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SERVICE DATE – AUGUST 29, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34738

PADUCAH & LOUISVILLE RAILWAY, INC. – ACQUISITION – CSX  
TRANSPORTATION, INC.

AGENCY: Surface Transportation Board, DOT.

ACTION: Decision No. 2 in STB Finance Docket No. 34738; Notice of Acceptance of Primary Application and Related Filings; Issuance of Procedural Schedule.<sup>1</sup>

SUMMARY: The Surface Transportation Board (Board) is accepting for consideration: the primary application filed August 3, 2005, by Paducah & Louisville Railway, Inc. (P&L) and CSX Transportation, Inc. (CSXT); the Sub-No. 1 related filing filed August 3, 2005, by Evansville Western Railway, Inc. (EVWR); and the Sub-No. 2 related filing filed August 3, 2005, by Four Rivers Transportation, Inc. (FRTI) and P&L.

The primary application seeks Board approval under 49 U.S.C. 11321-26 for P&L's acquisition of an approximately 124.5-mile CSXT line (the Evansville-Okawville Line or the Line) running between Evansville, IN (milepost OOH-324.0), and Okawville, IL (milepost OOH-445.7), including the 2.8-mile Mt. Vernon Branch (at Mt. Vernon, IN, between milepost OZJ-300 and milepost OZJ-302.8). The proposal is for P&L to purchase the track, ties, switches, and other track material (the improvements) and to lease for 20 years (with a 5-year extension available) the real property. This proposal is referred to as the P&L Transaction, and FRTI/P&L/EVWR<sup>2</sup> and CSXT are referred to collectively as applicants.

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<sup>1</sup> This decision covers: the application filed in STB Finance Docket No. 34738, Paducah & Louisville Railway, Inc. — Acquisition — CSX Transportation, Inc.; the exemption notice filed in STB Finance Docket No. 34738 (Sub-No. 1), Evansville Western Railway, Inc. — Acquisition and Operation Exemption — Paducah & Louisville Railway, Inc.; and the exemption notice filed in STB Finance Docket No. 34738 (Sub-No. 2), Four Rivers Transportation, Inc. And Paducah & Louisville Railway, Inc. — Continuance in Control Exemption — Evansville Western Railway, Inc. The application filed in STB Finance Docket No. 34738 is referred to as the “primary application.” The exemption notices filed in STB Finance Docket No. 34738 (Sub-Nos. 1 and 2) are referred to collectively as the “related filings.”

<sup>2</sup> EVWR is a wholly owned subsidiary of P&L, which is itself a wholly owned subsidiary of FRTI.

The related filings seek authority for P&L to immediately transfer the improvements and assign its lease of the real property to its newly created wholly owned subsidiary, EVWR. This proposal is referred to as the EVWR Transaction, and the P&L Transaction and the EVWR Transaction are referred to collectively as the P&L/EVWR Transaction. The Sub-No. 1 filing seeks an exemption under 49 U.S.C. 10502 and 49 CFR 1150.31 to permit EVWR to purchase the improvements, take assignment of the lease of the real property, and operate the Line. The Sub-No. 2 filing seeks an exemption under 49 U.S.C. 10502 and 49 CFR 1180.2(d)(2) to permit P&L to continue in control of EVWR, and to permit FRTI to continue in control of P&L and EVWR, when EVWR becomes a rail carrier upon acquisition of the Line.

The Board finds that the P&L Transaction is a “minor transaction” under 49 CFR 1180.2(c), and the Board adopts a procedural schedule for consideration of the primary application and the related filings, under which the Board’s final decision would be issued on December 12, 2005.

**DATES:** The effective date of this decision is **September 2, 2005**. Any person who wishes to participate in this proceeding as a party of record (POR) must file, no later than **September 12, 2005**, a notice of intent to participate. All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or either of the related filings, including filings by the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT), must be filed by **October 12, 2005**. Responses to comments, protests, requests for conditions, and other opposition, and rebuttal in support of the primary application or either of the related filings must be filed by **October 27, 2005**. If a public hearing or oral argument is held, it will be held **the week of November 14, 2005**. The Board will issue its final decision on **December 12, 2005**. For further information respecting dates, see Appendix A (Procedural Schedule).

**ADDRESSES:** Any filing submitted in this proceeding must be submitted **either** via the Board’s e-filing format **or** in the traditional paper format. Any person using e-filing should comply with the instructions found on the Board’s website at “www.stb.dot.gov” at the “E-FILING” link. Any person submitting a filing in the traditional paper format should send an original and 10 paper copies of the filing (and also an IBM-compatible floppy disk with any textual submission in any version of either Microsoft Word or WordPerfect) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each filing in this proceeding must be sent (and may be sent by e-mail only if service by e-mail is acceptable to the recipient) to each of the following: (1) Secretary of the United States Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) William A. Mullins (representing FRTI, P&L, and EVWR), Baker & Miller PLLC, 2401 Pennsylvania Avenue, NW, Suite 300, Washington, DC 20037; (4) Louis E. Gitomer (representing CSXT), Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005; and (5) any other person designated as a POR on the service list notice (as explained below, the service list notice will be issued as soon after September 12, 2005, as practicable).

FOR FURTHER INFORMATION CONTACT: Julia M. Farr, (202) 565-1655. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: CSXT, a Class I railroad,<sup>3</sup> owns and operates about 23,000 miles of railroad in the United States (in Alabama, Connecticut, the District of Columbia, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia) and in Canada (in Ontario and Quebec).

FRTI is a noncarrier holding company.

P&L, a wholly owned subsidiary of FRTI, is a Class II railroad that operates entirely in Kentucky over an approximately 262-mile line that extends between Louisville and Clayburn. P&L has been operating since 1986 and has built its traffic base from about 77,000 carloads in its first full year of operation (1987) to a high of 216,000 carloads in its best year. In addition to originating and terminating local traffic on its line, P&L interchanges: with CSXT, Norfolk Southern Railway Company (NS), Louisville and Indiana Railroad Company (L&I), and Canadian Pacific Railway Company (CP) at Louisville; with CSXT at Central City and Madisonville; and with Canadian National Railway Company (CN) and BNSF Railway Company (BNSF) at Paducah. P&L employs 223 persons, including 45 management or salaried employees and 178 craft employees represented by either 7 or 8 unions.<sup>4</sup> P&L owns 41 locomotives and it owns and/or leases 1,155 revenue service cars, 23 non-revenue cars, and 25 pieces of self-propelled maintenance-of-way (MOW) equipment.

EVWR, a wholly owned subsidiary of P&L, is a noncarrier. The proposals contemplate that EVWR would become a Class III railroad once the Line is acquired by P&L and is transferred to EVWR. P&L advises that its reasons for proposing to have the Line transferred to and operated by EVWR are both to permit P&L to retain certain substantial tax advantages available to it as a Kentucky railroad that P&L would lose if it were to operate a railroad outside of Kentucky and to protect P&L from potential liabilities and risks associated with operating a railroad outside of Kentucky. P&L states that EVWR would have its own employees, its own management, and its own financial arrangements, and that EVWR would publish tariffs, interline, and otherwise operate as a railroad independent of P&L. P&L notes, however, that EVWR and P&L would share a common management until such time as EVWR could hire its own management team. And, P&L adds, EVWR and P&L would also enter into a contract

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<sup>3</sup> The Board's regulations divide railroads into three classes based on annual carrier operating revenues. Class I railroads are those with annual carrier operating revenues of \$250 million or more (in 1991 dollars); Class II railroads are those with annual carrier operating revenues of more than \$20 million but less than \$250 million (in 1991 dollars); and Class III railroads are those with annual carrier operating revenues of \$20 million or less (in 1991 dollars). See 49 CFR Part 1201, General Instruction 1-1(a).

<sup>4</sup> Compare PLRY-1 at 9 (7 unions) with PLRY-1 at 10 (8 unions).

whereby P&L would provide management oversight and certain administrative services to EVWR.

The Evansville-Okawville Line. The 124.5-mile east-west Evansville-Okawville Line that would be acquired by P&L and transferred to EVWR has been operated by CSXT as its St. Louis Subdivision. Points located on the Line (going from east to west) include Evansville, Mt. Vernon, and Upton (in Indiana) and Epworth, Carmi, Trumbull, Enfield, Inland, McLeansboro, Delafield, Opdyke, Mt. Vernon, Woodlawn, Ashley, Nashville, Addieville, and Okawville (in Illinois).<sup>5</sup> The Line runs parallel to rail lines of CSXT and NS to the north, and the various points located on the Line are within the regions served by the Ohio, Wabash, and/or Mississippi Rivers. The various points located on the Line are also served by an extensive highway network, which includes Interstate Highway 64 (which runs parallel to the Line in an east-west direction) and Interstate Highway 57 (which crosses the Line in a north-south direction).

Interchange on the Line currently occurs at Woodlawn, IL, with BNSF, and at Mt. Vernon, IL, with Union Pacific Railroad Company (UP). CSXT and EVWR would conduct interchange at the east end of the Line and in CSXT's Howell Yard, both in Evansville, IN. P&L states that CSXT, BNSF, and UP would provide interchange with EVWR and would maintain competitive routes and rates over connections with EVWR.

Operation Of The Line By EVWR. P&L states: that EVWR would assume the common carrier obligation respecting the Line, and would operate the Line as an independent rail carrier affiliated with P&L; that EVWR expects to hire 3 management and 19 non-management employees (5 locomotive engineers, 5 trainmen, 5 MOW employees, 2 signal and communication employees, and 2 mechanical employees); that EVWR would commence operations with approximately 7 locomotives leased from P&L and would lease additional locomotives from P&L or third parties as business dictates; that EVWR would acquire or lease from P&L and third parties the MOW equipment necessary to operate and maintain the Line; and that, for its car supply, EVWR would use the existing (largely privately owned) cars on the Line, would use CSXT-supplied equipment as necessary, and would lease additional car supply from third parties as business dictates.

P&L asserts that, although EVWR would be a noncarrier subsidiary, it has not been created to avoid P&L's collective bargaining agreements or to avoid union operations over the Line. Rather, P&L explains: that EVWR intends to become a fully unionized carrier, and P&L and EVWR intend to enter into any necessary implementing agreements required to accomplish that purpose; that EVWR expects to have any employees hired to operate and maintain the Line work under essentially the same agreements that would apply if P&L were doing the work; and that EVWR expects that its employees will be represented by the same unions that would represent the employees if the Line were to be operated by P&L.

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<sup>5</sup> Two points located on the Line are called "Mt. Vernon," one in Indiana and the other in Illinois. The 2.8-mile Mt. Vernon Branch is located at Mt. Vernon, IN.

P&L states that EVWR would provide service to all customers on the Line 7 days per week with (1) one 2-person crew departing Mt. Vernon, IN, on Sunday, Tuesday, and Thursday, and returning from Okawville on Monday, Wednesday, and Friday, setting out and picking up cars at industries and interchange points en route; (2) another 2-person crew performing station and industry switching at Mt. Vernon, IN; (3) another 2-person crew performing station switching and interchange to/from CSXT at Evansville; and (4) two 2-person crews performing loading of unit coal trains at Epworth, IL, transiting to Mt. Vernon, IN, for unloading, and returning.

Financial Arrangements. Applicants state that, to acquire the Improvements, P&L would pay CSXT a certain amount (the precise amount has been submitted under seal) and P&L would immediately transfer those Improvements to EVWR for the same amount. Applicants further state that P&L would assign its lease in the real property to EVWR, and EVWR would be responsible for paying annual rental for the real property (the precise amount has been filed under seal) plus additional rental depending upon the number of carloads.

CSXT states that it does not plan any new financial arrangements in connection with the P&L Transaction. P&L states that it does not plan to issue any new securities in connection with the P&L Transaction, but intends to finance the acquisition through its existing line of credit or with cash on hand, depending on the situation at the time of closing. EVWR states that it will finance its purchase of the Improvements through a cash infusion from its initial capitalization, and that continuing operations and the annual lease payments would be financed through a combination of initial capitalization, cash from continuing operations, and borrowing from a third party.

Passenger Service Impacts. The P&L/EVWR Transaction would have no impact on commuter or passenger operations because the Line has no commuter or other passenger service.

Discontinuances/Abandonments. P&L states that EVWR does not anticipate discontinuing service over or abandoning any portion of the Line.

Public Interest Considerations. Applicants assert that, if approved, the P&L/EVWR Transaction would increase inter- and intramodal competition and would not result in any lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. They contend that it would not have any anticompetitive effects because it would simply allow EVWR to replace CSXT as the railroad serving local and overhead customers on the Line. Applicants further assert that significant truck competition provides an alternative to use of the Line for transportation.

P&L asserts that EVWR intends to aggressively market its operation to shippers on the Line and to potential receivers of western coal, as well as the eastern coal that the Line now carries. P&L believes that there are shippers along the Line that currently do not use rail service that could be convinced to use EVWR's service instead of truck service. P&L states that EVWR also plans to explore expansion of rail-water transload opportunities on the Line. P&L adds that EVWR would be headquartered on the Line, would hire qualified existing employees now working on the Line, would have local management and local personnel, and would provide a

more personalized, responsive, and more frequent service to customers on the Line than CSXT has been able to provide.

CSXT asserts that the P&L Transaction would improve CSXT's financial viability through system rationalization, including reducing its operating expenses and capital expenditures. CSXT notes, however, that, although CSXT and P&L have agreed to the P&L Transaction in principle and have resolved many specific items, it is difficult to estimate savings until all of the specific terms of the P&L Transaction are resolved.

P&L expects that the P&L/EVWR Transaction would result in operating economies, improved service, and improved financial viability. P&L does not anticipate any changes to routes and rates if EVWR takes over the service. P&L adds: that EVWR expects initially to handle about 63,100 carloads annually, including 42,900 carloads of coal, 6,700 carloads of chemicals, 9,600 carloads of agricultural commodities, 1,400 carloads of phosphate and fertilizer, 1,600 carloads of food and consumer products, and 900 carloads of metals; and that, based on such volumes, EVWR expects to earn gross revenues of about \$12,500,000 in its first year of operation.

Time Schedule For Consummation. If the Board approves the P&L/EVWR Transaction, applicants intend to consummate the transaction on the later of December 30, 2005, or the earliest date that P&L can acquire the Line pursuant to the authority sought in the primary application.

Environmental Impacts. Applicants contend that no environmental documentation is required because there would be no operational changes that would exceed the thresholds established in 49 CFR 1105.7(e)(4) or (5) and there would be no action that would normally require environmental documentation. Applicants therefore assert that neither the P&L Transaction nor the EVWR Transaction requires environmental documentation under 49 CFR 1105.6(b)(4) and (c)(2)(i).

Historic Preservation Impacts. Applicants contend that an historic report is not required because EVWR would operate the Line and would require separate Board approval to discontinue service, and because there are no plans to dispose of or alter properties subject to Board jurisdiction that are 50 years old or older. Applicants therefore assert that neither the P&L Transaction nor the EVWR Transaction requires an historic report under 49 CFR 1105.8(b)(1).

Labor Impacts. CSXT states that no CSXT employees would be dismissed on account of the P&L Transaction, but that 31 CSXT employees (10 Trainmen, 7 Engineers, 11 MOW workers, 2 Signal & Communications workers, and 1 Clerical worker) would be displaced, and 3 CSXT employees (2 Signal & Communications workers and 1 Clerical worker) would be relocated. CSXT states that it has not yet obtained any implementing agreements with its employees, but that it intends shortly to begin voluntary negotiations with its employees. CSXT adds that the predicted number of affected positions is based on current conditions and may change based upon conditions at the time of consummation.

P&L states that no P&L employee would be adversely impacted by the P&L/EVWR Transaction. P&L states that EVWR intends to hire approximately 10 employees (5 Trainmen and 5 Engineers) for train and engine service, and 9 employees (5 MOW workers, 2 Signal & Communications workers, and 2 Mechanical workers) for maintenance of the Line and equipment, and would consider for employment (based on qualifications to be determined by EVWR) all qualified current and former CSXT employees whose positions would be abolished as a result of the P&L Transaction and who make proper application for employment. P&L adds that the number of anticipated hires is based on current conditions and may change based upon conditions at the time of consummation.

*Protective Conditions.* For the P&L Transaction, applicants assert that, to provide the level of labor protection mandated by 49 U.S.C. 11326, the Board should impose the labor protective conditions in New York Dock Ry. – Control – Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979), as clarified in Wilmington Term. RR, Inc. – Pur. & Lease – CSX Transp., Inc., 6 I.C.C.2d 799, 814-826 (1990), aff'd sub nom. Railway Labor Executives' Ass'n v. I.C.C., 930 F.2d 511 (6th Cir. 1991). For the Sub-No. 1 related filing (the transfer of the Line from P&L to EVWR), they assert that no labor protective conditions may be imposed because the transaction is the type that would otherwise be handled under 49 U.S.C. 10901, which precludes such conditions. For the Sub-No. 2 related filing (the continuance in control of EVWR by P&L,<sup>6</sup> and the continuance in control of P&L and EVWR by FRTI<sup>7</sup>), they contend that, because the proposal involves one Class II carrier (P&L) and one Class III carrier (EVWR), the appropriate level of labor protection is that which is set forth in 49 U.S.C. 11326(b) (limited to 1 year of severance pay).

CSXT's 35% Ownership Interest In FRTI/P&L/EVWR. As noted above, EVWR is a wholly owned subsidiary of P&L, which is itself a wholly owned subsidiary of FRTI, a noncarrier holding company. Applicants advise that FRTI's common stock is divided into two blocks: a 65% block that is owned by P&L management; and a 35% block that is owned by CSXT. Applicants further advise: that 100% of FRTI's non-voting preferred stock is owned by CSXT; that one of the three members of FRTI's Board of Directors is a CSXT employee; and that three of the seven members of P&L's Board of Directors are CSXT employees. Applicants contend, however, that CSXT does not "control" FRTI/P&L/EVWR within the meaning of 49 U.S.C. 11323. Applicants cite Soo Line Railroad Company – Petition for Declaratory Order, STB Finance Docket No. 33350 (STB served Feb. 4, 1998), and explain that P&L management, which acquired its 65% interest in FRTI at the same time that CSXT acquired its 35% interest, has the power to appoint four members of the seven-member P&L board, whereas CSXT can appoint only three members. Applicants state that it is the P&L board that has the sole authority to manage, control, and make all decisions affecting the business of P&L and that, because P&L is controlled by its board and because it is the P&L board that has the power to direct P&L's day-to-day operations, P&L is independent in the conduct of its daily operations. According to applicants, P&L's board has exercised exclusive control over P&L's business affairs since P&L was reorganized and CSXT purchased its equity interest in P&L in 1995; CSXT has not been

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<sup>6</sup> See 49 U.S.C. 11323(a)(3).

<sup>7</sup> See 49 U.S.C. 11323(a)(5).

involved in P&L's day-to-day management; and, to avoid even the appearance of control in connection with the P&L Transaction, the CSXT-appointed directors of P&L refrained from participating in any discussions or required votes concerning P&L's proposal to acquire the Evansville-Okawville Line. Applicants state that no P&L or EVWR officers will be appointed by, or affiliated with, CSXT.

**PRIMARY APPLICATION AND RELATED FILINGS ACCEPTED.** The Board finds that the proposed P&L Transaction would be a "minor transaction" under 49 CFR 1180.2(c), and the Board is accepting the primary application for consideration because it is in substantial compliance with the applicable regulations governing minor transactions. See 49 U.S.C. 11321-26; 49 CFR part 1180. The Board is also accepting for consideration the two related filings, which are also in compliance with the applicable regulations. The Board reserves the right to require the filing of supplemental information, if necessary to complete the record.

**PUBLIC INSPECTION.** The primary application and the related filings are available for inspection in the Docket File Reading Room (Room 755) at the offices of the Surface Transportation Board, 1925 K Street, N.W., in Washington, DC. In addition, the primary application may be obtained from Mr. Mullins (representing FRTI, P&L, and EVWR) and Mr. Gitomer (representing CSXT) at the addresses indicated above, and the related filings may be obtained from Mr. Mullins (representing FRTI, P&L, and EVWR) at the address indicated above.

**PROCEDURAL SCHEDULE.** The Board has considered applicants' PLY-3/CSXT-3 request (filed August 3, 2005) for a procedural schedule, under which the Board would issue its final decision on December 10, 2005, and that decision would become effective on December 30, 2005. Applicants have explained that their proposed schedule would allow them to close the P&L/EVWR Transaction on December 30, 2005, and would thus allow the changeover in operations to occur before the end of the year and over a weekend.

The Board is adopting a procedural schedule that is essentially the same as applicants' proposed procedural schedule. However, whereas applicants' schedule provides that an oral argument will be held, if necessary, on November 15, 2005, to allow greater flexibility in the handling of the Board's docket, the Board's schedule provides that any necessary oral argument or public hearing will be held the week of November 14, 2005. Further, although applicants' schedule provides that the final decision will be issued on a Saturday, the Board's schedule provides that the final decision will be issued on December 12, 2005 (a Monday), to make the schedule consistent with the Board's usual operating procedure. This schedule will allow the Board to meet the applicable statutory deadline --- which requires a final decision no later than the 45th day after the date on which the evidentiary proceedings are concluded --- even if no public hearing or oral argument is found to be necessary.

Under the procedural schedule adopted by the Board: any person who wishes to participate in this proceeding as a POR must file, no later than **September 12, 2005**, a notice of intent to participate; all comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or either of the related filings, including filings by DOJ and DOT, must be filed by **October 12, 2005**; and responses to comments, protests,

requests for conditions, and other opposition and rebuttal in support of the primary application or either of the related filings must be filed by **October 27, 2005**. As in past proceedings, DOJ and DOT will be allowed to file, on the response due date (here, **October 27th**), their comments in response to the comments of other parties, and applicants will be allowed to file (as quickly as possible thereafter) a response to any such comments of DOJ and/or DOT. Under this schedule, a public hearing or oral argument may be held **the week of November 14, 2005**. The Board will issue its final decision on **December 12, 2005**, and, to accommodate the request for a 2005 year-end closing, the Board will make any such approval effective on **December 30, 2005**. For further information respecting dates, see Appendix A (Procedural Schedule).

**NOTICE OF INTENT TO PARTICIPATE.** Any person who wishes to participate in this proceeding as a POR must file with the Board, no later than **September 12, 2005**, a notice of intent to participate, accompanied by a certificate of service indicating that the notice has been properly served on the Secretary of the United States Department of Transportation, the Attorney General of the United States, Mr. Mullins (as representative of FRTI, P&L, and EVWR), and Mr. Gitomer (as representative of CSXT).

**SERVICE LIST NOTICE.** The Board will serve, as soon after September 12, 2005, as practicable, a notice containing the official service list (the service-list notice). Each POR will be required to serve upon all other PORs, within 10 days of the service date of the service-list notice, copies of all filings previously submitted by that party (to the extent such filings have not previously been served upon such other parties). Each POR also will be required to file with the Board, within 10 days of the service date of the service-list notice, a certificate of service indicating that the service required by the preceding sentence has been accomplished. Every filing made by a POR after the service date of the service-list notice must have its own certificate of service indicating that all PORs on the service list have been served with a copy of the filing. Members of the United States Congress (MOCs) and Governors (GOVs) are not parties of record and need not be served with copies of filings, unless any Member or Governor has requested to be, and is designated as, a POR.

**COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION EVIDENCE AND ARGUMENT, INCLUDING FILINGS BY DOJ AND DOT.** All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or either of the related filings, including filings by DOJ and DOT, must be filed by **October 12, 2005**.

Because the P&L Transaction proposed in the primary application is a minor transaction, no responsive applications will be permitted. See 49 CFR 1180.4(d)(1).

Protesting parties are advised that, if they seek either the denial of the primary application or the imposition of conditions upon any approval thereof, on the theory that approval (or approval without conditions) would harm competition and/or their ability to provide essential services, they must present substantial evidence in support of their positions. See Lamoille Valley R.R. Co. v. ICC, 711 F.2d 295 (D.C. Cir. 1983).

**RESPONSES TO COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER OPPOSITION; REBUTTAL IN SUPPORT OF THE APPLICATION.**

Responses to comments, protests, requests for conditions, and other opposition submissions, and rebuttal in support of the primary application or either of the related filings, must be filed by **October 27, 2005**.

**PUBLIC HEARING/ORAL ARGUMENT.** The Board may hold a public hearing or an oral argument in this proceeding **the week of November 14, 2005**.

**DISCOVERY.** Discovery may begin immediately. The parties are encouraged to resolve all discovery matters expeditiously and amicably.

**ENVIRONMENTAL MATTERS.** Under the Council on Environmental Quality (CEQ) regulations, for those types of proposed actions whose environmental effects are ordinarily insignificant, an environmental review need not be conducted under the National Environmental Policy Act of 1969 (NEPA).<sup>8</sup> Rather, such activities are covered by a “categorical exclusion.” In its environmental rules, the Board has various categorical exclusions.<sup>9</sup> As pertinent here, under 49 CFR 1105.6(c)(2)(i), no environmental review is normally required for a rail line acquisition proposal that would not result in operational changes that exceed certain thresholds – generally an increase in rail traffic of at least three trains a day or 50 percent in traffic (measured in gross ton miles annually in an air quality “nonattainment” area,<sup>10</sup> which is where the easternmost terminus of the Evansville-Okawville Line is located.

Applicants state in their application that EVWR expects initially to handle about 63,100 carloads annually. The traffic would consist of about 42,900 carloads of coal, 6,700 carloads of chemicals, 9,600 carloads of agricultural commodities, 1,400 carloads of phosphate and fertilizer, 1,600 carloads of food and consumer products, and 900 carloads of metal. In supplemental information on traffic movements provided by applicants to the Board’s Section of Environmental Analysis (SEA), applicants state that traffic now moving over the Evansville-Okawville Line would continue moving over the Line at the same volume should the Board approve the P&L/EVWR Transaction. According to applicants, EVWR would provide rail service to all customers on the Line seven days per week. Applicants explain that EVWR expects to conduct approximately 60 train movements per week on the Line. Applicants state that of the 60 train movements per week, six train movements (three round-trips per week) would be line-haul movements providing local service on the 104-mile segment from Mt. Vernon, IN, to Okawville, IL. There would be two train movements (one round-trip) providing local service and overhead movements for interchange between Mt. Vernon, IN, and Evansville, IN, which are approximately 17 miles apart. Additionally, on the 2.8-mile Mt. Vernon Branch near Mt.

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<sup>8</sup> 40 CFR 1500.4(p), 1501.4(a)(2), 1508.4.

<sup>9</sup> 49 CFR 1105.6(c).

<sup>10</sup> Areas of the country where air pollution levels persistently exceed the national ambient air quality standards may be designated “nonattainment.” Evansville is located in an area designated as an air quality “nonattainment” area by the Environmental Protection Agency.

Vernon, IN, approximately 10 switching movements would occur. The remainder of the movements would occur on the segments between Epworth, IL, and Mt. Vernon, IN, and between Mt. Vernon, IN, and Evansville, IN. According to applicants, EVWR does not anticipate any changes to the existing route, and has no plans to immediately increase traffic levels on the Line.

Applicants state that, upon Board approval of the P&L/EVWR Transaction, EVWR intends to aggressively market its rail operations to shippers on the Line that currently ship and receive commodities by truck to provide more frequent and improved service to shippers. In addition, EVWR plans to explore expansion of rail-water transload opportunities on the Line. Presently, there is rail-water transload activity on the Line at Mt. Vernon, IN. Of the 63,100 carloads currently handled on the Line, approximately 17,800 carloads per year of coal, fertilizer, and agricultural products are currently handled by CSXT at this transload facility. EVWR projects traffic levels for this operation to remain the same as CSXT's current transload activities.

Because EVWR projects no immediate increase in traffic levels on the Line, and because the amount of any future increase in traffic as a result of marketing is speculative, the P&L/EVWR Transaction does not meet or exceed the Board's thresholds for environmental documentation established at 49 CFR 1105.7(e)(4) or (5), and there is nothing in either the primary application or the related filings to indicate that the P&L/EVWR Transaction has any potential for significant environmental impacts. The Board's SEA has therefore concluded that this proceeding is "categorically excluded" from the environmental review required by NEPA and that formal environmental review is not warranted in this case.

Finally, SEA agrees with applicants that the proposed action does not require historic review under the National Historic Preservation Act of 1966 because further approval would be required to abandon any service, and because applicants have advised the Board that there are no plans to dispose of or alter properties subject to the Board's jurisdiction that are 50 years old or older. 49 CFR 1105.8(b)(1).

**FILING/SERVICE REQUIREMENTS.** Persons participating in this proceeding may "file" with the Board and "serve" on other parties: a notice of intent to participate (due by **September 12th**); a certificate of service indicating service of prior pleadings on persons designated as PORs on the service-list notice (due by the 10th day after the service date of the service-list notice); any comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application or either of the related filings (due by **October 12th**); and any responses to comments, etc., and any rebuttal in support of the primary application or either of the related filings (due by **October 27th**).

Filing Requirements. Any document filed in this proceeding must be filed **either** via the Board's e-filing format **or** in the traditional paper format. Any person e-filing a document should comply with the instructions found on the Board's website at "www.stb.dot.gov" at the "E-FILING" link. Any person filing a document in the traditional paper format should send an original and 10 paper copies of the document (and also an IBM-compatible floppy disk with any

textual submission in any version of either Microsoft Word or WordPerfect) to: Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423-0001.

**Service Requirements.** One copy of each document filed in this proceeding must be sent to each of the following (any copy may be sent by e-mail only if service by e-mail is acceptable to the recipient): (1) Secretary of the United States Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590; (2) Attorney General of the United States, c/o Assistant Attorney General, Antitrust Division, Room 3109, Department of Justice, Washington, DC 20530; (3) William A. Mullins (representing FRTI, P&L, and EVWR), Baker & Miller PLLC, 2401 Pennsylvania Avenue, NW, Suite 300, Washington, DC 20037; (4) Louis E. Gitomer (representing CSXT), Ball Janik LLP, 1455 F Street, N.W., Suite 225, Washington, DC 20005; and (5) any other person designated as a POR on the service-list notice.

**SERVICE OF DECISIONS, ORDERS, AND NOTICES.** The Board will serve copies of its decisions, orders, and notices only on those persons who are designated on the official service list as either POR, MOC, or GOV. All other interested persons are encouraged either to secure copies of decisions, orders, and notices via the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Decisions & Notices" or to make advance arrangements with the Board's copy contractor, ASAP Document Solutions (mailing address: Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: asapdc@verizon.net; telephone number: 202-306-4004), to receive copies of decisions, orders, and notices served in this proceeding. ASAP Document Solutions will handle the collection of charges and the mailing and/or faxing of decisions, orders, and notices to persons who request this service.

**ACCESS TO FILINGS.** An interested person does not need to be on the service list to obtain a copy of the primary application or any other filing made in this proceeding. Under the Board's rules, any document filed with the Board (including applications, pleadings, etc.) shall be promptly furnished to interested persons on request, unless subject to a protective order. 49 CFR 1180.4(a)(3). The primary application and other filings in this proceeding will also be available on the Board's website at "www.stb.dot.gov" under "E-LIBRARY/Filings."

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

**It is ordered:**

1. The primary application in STB Finance Docket No. 34738 and the related filings in STB Finance Docket No. 34738 (Sub-Nos. 1 and 2) are accepted for consideration.
2. The parties to this proceeding must comply with the Procedural Schedule adopted by the Board in this proceeding as shown in Appendix A.
3. The parties to this proceeding must comply with the procedural requirements described in this decision.

4. This decision is effective on September 2, 2005.

Decided: August 25, 2005.

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

Vernon A. Williams  
Secretary

**APPENDIX A: PROCEDURAL SCHEDULE**

August 3, 2005	Primary application, related filings, motion for protective order, and request for issuance of procedural schedule filed.
September 2, 2005	Board notice of acceptance of primary application and related filings published in the <u>Federal Register</u> .
September 12, 2005	Notices of intent to participate in this proceeding due.
October 12, 2005	All comments, protests, requests for conditions, and any other evidence and argument in opposition to the primary application and/or either or both of the related filings, including filings of DOJ and DOT, due.
October 27, 2005	Responses to comments, protests, requests for conditions, and other opposition due. Rebuttal in support of the primary application and/or either or both of the related filings due.
Week of November 14, 2005	A public hearing or oral argument may be held the week of November 14, 2005.
December 12, 2005	Date of service of final decision.
December 30, 2005	Effective date of final decision.