoff Line have anything to do with any purported harm arising from the Conrail transaction. There is no Board precedent for granting any of the Coalition’s requested measures.”). NS further contends that the Board’s previous conclusions are equally true this year. The Lackawanna Coalition, NS argues, has presented no new evidence or argument that would warrant either the extraordinary relief it apparently seeks or any extension of the formal oversight period.

Response to Morristown & Erie Railway. CSX and NS contend that they never promised that all short lines would have, after the Split Date, the right to connect to two Class I carriers. CSX and NS further contend, however, that, as a matter of fact, M&E, which connects directly to NS, has the right to interchange with CSX through Conrail at its interchange at Center Street.

Response to New Jersey Department of Transportation. (1) CSX and NS advise that they agree with NJDOT that, given the complexity of NJ Transit, Conrail, CSX, and NS train operations on the New Jersey rail network, all parties must continue to work cooperatively to ensure that the safety and reliability of all rail services in this region continue to be maintained at the highest level. CSX and NS add that they are pleased with their positive and cooperative relationships with NJDOT, and will seek to maintain those relationships with NJDOT, New Jersey Transit, and other stakeholders in the years to come.

(2) CSX and NS contend that the Board should not impose a condition mandating the application of the Northeast Operating Rules Advisory Committee (NORAC) operating rules to Conrail lines in the Shared Assets Areas in New Jersey beyond the agreed-upon three-year period. Such a condition, CSX and NS maintain, is not warranted, although they acknowledge the need to coordinate and apply operating rules so as to facilitate the safe and efficient operation of freight and passenger rail service in New Jersey, and indicate that they will continue to work in close coordination with Conrail, NJDOT, and New Jersey Transit toward that end. Moreover, CSX and NS add, the adoption of railroad operating rules is subject to the oversight of the Federal Railroad Administration.

Response to North Jersey Transportation Planning Authority. CSX and NS contend that the requests for relief made by NJTPA are not justified and should be denied.

(1) CSX and NS contend that NJTPA has demonstrated no justification for a radical restructuring of the North Jersey SAA. As respects the report prepared by the Rutgers University Voorhees Transportation Center, CSX and NS advise: that the report is mostly

devoted to describing the proceedings in STB Finance Docket No. 33388, and contains only limited additional information; that, although the report relies heavily on statements made in a series of meetings held in March, April, and May of 2003, neither the identity, affiliation, or even number of individuals who participated and expressed various views is revealed (except that it is revealed that representatives of PSE&G and PANYNJ participated); and that, even if the anecdotal assertions noted in the report are true, this suggests nothing more than the occasional isolated incidents that inevitably occur from time to time in areas of heavy rail activity. The fact of the matter, CSX and NS claim, is that the North Jersey SAA and the other SAAs are functioning well.

(2) CSX and NS deny the allegation that Class I staff, in submitting quotes and invoicing for service, have noted the additional cost of serving locations in the SAAs. The truth, according to CSX and NS, is that neither CSX nor NS assesses a separate charge to shippers for service to/from the SAAs; the quoted price, CSX and NS maintain, is for the total move. And, CSX and NS observe, if there were any widespread issue as to pricing within the SAAs, it is reasonable to expect that NITL and/or ACC would have had something to say regarding the matter.

(3) CSX and NS contend that NJTPA has provided no basis for requiring an additional, Board-directed \$30 million investment of the kind suggested. CSX and NS note that CSX, NS, and Conrail have invested significantly in the SAAs. And, CSX and NS advise, they will continue to invest in North Jersey, just as they will continue to invest elsewhere, when the investments make sense operationally and commercially.

(4) CSX and NS contend that NJTPA's request to radically restructure the CSAO is contrary to a fundamental premise of the Board's approval of the Conrail Transaction: that the NJSAA (and the other SAAs) should be operated neutrally by an entity owned by both carriers, and used by its joint owners, the competing Class I carriers themselves, for the pickup and delivery of their line-haul freight. CSX and NS further contend that the filings submitted in this proceeding confirm the benefits of the SAAs to the overwhelming number of shippers. And, CSX and NS claim, NJTPA has offered no evidence that would support its suggested radical restructuring of the mechanism through which CSX and NS have introduced two-carrier competition in the SAAs.

(5) CSX and NS contend that they never made a general commitment, and the Board never imposed a general obligation, of "dual access" for New Jersey short lines. CSX and NS further contend that the Board expressly declined to impose a condition requiring CSX and NS to maintain existing gateways and rate relationships in perpetuity. See Merger Dec. No. 89, 3 S.T.B. at 276. And, CSX and NS add, the fact of the matter is that both CSX and NS have worked with their short line partners in New Jersey and elsewhere, and will continue to work with their short line partners, to develop new business and to improve service for existing customers.

Response to New Jersey Shortline Railroad Association. CSX and NS contend that they have worked diligently, and successfully, to develop and realize opportunities in conjunction with their short line partners in the SAAs. CSX and NS further contend that they have been successful in taking trucks off the highway as a result of the extended single-line service the Conrail Transaction created. CSX and NS explain that they and Conrail meet regularly to address short line initiatives, and that, in fact, many such initiatives, including sales, new short line startups, and enhancement of existing short line arrangements, have already been implemented. CSX explains that it regularly meets and confers with its short line partners, and that the rate of growth of CSX traffic exchanged with short lines exceeds the rate of growth of CSX local traffic. NS explains that it has worked specifically with NJSLRRA to develop a Commercial Development Business Guide to promote business opportunities with New Jersey short lines, and has developed a New Jersey Business Development Initiative with a number of New Jersey short lines. And, NS adds, there was, in the first quarter of 2004, a 25% increase in carloads exchanged between NS and participating New Jersey short lines compared with the first quarter of 2003, and eight of the thirteen participating short lines showed increases in the number of cars exchanged.

Response to Pennsylvania Parties (DCED and PIDC). CSX and NS contend that they have honored, in good faith, the commitments described in their respective 1997 letters to Governor Ridge and Mayor Rendell (CSX and NS refer to the two 1997 letters as the “Pennsylvania Letters”). CSX and NS further contend that their actions since the Split Date have contributed significantly to economic development and employment in the Commonwealth. There is, CSX and NS maintain, no need to negotiate changes to the Letters, nor is there any reason to extend the oversight proceeding or impose any new reporting requirement to monitor compliance with them.

Economic Development (CSX and NS). As respects CSX’s ¶ 1 and NS’s ¶ I, CSX and NS contend that they have substantially completed, or are in the process of completing, the anticipated actions proposed in the Pennsylvania Letters. CSX and NS add that, when circumstances indicated that an adjustment in approach should be made, CSX and NS have proceeded with alternative projects and other efforts that have provided comparable, if not greater, benefits to the citizens of Pennsylvania. It is, CSX and NS argue, a core business function of both CSX and NS to encourage the development and expansion of industry along their routes. CSX and NS maintain that, although not all rail economic development projects envisioned by the Pennsylvania parties bore the anticipated fruit, CSX and NS nevertheless have vigorously pursued, and are continuing to pursue, opportunities throughout the Commonwealth on their own initiative, attracting new and expanded business that has brought thousands of jobs to Pennsylvania.

Substantial Presence (CSX and NS). CSX and NS note that each of them has a substantial presence in Pennsylvania. CSX and NS note, in particular, that, of all the states in which NS operates, its greatest rail infrastructure presence is in Pennsylvania (2,508 track

miles). CSX and NS further note that, although CSX has a more limited presence in Pennsylvania (1,058 track miles), Pennsylvania is still very important for CSX's north-south and east-west traffic flows. And, CSX and NS add, customers in the major industrial areas of Pittsburgh and Philadelphia, as well as elsewhere in the Commonwealth, are important to both CSX and NS. The fact of the matter, CSX and NS contend, is that they will continue to have significant business interests within Pennsylvania and will continue to make economic development investments in Pennsylvania without any need for continuing Board involvement.

Working Relationship with Commonwealth (CSX and NS). CSX and NS contend that each of them desires a strong, cooperative working relationship with the Commonwealth. CSX and NS advise that, to this end, each of them has had recent discussions with Commonwealth officials, because each shares with the Commonwealth a common interest in pursuing economic and community development in Pennsylvania on a reasonable basis. CSX and NS further advise that economic development efforts are essential to their continued traffic growth in the state and the region, and that they are willing to work cooperatively with the Commonwealth on future customer incentive initiatives without the need for any further formal agreement.

Attracting Kvaerner ASA to the Philadelphia Navy Yard (CSX and NS). As respects CSX's ¶ 1(A) and NS's ¶ 1(A), CSX and NS advise that each of them contributed \$10 million (for a total contribution of \$20 million) toward the successful effort to attract Kvaerner ASA to the Philadelphia Navy Yard. That shipyard, CSX and NS note, employs nearly 1,000 people.

Rail-Served Economic Development Programs (CSX). As respects CSX's ¶ 1(B), CSX advises that it spent \$40,500 in 2002 for upgrade and maintenance of PIDC's Northeast Philadelphia Airport Industrial Track, and that it has reached agreement with the DCED that the balance of \$4,960,000 will be contributed through a credit toward the Philadelphia Regional Port Authority's purchase of parcels in South Philadelphia owned by CSX and Conrail (the credit on the Conrail parcels would be in the amount of CSX's 42% ownership interest). CSX explains: that, although it timely provided an appraisal for its parcel, it did not understand that it was to provide appraisals for the Conrail parcels as well; that, when this omission was pointed out, CSX obtained and provided those appraisals; and that, although the transactions have not yet closed, this is not because CSX delayed in providing appraisals, but because some environmental issues must be addressed before transfer, and also because PRPA believes that the appraisals are too high, and, therefore, further work must be done to determine a price. CSX insists, however, that it is optimistic that these issues will be resolved, and that PRPA will acquire the land it desires. And, as respects the claim that CSX refused to fund its share of a \$900,000 clearance upgrade to Conrail's Bustleton Branch needed to serve a frozen food distributor and other occupants of the Willits Road industrial park, CSX maintains that it was informed by PIDC, in an April 11, 2002 letter, see CSX/NS-6, Exhibit 11, that the only customer on that line that would have benefitted from the clearance project had ceased operations in the months following PIDC's proposal of the project.

Rail-Served Economic Development Programs (NS). As respects NS's ¶ I(B), NS advises that, in cooperation with PIDC and the Delaware River Port Authority, NS is constructing, at the Philadelphia Naval Business Center (PNBC), a new intermodal terminal that is expected to be completed and open for business in 2005, and that is expected to create 500 to 1,000 jobs in the Philadelphia region. And, NS adds, its investment in this project alone is estimated at \$16 million, which by itself fully satisfies the \$15 million commitment under ¶ I(B).

Economic Development Incentive Programs (CSX and NS). As respects CSX's ¶ 1(C) and NS's ¶ I(C), CSX and NS contend that the very purpose of a railroad's economic development effort is to support the location or expansion of facilities along its own system that will generate new or increased business for it. The language of these provisions, CSX and NS argue, reflects the fact that the actual expenditure of funds depends on the availability of qualifying projects, and, more generally, on future business and economic conditions. And, CSX and NS contend, economic development initiatives cannot be unilaterally mandated by the Commonwealth or even bilaterally agreed to by the Commonwealth and a rail carrier. Such initiatives, CSX and NS explain, must include direct consultation between the appropriate railroad and the specific shipper whose facilities are sought to be developed or expanded on that railroad's lines, and a contractual commitment for an acceptable level of rail business for the sponsoring carrier must come from the shipper itself. CSX and NS also note: that each economic development proposal must be evaluated individually; that there is no simple formula that CSX or NS can mechanically apply in assessing an economic development proposal; and that, moreover, carriers seeking to attract new or expanded business provide different kinds of support, and the value of such support cannot always be measured in terms of dollars expended (CSX and NS explain that, in addition to providing direct financial assistance where appropriate, CSX and NS routinely provide shippers considering relocation or expansion free and confidential site selection, engineering, and technical assistance to help the shipper understand how rail service can be crafted to meet its transportation needs). CSX and NS further contend that the fact of the matter is that they made the required amount of funds available, for the required period, to fund any economic development projects identified in cooperation with Commonwealth officials that satisfied the requirements of CSX's ¶ 1(C) and NS's ¶ I(C). And, CSX and NS maintain, DCED's theory that economic development projects not specifically proposed by DCED or the Governor's Action Team are irrelevant is utterly unreasonable. CSX and NS insist that their actual business development efforts have provided the same benefits — job creation and economic growth — that would have been provided by any project arrived at through formal consultation with state officials.

Economic Development Incentive Programs (CSX). As respects CSX's ¶ 1(C), CSX advises that ¶ 1(C) requires it to “make available” (not “expend”) \$2 million per year for 5 years in support of economic development projects, if any, that will provide CSX “contractual obligations for certain levels of rail business.” This provision is not, CSX argues, an open-ended, unconditional promise for CSX to make payments of \$10 million for any economic development project proffered by DCED or the Governor's Action Team. CSX contends: that it

expended approximately \$550,000 on two projects in 2000 to provide incentive for the location of U.S. Gypsum in Aliquippa, PA (CSX disputes DCED's claim that CSX had verbally committed to fund another \$2.2 million of costs for that project, but then refused); that, although the Governor's Action Team suggested a few other projects for possible funding, those projects did not develop into viable opportunities; that, however, CSX, on its own, has actively pursued opportunities for new or expanded business along its lines in Pennsylvania (CSX indicates that it routinely provides shippers considering relocation or expansion technical assistance, and, in some cases, also offers contract incentives to offset the cost of constructing rail access facilities); that, in fact, a number of companies have located new facilities, or have expanded existing facilities, on CSX's lines in Pennsylvania since approval of the Conrail Transaction; that, in addition, CSX and NS have also been working together on certain joint projects to assist coal shippers located on Conrail's Monongahela lines (CSX claims that CSX and NS expect that their contribution to economic development in Pennsylvania will exceed \$9 million within the next two years through this initiative alone); and that CSX and NS have also been working on joint projects to attract businesses to locations in Philadelphia within the South Jersey-Philadelphia SAA.

Economic Development Incentive Programs (NS). As respects NS's ¶ I(C), NS advises that ¶ I(C) requires it to "make available" (not "expend") a "maximum" of \$5 million per year for 5 years in support of such economic development projects, if any, that will provide NS "contractual obligations for acceptable levels of rail business." This provision is not, NS argues, an open-ended, unconditional promise for NS to make payments of \$25 million for any economic development project proffered by DCED or the Governor's Action Team. NS contends that, in fact, it made available up to \$5 million per year in each of the first five post-Split Date years for qualifying economic development projects, and that, if Pennsylvania had identified projects that qualified for funding, the funds were available to be expended. NS further contends: that, although the Governor's Action Team identified a few projects for NS's consideration over the 5-year period, these projects either did not offer the requisite prospect of rail business or were not pursued for reasons unrelated to NS; that, however, NS has not waited for DCED or other Pennsylvania parties to scout out economic development opportunities, but, rather, has pursued, on its own, numerous shipper-specific development opportunities throughout Pennsylvania (NS cites several dozen new or expanded facilities and projects as to which it has taken, or is presently taking, a role in bringing to Pennsylvania); and that NS's efforts in this regard have included both direct financial assistance and also in-kind technical assistance (such as site selection assistance, engineering support, technical drawings and specifications, etc.). NS adds that it has also undertaken projects at locations outside Pennsylvania that are of a direct economic benefit to companies in the Commonwealth (NS cites, as one example, its installation of a new siding at an Ohio power plant, which has permitted rail deliveries to the plant of coal from Pennsylvania mines), and it has also pursued and funded numerous other projects in Pennsylvania, projects that mean jobs and economic growth for the Commonwealth (NS cites a number of such projects, including its \$10.2 million improvements to the Juniata Locomotive Shop in Altoona, PA).

Future Economic Development Efforts (CSX and NS). As respects their future approach to economic development in Pennsylvania, CSX and NS advise that they believe it would be productive to establish a program of regular, periodic (perhaps quarterly) bilateral meetings between each respective carrier's representatives (including a Marketing official, an Industrial Development Department representative, and, when appropriate, Engineering and Transportation Department personnel as well) and representatives of relevant Commonwealth, municipal, and local entities. CSX and NS note, however, that, because it would not be appropriate for CSX and NS personnel to attend the same meetings, their "bilateral" approach would involve separate meetings by each carrier with Commonwealth officials. CSX and NS add: that the focus of these meetings would be cooperative pursuit of future economic development opportunities; that such a program should help foster a sense of trust and mutuality and maximize the prospect that projects of shared importance will be realized in the future; and that these meetings would complement other established channels of communication with Commonwealth representatives (such as the quarterly meetings with the Pennsylvania DOT Rail Freight Advisory Council).

Marketing Agreements with PIDC (CSX and NS). As respects CSX's ¶ 1(D), CSX contends that Pennsylvania has specifically acknowledged that joint marketing efforts have gone forward with CSX. As respects NS's ¶ I(D), NS contends that Pennsylvania has expressed no concerns as to joint marketing efforts with regard to NS.

Intermodal Terminals (CSX and NS). As respects CSX's ¶ 1(E), CSX contends that it constructed a new state-of-the-art intermodal terminal at Greenwich Yard to replace its small facility on Snyder Avenue. CSX adds that the Conrail Transaction has permitted CSX to handle double-stack container traffic at this facility by utilizing the CSX-allocated line in New York and trackage rights over NS in Pennsylvania. As respects NS's ¶ I(E), NS contends that the new NS intermodal terminal contemplated by this provision will be completed in 2005.

Jobs (CSX and NS). As respects CSX's ¶ 2 and NS's ¶ II, CSX and NS advise that their projections respecting employment in the Philadelphia area were made in good faith based on the best assessment at the time the Pennsylvania Letters were drafted of, among other things, the numbers of positions that would be required to manage the as-then untried concept of SAAs. CSX and NS contend: that, as CSX and NS anticipated, Conrail's headquarters has remained in Philadelphia; that CSX and NS anticipate that Conrail's headquarters will continue to remain in Philadelphia for an indefinite period of time; that, however, the composition, size, and positioning of Conrail's staff have changed as it and its co-owners have responded to market and economic conditions and the operational and business needs of the carriers' customers; that Conrail today is a smaller, more efficient organization than originally anticipated in 1997 (Conrail, CSX and NS claim, has proven able to perform safely, efficiently, and effectively with a total of about 1,350 employees, down from about 1,700 employees just after the Split Date); that, in particular, the number of headquarters and other administrative staff is much smaller than the 350 people thought to be needed in October 1997; and that, as economic, business, and operational conditions affecting Conrail continue to change, the size, composition, and location

of Conrail staff will also continue to evolve, so that CSX and NS may serve the public most effectively and efficiently. CSX and NS further contend that, although it is difficult to determine with precision how many jobs have been and will be added in Pennsylvania as a direct result of their industrial development efforts (CSX and NS note, in this respect, that their combined \$20 million in payments to support the redevelopment of the Philadelphia Navy Yard have paid off in light of the nearly 1,000 jobs Kvaerner has brought to Philadelphia), the fact of the matter is that the Conrail Transaction has produced more jobs for Pennsylvanians than would have existed absent the transaction (CSX and NS acknowledge, however, that the jobs that have resulted from the Conrail Transaction differ somewhat in nature and location from those anticipated in 1997).

Jobs (CSX). As respects CSX's ¶ 2, CSX advises that it has, in Philadelphia, a small office that is presently staffed with facilities management, government relations-corporate communications, intermodal, and law department personnel. CSX contends that, although some additional CSX employees were initially relocated to the Philadelphia office immediately after the Split Date, CSX subsequently determined that it could more efficiently serve Pennsylvania from its Maryland and New York division offices. CSX claims: that it has substantially complied with its projection of 185 jobs in Philadelphia; that the new Greenwich intermodal terminal alone employs 45 CSX employees and 29 employees of contractors who provide service on a full-time basis; and that the new terminal has undoubtedly generated many more rail-related jobs. And, CSX adds, it estimates that the new and expanded facilities it serves represent over 600 new jobs for Pennsylvania.

Jobs (NS). As respects NS's ¶ II, NS notes that, as anticipated, NS established a Mid-Atlantic Regional headquarters in Philadelphia. NS further notes, however: that its basic approach for operating its system has evolved from the operating plan set forth in the Conrail Application, which was the basis for the projections set forth in the NS's Pennsylvania Letter; that NS's effort to convert north-south traffic back to rail is now centered in Harrisburg, PA, one of the three hubs in the new NS system; and that, therefore, many of the positions anticipated to have been located in the regional headquarters are now located elsewhere in Pennsylvania. NS adds: that, with respect to new rail-related jobs, PIDC itself has estimated that NS's new intermodal terminal at the PNBC will generate some 500-1,000 jobs after it opens in 2005; that these figures exceed by several multiples the number of jobs hoped to be created by NS activities in Philadelphia, and meet or exceed the combined number of NS, Conrail, and other rail-related jobs anticipated in NS's Pennsylvania Letter; and that NS estimates that companies benefitting from its industrial development efforts have brought approximately 3,600 new jobs to Pennsylvania since 1999.

Capital Expenditures (CSX and NS). As respects CSX's ¶ 3 and NS's ¶ III, CSX and NS advise that the Pennsylvania Letters recited the significant capital investments CSX and NS anticipated undertaking in Pennsylvania and listed certain specific anticipated Philadelphia-area projects (three for CSX and four for NS). CSX and NS further advise that Pennsylvania: has not

complained about either CSX's or NS's statewide level of investment; and has acknowledged that the projects contemplated in the CSX Letter have been implemented.

Capital Expenditures (CSX). As respects CSX's ¶ 3, CSX advises that Pennsylvania has acknowledged that the three projects specifically listed in CSX's Pennsylvania Letter (the Greenwich Yard intermodal facility, the Eastwick connection track, and the Belmont siding) have been completed. CSX further advises: that the intermodal facility actually cost \$22 million (not the \$15 million that CSX had estimated); that CSX has also made, since approval of the Conrail Transaction, a substantial investment in many other capital improvement projects in Pennsylvania (CSX cites several projects that, in total, cost \$49.7 million); and that, in addition, CSX has also undertaken a host of smaller capacity-enhancing or otherwise beneficial capital improvement projects that themselves total tens of millions of dollars more. CSX adds: that, although CSX's Pennsylvania Letter recites that CSX's Operating Plan projected about \$27 million in capital improvement expenditures in Pennsylvania, the fact of the matter is that CSX actually invested much more; that, in some cases, projections made in 1997 turned out to be high, and, in other cases, such projections turned out to be low; and that, in all cases, CSX has proceeded in good faith to assess circumstances as they developed to build a strong rail network for the benefit of the citizens of Pennsylvania and all other interested parties. And, CSX notes, its investments will continue.

Capital Expenditures (NS). As respects NS's ¶ III, NS advises that Pennsylvania's grievance regarding NS's ¶ III "capital expenditure" commitments reflects the fact that not all of NS's Operating Plan projects slated for Philadelphia (a \$4 million Triple Crown facility, a \$10 million intermodal facility, a \$16 million automobile facility, and a \$1.4 million track connection at Zoo interlocking) were completed as originally contemplated. NS explains: that, for operational reasons, the Triple Crown facility was constructed at Bethlehem, PA, rather than at Philadelphia; that the intermodal facility is under construction at the PNBC, at an estimated cost of \$16 million (not the \$10 million estimated in 1997); that the automobile facility has not been undertaken because the business necessary to justify the construction of such a facility has not developed (NS notes, however, that it retains property on an immediately available option at the PNBC in Philadelphia which is dedicated to this facility should the business develop); and that the Zoo interlocking track connection has not been undertaken because operational circumstances have rendered that project unnecessary. NS, which notes that the Board has held that applicants are not bound to carry out every project and make every expenditure described in an operating plan, contends: that it responded to the post-Split Date business and operational environment by investing additional millions of dollars in Pennsylvania in ways not specifically anticipated in the application; that one major project was a \$5.6 million automation and expansion of Enola Yard near Harrisburg; that another major project is the anticipated construction of a \$25 million rail line in Indiana County, PA, that will create a new, shorter route for delivery of coal to Reliant Energy's Keystone Generating Plant; and that still another major project, as to which the parties have reached an agreement in principle, will include the expenditure of millions of dollars by NS and Amtrak to improve an Amtrak line within

Pennsylvania, and further to address clearance problems for traffic moving into, out of, and through the state.

Passenger Rail (CSX and NS). As respects CSX's ¶ 4 and NS's ¶ IV, CSX and NS advise that Pennsylvania does not contend that these commitments have not been satisfied.

Civic and Charitable Giving (CSX); Corporate Citizenship (NS). As respects CSX's ¶ 5 ("Civic and Charitable Giving") and NS's ¶ V ("Corporate Citizenship"), CSX and NS advise that they are active participants in civic and charitable affairs in Philadelphia and throughout the Commonwealth.

Civic and Charitable Giving (CSX). CSX advises that, in addition to honoring the charitable commitments previously made by Conrail, it continues to support local civic and charitable groups in Philadelphia and throughout the Commonwealth. And, CSX adds, its employees continue to contribute to national and local charities.

Corporate Citizenship (NS). NS advises that it is an active participant in civic and charitable affairs in Philadelphia and throughout Pennsylvania. NS further advises that NS and its employees continue to contribute to the United Way and other national and local charities.

Response to Rail Cents Enterprises. CSX and NS respond that the fact that a consultant may now have ideas as to how the SAAs might have been structured differently is no basis for a massive and radical Board-ordered revision of the SAAs at the very end of the general oversight period. The structure of the SAAs, CSX and NS note, was an essential component of the Conrail Transaction.

Response to Resources Warehousing & Consolidation Services. CSX and NS advise that, although they promised to bring intramodal competition to northern New Jersey, they did not promise, and no condition imposed by the Board requires them, to utilize their investment in Conrail for the benefit of other intermodal terminals. CSX and NS further advise that the Board has already explained why RWCS has no right to the relief it previously sought against CSX and now seeks against both CSX and NS: "RWCS now complains that CSX has refused RWCS' request to quote a general rate that could be used by any shipper using RWCS' services regardless of the commodity and the origin and destination. CSX has no such obligation either under our merger conditions or under the statute. First, RWCS is not a shipper, so CSX has no obligation to quote any rate to it. Moreover, when CSX does quote a rate to shippers who use RWCS' services, it is statutorily entitled to do so in the manner that it chooses as long as it does not violate any provision of the Act. 49 U.S.C. 10701(c). Most carriers tailor their rates to the particular shippers, commodities and routes they are serving, just as CSX has done here. Accordingly, we see no basis upon which to grant RWCS' request for relief." Oversight Dec. No. 6, slip op. at 6. And, CSX and NS add, the evidence indicates that service has

generally been good within the North Jersey SAA, and there is no reason to believe that service would be better if CSX and NS were to promote the use of the RWCS facility.

Response to the SEDA-COG JRA Parties. NS contends that the relief sought by the SEDA-COG JRA parties is not justified in fact or law and should be denied.

(1) NS notes that none of the SEDA-COG JRA parties was a party to the 1997 NS/Robey settlement agreement or the 2001 NS/Robey TRA. NS's 1997 discussions, NS explains, were with Mr. Robey, for the North Shore Affiliates; the 1997 letter (i.e., the settlement agreement) was between NS and Mr. Robey; and the 2001 NS/Robey TRA was between NS and the North Shore Affiliates. NS further explains that none of the SEDA-COG JRA parties participated in the Conrail control proceeding or bargained with NS for any rights in connection with the Conrail Transaction. Indeed, NS adds, the Board has already recognized that the real parties in interest with respect to this matter are the North Shore Affiliates, not SEDA-COG JRA or any shipper. See Oversight Dec. No. 5, slip op. at 22. There is, NS argues, simply no basis for a non-party such as SEDA-COG JRA to demand changes to an agreement to which it is not a party and that was negotiated in connection with a proceeding in which it did not participate.

(2) NS notes that the real parties in interest, Mr. Robey and his North Shore Affiliates, have expressly confirmed to NS in writing that the 2001 NS/Robey TRA and the access rights to CP embodied in it are fully consistent with the rights contemplated in the 1997 NS/Robey settlement agreement. See CSX/NS-6, Exhibit 19.

(3) NS notes that the penultimate sentence of the 1997 NS/Robey settlement agreement speaks of "providing access to CP that does not harm Norfolk Southern." See CSX/NS-6, Exhibit 18. This disclaimer, NS contends, demonstrates that the CP access contemplated by the 1997 NS/Robey settlement agreement was never intended to be the unlimited, completely unrestricted access that the SEDA-COG JRA parties now demand that the Board impose for their benefit.

(4) NS notes that the CP access that the North Shore Affiliates and their shippers enjoy under the terms of the 2001 NS/Robey TRA, even with the limitations in that agreement, is access that did not exist before the Conrail Transaction. This is important, NS argues, in view of the principle, long applied in "major merger" cases, that relief granted under the Board's conditioning power should "be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation." Merger Dec. No. 89, 3 S.T.B. at 278. The relief sought by the SEDA-COG JRA parties, NS maintains, would not remedy any adverse effect of the Conrail Transaction, but, rather, would put the SEDA-COG JRA parties in a better position than they occupied prior to the transaction. See also Oversight Dec. No. 5, slip op. at 23-24 (a short line, claiming that a new routing created by the Conrail Transaction was inefficient, asked the Board to compel elimination of a contractual interchange restriction in order to make the new routing more

efficient; the Board, rejecting the request for relief, noted that, whatever the new routing's shortcomings might be, there was no need to impose additional conditions when options had been increased, not decreased, as a result of the transaction).

Response to SMS Rail Service. (1) CSX and NS contend that the aspirational goals articulated in the Conrail application (such things as increased competition, improved service, attracting new customers, and removing trucks from the road) are just that: statements about the broad expected impact of the Conrail Transaction generally. Such goals, CSX and NS add, are not specific promises of individualized benefits guaranteed to accrue to the satisfaction of every shipper (or every short line) that does business in the eastern United States. (2) CSX and NS contend that the alleged anecdotal examples cited by SMS, even if accurate, do not suggest that the Conrail Transaction has created any competitive harm requiring a remedy. The fact of the matter, CSX and NS maintain, is that rail competition in New Jersey has increased because of the transaction. And, CSX and NS note, rail carriers routinely win and lose business amongst each other and competing modes of transportation every day. (3) CSX and NS contend that the evidence clearly shows that the broad goals of the Conrail Transaction as to increased competition, efficiency, and service have indeed been fulfilled. Indeed, CSX and NS add, the facts show that both CSX and NS have worked extensively with short lines in New Jersey to the mutual benefit of all concerned.

Response to State of New York. CSX and NS advise that they appreciate and share New York's desire to continue to work together to achieve common goals. CSX and NS further advise, however, that they do not agree that they have failed to fulfill any obligations to New York arising out of the Conrail Transaction. There is, CSX and NS maintain, no basis for concluding that any Board intervention is required or that the formal oversight period needs to be extended.

CSX's Response to New York. CSX disputes New York's claim that CSX has not fulfilled all the promises that induced New York to support the Conrail Transaction. CSX advises that, in fact, it has complied with all the conditions imposed by the Board for the benefit of New York, and that it will continue to meet and consult with representatives of New York on a regular basis to ensure that mutually beneficial arrangements are explored and implemented. There is, CSX contends, no need for an extension of the formal oversight period. And, CSX adds, the Board remains available in any event to address any future concerns related to the Conrail Transaction.

Conditions Not Disputed by New York. CSX advises that New York has not even alleged a failure by CSX to fulfill Conditions 28, 29, 30, and 33. See Merger Dec. No. 89, 3 S.T.B. at 388-389. (a) Condition 28 directed CSX to attempt to negotiate unrestricted haulage or trackage rights with CP from Selkirk to Fresh Pond. CSX advises that it granted unrestricted trackage rights to CP. (b) Condition 29 directed CSX to make an offer to the City of New York to establish a committee to promote the development of rail traffic to/from the City. CSX advises

that the work of this committee is ongoing. (c) Condition 30 directed CSX to cooperate with New York interests in studying the feasibility of upgrading cross-harbor car float and tunnel facilities. CSX advises that this cooperation is ongoing. (d) Condition 33 directed CSX to meet with regional and local authorities in the Buffalo area to establish a committee to promote the growth of rail traffic to/from that area. CSX advises that it continues to participate in this committee.

Conditions Disputed by New York, and Other Matters: In General. CSX notes that New York has questioned whether CSX has maintained Conrail's employment levels and invested sufficiently in network improvements in the Buffalo area (Condition 35), and has complained about the condition of the Genesee Junction Yard (Condition 56). CSX further notes that New York has voiced complaints unrelated to any specific conditions, including insufficient capital investment in New York generally, insufficient economic development effort by CSX, and concerns about CSX grade crossing warning systems. As noted below, CSX disputes New York's claims regarding all of these matters.

Condition 35. Condition 35 directed CSX to adhere to its representations regarding investment in new connections and upgraded facilities in the Buffalo area. See Merger Dec. No. 89, 3 S.T.B. at 389. As New York has noted, the Board indicated that these representations included: (i) upgrading Conrail's existing computer technology and fueling facilities at Buffalo; (ii) maintaining or increasing current employment levels in the Buffalo area; (iii) providing overhead trackage rights to NS through Buffalo to Suspension Bridge; (iv) working with NS and other carriers operating in the Buffalo area to schedule switching and through movements within the area's rail network so as to reduce congestion at points such as CP Draw; and (v) investing substantial funds in network improvements to reduce shipping time and enhance service reliability for rail shippers in the Greater Buffalo area. See Merger Dec. No. 89, 3 S.T.B. at 288 (numbered paragraph 3).

CSX contends that it has fulfilled Condition 35, and addresses its argument to items ii and v (the two items, CSX claims, with respect to which New York has expressed dissatisfaction. As respects item ii (maintaining Conrail employment levels), CSX advises: that, after the Split Date, CSX hired 250 T&E employees in the Buffalo area, expanding the total to 900; that those figures have largely been maintained; that efforts are underway to expand hiring further during the summer of 2004; and that, although there were reductions in operations at Frontier Yard for a period of time as a result of a downturn in car volumes tied to the economy, employment there has since been restored, and, in fact, has increased over the prior level. As respects item v (investing substantial funds in network improvements), CSX advises: that, recognizing the increases in volumes in intermodal and rail-truck transfers over traditional carload business, plans were developed to convert Seneca Yard to an intermodal facility, beginning this year; that this project will be funded with \$4.5 million in State dollars and \$1.5 million from CSX, the second investment of that amount by CSX in the area since the Split Date; and that there is also a plan to develop a TRANSFLO project at William Street next year,

once CSX vacates the property for its new facility, and that facility will cost \$1 million, with equal shares of funding from TRANSFLO and New York.

Condition 56. Condition 56 granted the responsive application that had been filed by LAL to the extent necessary to permit LAL to operate across Conrail's Genesee Junction Yard to reach a connection with R&S, and directed CSX and LAL to negotiate the details of such operations. See Merger Dec. No. 89, 3 S.T.B. at 391. CSX contends that it has fulfilled Condition 56; CSX explains that it entered into the mandated arrangement with LAL and agreed to maintain the yard in FRA Class 1 condition. As respects New York's claim that the yard has not been maintained in that condition, and that LAL and R&S have suffered damages as a result, CSX contends: that LAL has not itself asserted noncompliance with Condition 56; and that, although a NYSDOT inspection on April 23, 2004, identified minor problems, all such problems were promptly corrected.

Insufficient Capital Investment. CSX contends that, in implementing the Conrail Transaction, it has already made substantial investments in New York, including \$49.3 million in completed (\$34.9 million) or planned (\$14.4 million) improvements along the River Line, the majority of which (\$28 million) was invested in New York, and all of which has a direct impact on operations in New York. CSX further contends that substantial investment was also made in Selkirk Yard (\$7.8 million), and that there are plans for additional projects in Buffalo. And, CSX adds, the Rail Infrastructure Investment Act of 2002 provides for a period of up to one year after the completion of a project to file for tax benefits, and CSX fully intends to file for tax benefits for its qualifying investments in New York.

Insufficient Economic Development Effort. CSX contends that two CSX industrial and economic development personnel are located in Selkirk, NY, and oversee CSX's statewide economic development effort.

Grade Crossing Warning Systems. CSX contends that it is fully cooperating with FRA's investigation of grade crossing warning systems, and, as respects such systems, is implementing an action plan in Rochester and throughout New York. This plan, CSX notes, addresses each crossing at which three or more reports of malfunctions have occurred within the past year, resulting in a plan to address at least 46 crossings on 67 tracks over 9 subdivisions. And, CSX adds, the work began on February 25th, and has an expected completion date of mid-September.

NS's Response to New York. NS contends that, although New York has expressed concerns about infrastructure investment in general and the status of the Portageville Bridge on the Southern Tier Mainline in particular, and has also complained that NS closed an economic development office in the State, New York has not identified any alleged specific, bargained-for undertaking connected with the Conrail Transaction that NS has failed to perform. New York's complaint, NS advises, is that NS has failed to live up to certain generalized "expectations" to the State's satisfaction. NS argues, however, that generalized assertions about "expectations,"

without more, cannot form the basis for intervention by the Board or for the extension of the oversight period beyond its intended termination date.

NS advises that, after the transaction was initially implemented, NS opened an economic development office in New York. NS acknowledges, in essence, that it later closed that office, but only (NS claims) after it determined that it could more efficiently serve New York from an office in Harrisburg, PA.

NS further advises that it will continue to work with State officials as warranted on issues of infrastructure and economic development. NS notes, however, that it takes, and indeed it must take, a system-wide approach that looks to the system as a whole, and to individual geographic regions as they fit into that system; limited dollars for capital improvements, NS argues, must be allocated not based on political boundaries, but on where those resources can best be applied so as to respond most effectively to the business and operational needs of customers throughout the entire NS system. And, NS adds, because rail systems operate as intricate networks, operational fluidity and efficiency often can be improved for one geographic region by implementing infrastructure projects or operational modifications hundreds of miles away. NS advises that it will continue to examine very carefully the need for infrastructure investment across its entire system, and will continue to allocate its finite dollars where the need is greatest.

With respect to the Portageville Bridge on the Southern Tier Mainline, NS advises that, as of several years ago, its estimate of the cost associated with undertaking refurbishment of that bridge was approximately \$35 million, which (NS maintains) was not then, and is not now, justified by the level of usage on the Southern Tier Mainline and the finite pool of available capital dollars. NS notes, however, that it has secured operating rights that will ensure the continued flow of traffic in the event the bridge becomes unusable. (a) NS notes that it can reroute its own traffic over the Southern Tier Extension, via trackage rights it now holds over the Western New York & Pennsylvania Railroad. (b) NS notes that it has committed to use its best efforts to assist CP to obtain trackage rights over the same route. (c) NS notes that NS and CP are working toward agreements that would permit CP freight traffic between Buffalo and Binghamton to move via NS haulage (which, NS notes, would mean that, if the Portageville Bridge cannot be used, CP traffic could move, in NS haulage, via NS's trackage rights over the WNY&P).

NS contends that, to the extent infrastructure investment in New York is warranted by circumstances, NS will continue to work with state and local officials to pursue such projects. NS further contends, however, that the process of identifying and prioritizing infrastructure investment projects, and working with relevant state and local officials in the affected locations, is not a requirement unique to, or imposed on NS by, the Conrail Transaction, but is, rather, an ordinary part of the railroad's day-to-day operation of its business. The concerns raised by

New York, NS maintains, are generalized concerns not arising from or related to the Conrail Transaction, and do not form the basis for an extension of the general oversight proceeding.

Response to Union County (New Jersey). CSX and NS contend that Union County has provided no basis either for extending oversight or for a radical restructuring of the North Jersey SAA.

(1) CSX and NS contend that Union County's recommendation that the North Jersey SAA be restructured and placed under the aegis of a new operating entity was apparently made without any consultation with PANYNJ, which (CSX and NS note) has not suggested that it endorses either the underlying premise that there must be any fundamental restructuring or the idea that it acquire substantial rail facilities for its freight operations. Union County, CSX and NS maintain, has simply provided no basis for this request for action by the Board.

(2) CSX and NS dispute Union County's claim that CSX and NS have failed to satisfy their transaction commitments in a number of ways. Union County's characterizations of the commitments and the status of their fulfillment are not, CSX and NS maintain, entirely accurate. (a) As respects the claim that the railroads' 50% match for port area improvements has not been consummated, CSX and NS explain that this refers to discussions about an initiative launched after the Conrail Transaction, as to which none of the involved parties has expressed any concerns. (b) CSX and NS apparently acknowledge that numerous Union County brownfield properties remain undeveloped. CSX and NS explain, however, that this has nothing to do with any obligation arising under the Conrail Transaction. And, CSX and NS add, they have already invested substantial resources in North Jersey and will continue to do so when the investments make sense operationally and commercially. (c) CSX and NS maintain that they never promised that all New Jersey short lines would have post-transaction access to two Class I railroads. (d) CSX and NS concede that, in a 1998 Letter Agreement with NJDOT, they pledged their cooperation with a proposed light rail Elizabethport-Cranford passenger service project. CSX and NS claim, however, that NJ Transit is still in the process of conducting studies for this project, and that NJDOT has not complained of any lack of cooperation on this project. And, CSX and NS add, they do not believe that there would be any basis for such a complaint.

(3) As respects the more general complaint that CSX and NS have not done enough to promote freight rail in the North Jersey SAA, CSX and NS note that the fact of the matter is that rail traffic has actually grown in that SAA.

Response to Other Parties. With respect to the broad issues raised by Mr. Arthur B. Shenefelt, CSX and NS contend that, although Mr. Shenefelt has a long-term, historical perspective on the rail industry, the broad issues he has raised are beyond the scope of this proceeding. With respect to the specific issue raised by Mr. Shenefelt (possible rail service for aggregate/sand shipments), CSX and NS contend that Mr. Shenefelt was short on specific facts, and presented no basis for any action by the Board.

With respect to concerns raised by Mr. William R. Wright, CSX and NS contend that the SAAs now enjoy, by virtue of the Conrail Transaction, significant investments in infrastructure and vigorous competition from two Class I carriers in territory formerly served solely by Conrail. The SAAs, CSX and NS argue, are a success story, and Mr. Wright's allegations to the contrary are simply without merit.