

238091

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS
2401 PENNSYLVANIA AVENUE, NW
SUITE 300
WASHINGTON, DC 20037

TELEPHONE: (202) 663-7820
FACSIMILE: (202) 663-7849

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WILLIAM A. MULLINS

(202) 663-7823 (Direct Dial)
E-Mail: wmullins@bakerandmiller.com

March 31, 2015

VIA E-FILING

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Norfolk Southern Railway Company – Acquisition and Operation -
Certain Rail Lines of the Delaware and Hudson Railway Company, Inc.*, STB
Docket No. F.D. 35873

Dear Ms. Brown:

Enclosed is Norfolk Southern Railway Company's ("NS") "Response To Comments And Rebuttal In Support Of Application" (NS-16) in the above referenced proceeding. NS is separately e-filing a Public Version and a Highly Confidential Version. The use of double brackets in both versions indicates highly confidential information that has been redacted in the Public Version. If there are any questions concerning either filing, please contact me at the address and phone listed above or at wmullins@bakerandmiller.com.

Respectfully submitted,



William A. Mullins
Attorney for Norfolk Southern Railway Company

Enclosures

cc: Parties of Record

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873¹

NORFOLK SOUTHERN RAILWAY COMPANY

– ACQUISITION AND OPERATION –

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

**RESPONSE TO COMMENTS
AND REBUTTAL IN SUPPORT OF APPLICATION**

**James A. Hixon
William A. Galanko
John M. Scheib
Maquiling B. Parkerson
Aarth S. Thamodaran
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939
Fax: (757) 533-4872**

**William A. Mullins
Amber L. McDonald
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849**

**Attorneys for Norfolk Southern
Railway Company**

March 31, 2015

CONTAINS COLOR MATERIALS

¹ The Application and this Rebuttal also embrace Finance Dockets No. 34209 (Sub-No. 1) and No. 34562 (Sub-No. 1).

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PUBLIC VERSION**LIST OF ACRONYMS USED IN REBUTTAL**

| | |
|------|--|
| APA | Asset Purchase Agreement |
| BEA | Bureau of Economic Analysis Economic Area (BEA, 1995 version) |
| BPRR | Buffalo & Pittsburgh Railroad, Inc. |
| C&D | Construction and demolition debris |
| CMQ | Central Maine and Quebec Railway US Inc. (formerly Montreal, Maine & Atlantic) |
| CN | Canadian National Railway |
| CP | Canadian Pacific Railway Co. and its rail carrier operating subsidiaries |
| CSX | CSX Transportation, Inc. |
| D&H | Delaware and Hudson Railway Co., Inc. |
| D-L | Delaware and Lackawanna Railroad |
| EOH | East of Hudson Rail Freight Service Task Force, Inc. |
| GWI | Genesee & Wyoming Inc. |
| LRWY | Lehigh Railway, LLC |
| LVRR | Lycoming Valley Railroad Co. |
| MSW | Municipal solid waste |
| NGFA | National Grain and Feed Association |
| NYSW | New York Susquehanna and Western Railway |
| NS | Norfolk Southern Railway Co. |
| PPL | PPL Energy Plus, LLC |
| RBMN | Reading, Blue Mountain and Northern Railroad |
| RSR | Rochester & Southern Railroad, Inc. |
| S&NC | Saratoga & North Creek Railway |
| WCOR | Wellsboro & Corning Railroad LLC |

PUBLIC VERSION**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY**-- ACQUISITION AND OPERATION --****CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

**RESPONSE TO COMMENTS AND REBUTTAL
IN SUPPORT OF APPLICATION**

SUMMARY OF ARGUMENT

Norfolk Southern Railway Company (“NS” or “Applicant”) files this Response to Comments and Rebuttal in Support of its Application (“Rebuttal”) seeking approval of NS’s acquisition and operation of 282.55 miles of Delaware and Hudson Railway Company, Inc.’s (“D&H”) rail lines located in Pennsylvania and New York (the “D&H South Lines”) and of modifications of existing trackage rights, collectively deemed the “Transaction” in the Application. On December 16, 2014, the Surface Transportation Board (“Board”) accepted NS’s Application for consideration as a minor transaction under the regulations, embraced NS’s two related trackage rights filings, and adopted a procedural schedule (“December 16 Decision”).² Comments on the Application and requests for conditions were due on January 21, 2015.

² Notice of the Board’s acceptance of the Application formally was published in the Federal Register on December 22, 2014, 79 Fed. Reg. 76446. The original schedule adopted in the December 16 Decision provided for comments and requests for conditions to be filed on January 15, 2015. On January 14, 2015, the Board issued a decision extending the deadline for comments on the Application to January 21, 2015 (“January 14 Decision”). This extension provided parties with a comment period of 30 days from the date of the Federal Register

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Based upon the record, the Application should be approved as a minor transaction without conditions. The record shows that there are no anticompetitive effects, as the Transaction is essentially end-to-end and there are no 2-to-1 shippers actually located on the D&H South Lines.³ When one analyzes traffic flows using a BEA to BEA corridor analysis, as Dr. Grimm did and which methodology has been argued in past proceedings as overstating anticompetitive effects, there are likewise no actual 2-to-1 corridors. Although not required and despite claims to the contrary, Dr. Grimm's analysis considered competitive effects resulting from D&H's planned trackage rights discontinuances and competitive effects resulting from the termination of certain private commercial agreements between D&H and NS. Even under this overly broad approach, Dr. Grimm concluded that the Transaction results in no anticompetitive effects.

Indeed, the Transaction produces significant public interest benefits, which no party credibly has disputed; and even if there were anticompetitive effects, which there are not, these benefits would clearly outweigh any such anticompetitive effects and would thus require the Board to approve the Transaction. As established by NS's witness John Friedmann, as discussed in the Operating Plan, and as recognized by the many supporting constituencies, the Transaction (1) benefits shippers by aligning ownership with usage, which promotes operating efficiencies, improved maintenance, and more reliable and sustainable service; (2) preserves and enhances competition in the Northeast surface transportation market by creating a single-line route for NS

publication of the Board's decision accepting NS's Application and gave parties more than 60 days from the date of the filing of the Application to review it, undertake discovery, analyze the competitive effects, and draft and file comments.

³ CNJ Rail's expert Michael Nelson claims that approximately 150 shippers on connecting short lines will face 2-to-1 reductions in their competitive options. VS Nelson, at 8. However, all of the shippers cited by Mr. Nelson will retain access to CP routings and rates post-Transaction under NS's and D&H's two new commercial agreements. Further, all of the short lines listed by Mr. Nelson have filed letters supporting the Transaction.

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in the region and by allowing D&H to focus on more successful routes; and (3) preserves and possibly increases jobs on the D&H South lines by providing D&H employees on the lines with opportunities for continued employment with NS and by restoring local service levels on the line. See NS-1, Operating Plan at 4-8 (Pages 112-116 Volume 1)

The Transaction has received widespread support. To date, over 125 parties representing a broad range of interests have supported the Transaction. Not one shipper located on the D&H South Lines, or on any connecting short lines, has commented that it opposes the Transaction or even requests a condition. Supporting shippers representing approximately 70% of the traffic on the D&H South Lines include grain, energy, chemical, and intermodal and logistics companies. These include the Bartlett Grain Co., LP; Gold Star Feed and Grain, LLC; Grain Processing Corp.; Consol Energy; Murphy Energy Corp.; Gavilon Fertilizer, LLC; Air Products and Chemicals, Inc.; PVS Chemicals, Inc.; Hanjin Shipping America, LLC; Hapag Lloyd (America) Inc.; Hub Group; JB Hunt Transport Services; and UPS, among numerous others. Further, all of the connecting short lines, including the largest connecting short line, Reading, Blue Mountain and Northern Railroad (“RMBN”), have submitted letters supporting the Transaction. In total, over 30 short lines have filed letters in support. The Pennsylvania Department of Transportation, Vermont Agency of Transportation, State of Maine Department of Transportation, Massachusetts Department of Transportation, and State of Connecticut Department of Transportation also have filed statements supporting approval of the Transaction without conditions, and the New York State Department of Transportation supports approval of the Transaction with one unrelated condition. The Transaction also has received support from numerous New York and Pennsylvania Congressmen and both U.S. Senators from Pennsylvania. No U.S. Senator or U.S. Congressman opposes the Transaction.

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Only 10 parties filed comments opposing the Application or requesting conditions, reinforcing the overwhelming support for and the procompetitive nature of this minor Transaction. Of the comments filed, two sets of comments were filed by parties who have no standing in this proceeding and have been prolific participants in many prior Board proceedings. Only one set of comments was filed by a shipper; and, that shipper is not even located on the D&H South Lines, moves no traffic over the D&H South Lines, and currently is solely-served by NS. All of the commenters (except for the labor interests) impermissibly seek conditions to either remedy pre-existing conditions or significantly improve their pre-Transaction competitive positions, or seek conditions based upon alleged competitive harms caused by D&H's decision to discontinue certain uneconomic trackage rights or NS's and D&H's decision to cancel certain private commercial agreements, both of which are not part of the Transaction subject to the Board's approval and remedial authority in this proceeding. In short, no conditions are warranted.

As will be discussed in this Rebuttal, none of the commenters have met the required burden to show that the Transaction will result in an anticompetitive effect that is both "likely" and "substantial" so as to warrant the imposition of a condition. This conclusion is not altered in any way if one also considers the effects of the D&H trackage rights discontinuances or the termination of the private commercial agreements. Likewise, no party has established that the Transaction will result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. As such, the Board is required to approve this minor Transaction without conditions under 49 U.S.C. §11324(d).

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I. THE APPROPRIATE LEGAL STANDARD

The Transaction involves NS's acquisition and operation of 282.55 miles of rail lines located in Pennsylvania and New York that are owned and operated by D&H, a Class II carrier. In the December 16 Decision, the Board properly found the Transaction to be a "minor" transaction. As such, the Transaction is governed by the standards of 49 U.S.C. § 11324(d), which provides as follows:

(d) In a proceeding under this section which does not involve the merger or control of at least two Class I railroads, as defined by the Board, the Board shall approve such an application unless it finds that--

- (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and
- (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

Under this standard, for the Board to deny the Application, parties must show that the Transaction will substantially lessen competition, create a monopoly, or restrain trade in freight transportation. As discussed below, no party has made such a showing. Accordingly, the Board need not even consider whether the Transaction benefits the public interest and simply must approve the Transaction.

Even if the Board concluded that some anticompetitive effects may result from the Transaction, the Board must still approve the Transaction unless it finds that the projected competitive harms outweigh the Transaction's benefits to the public interest and that such harms cannot be sufficiently ameliorated by conditions. Illinois Central Corp. And Illinois Central R.R. Co. – Control – CCP Holdings, Inc., Chicago, Central & Pacific R.R. Co. And Cedar River R.R. Co., FD No. 32858, 1996 STB LEXIS 157, at *7-8 (STB served May 14, 1996). In this case, no party has challenged credibly the notion that the Transaction will produce substantial public

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interest benefits; and in fact, over 125 parties have acknowledged such benefits. Accordingly, even if all of the alleged competitive harms were true, which they are not, those harms still would not outweigh the unchallenged public interest benefits of the Transaction. As such, the Board is required to approve the Transaction.

II. EFFECTS ARISING FROM THE D&H TRACKAGE RIGHTS DISCONTINUANCES ARE NOT RELEVANT TO THIS PROCEEDING, OR, ALTERNATIVELY, IF RELEVANT, RESULT IN NO COMPETITIVE HARMS THAT WARRANT IMPOSITION OF A CONDITION

Several parties, including the New York State Department of Transportation (“NYSDOT”), the National Grain and Feed Association (“NGFA”), Riffin, CNJ Rail, and Nasca, raised concerns related to D&H’s plans to discontinue certain trackage rights, as described in the Application. See, e.g., NS-1, at 10 n.3, 28. In general, these parties claim that there will be competitive effects from such discontinuances and that such effects must be addressed in this proceeding. The Board should reject this notion. First, D&H’s trackage rights discontinuances are not part of the Transaction that is subject to this proceeding; they are subject to a separate proceeding, which D&H filed on March 19, 2015.⁴ Second, although not required, NS’s competitive analysis considered the effects of the discontinuances and still found no anticompetitive effects.

A. The D&H Trackage Rights Discontinuances Are Not Part of The Transaction And Are Subject To A Separate Board Proceeding

D&H’s discontinuances are not part of the Transaction for which the Application seeks Board authority and are properly addressed in D&H’s separately filed discontinuance proceeding. As the Board itself stated in the December 16 Decision, it “need not address these trackage rights in this proceeding” because the “trackage rights run over NSR lines that are not

⁴ D&H filed for discontinuance authority with a two-year out-of-service notice of exemption pursuant to 49 C.F.R. § 1152.5, Subpart F. See AB-156 (Sub-No. 27X).

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part of the D&H Short [*sic*] Lines at issue in this Control Transaction.”⁵ The Board was correct to so find. This is a simple line acquisition whereby NS is the only Applicant seeking authority to acquire a line and modify trackage rights. This is not a merger or control proceeding where the buyer and seller are both applicants and all trackage rights, abandonments, and discontinuances for both parties are included in the application. D&H was not, and is not required to be, an applicant. As such, NS had no legal authority or obligation to include D&H’s discontinuances in its Application.

D&H has decided to discontinue its trackage rights over certain lines and sell the D&H South Lines based on its assessments of the economics and operations of the lines and the trackage rights. D&H’s decision to pursue both does not obligate NS to combine the discontinuances of lines otherwise unrelated to the line sale with the line sale in the same Board proceeding.⁶ The fact that D&H has filed a two-year out-of-service notice of exemptions for the discontinuances shows that the trackage rights’ lack of use began long before D&H and NS entered into the Asset Purchase Agreement (“APA”) and clearly predates even the beginning of the negotiations that led to the APA.⁷ D&H itself, in its concurrently filed comments, states that

⁵ The Board used the phrase “Control Transaction” in the December 16 Decision. However, the Transaction is not a “control” transaction as that phrase is used in § 11324(b), which standard is applicable to control transactions filed under §§ 11323(a)(3)-(5), and as defined in § 11323(b). Here, NS is not seeking “control” of another rail carrier, but rather the acquisition/ownership of a rail line or, as the Board put it, “control” of another rail line. As such, this Transaction is a line acquisition subject to § 11323(a)(2) and § 11323(a)(6) with respect to the trackage rights.

⁶ In fact, if D&H had not agreed to sell the D&H South Lines to NS, it may have chosen to take a different business and regulatory approach, and is still free to do so in the event the Transaction is denied. Nothing in the APA or the Board’s regulatory jurisprudence requires D&H to exercise or not exercise its discontinuance authority in the event the Transaction is not approved.

⁷ CNJ Rail’s suggestion that the discontinuances result from nefarious negotiations between NS and D&H ignores the realities of the marketplace and is belied by the fact that D&H has filed its discontinuances using the two-year out-of-service notice of exemption process.

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the “the vast majority of its connecting trackage rights have become irrelevant and are no longer economically justified.” D&H March 31, 2015 Comments at 2. Thus, the competitive effects, if any, arising from those discontinuances, are not a result of the Transaction and should be judged on their own merits.

B. NS’s Competitive Analysis Considered The D&H Trackage Rights Discontinuances And Identified No Anticompetitive Effects

Despite the fact that the competitive effects, if any, of D&H’s discontinuances do not result from the Transaction, Dr. Grimm performed a competitive analysis that included the competitive effects of such discontinuances (along with NS’s and D&H’s termination of certain private commercial agreements outside the Board’s jurisdiction). Taking in the totality of the acquisition, the discontinuances, and the termination of certain private commercial agreements, he found only four markets with potential 2-to-1 effects. See NS-1, at 90-92. Upon further examination, Dr. Grimm concluded that these were not true 2-to-1 corridors because there were independent alternatives to NS/D&H routings involving CSX and Central Maine and Quebec Railway US Inc. (formerly Montreal, Maine & Atlantic) (“CMQ”).

Dr. Grimm further discusses the competitive effects of the discontinuances and haulage rights termination on a more micro level in his Rebuttal Verified Statement (“RVS Grimm”),

As CNJ Rail notes, D&H acquired the majority of the trackage rights that it seeks to discontinue as part of the Final System Plan (“FSP”) that created Consolidated Rail Corp. (“Conrail”). Although the original intent of the FSP was to allow D&H to serve as a viable competitive alternative to Conrail, Conrail in its prior form no longer exists. Today, NS, CSX, and in some cases, CN all provide competition in the Northeast market along with D&H. It is precisely this intense competition that resulted in D&H discontinuing certain trackage rights in 2005. See Delaware And Hudson Ry. Co., Inc. – Discontinuance of Trackage Rights – in Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Erie, and Genesee Counties, NY; Canadian Pacific Ry. Co. – Trackage Rights Exemption – Norfolk Southern Ry. Co.; Norfolk Southern Ry. Co. – Trackage Rights Exemption – Delaware And Hudson Ry. Co., Inc., AB-156 (Sub-No 25X), FD No. 34561, FD No. 34562, 2005 STB LEXIS 24, at *22 (STB served Jan. 19 2005) (“2005 D&H Discontinuances”). And, it is this same competition that is now resulting in the current D&H discontinuances.

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attached hereto as Exhibit A. He shows that even if one considers the arguments raised outside of the context of a BEA to BEA corridor analysis and examines claims of specific competitive harm in particular circumstances, even claims related to the discontinuances and haulage rights termination, no party has shown specific competitive harm. There are no 2-to-1 competitive effects. See RVS Grimm, at 8-9; RVS Mutén, at 3. At most, these parties (the arguments of each independent party are addressed below) have shown the potential for 3-to-2 competitive effects, but no party has presented evidence establishing that such 3-to-2 effects are anticompetitive.

Absent a specific showing of competitive harm in a 3-to-2 situation, which has not been shown here, the Board's policy is to preserve competition only in 2-to-1 instances. See e.g., Major Rail Consolidation Procedures, EP No. 582 (Sub-No.1) (STB served June 11, 2001) ("we have consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis"); Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and the Denver and Rio Grande Western R.R. Co., FD No. 32760, Decision No. 44, 1 S.T.B. 233, 351 (STB served Aug. 12, 1996) ("UP/SP") (STB has "focused usually on preserving two-railroad competition, not on preserving three-railroad competition"). The mere theoretical possibility that the D&H trackage rights might provide some competitive alternative is not sufficient to support a claim of competitive harm.⁸

⁸ See, e.g., Canadian National Railway Co., Grand Trunk Corp., and WC Merger Sub, Inc. – Control – Wisconsin Central Ltd., Fox Valley & Western Ltd., Sault Ste. Marie Bridge Co., and Wisconsin Chicago Link Ltd., FD No. 34000, 2001 STB LEXIS 711, at *39 (STB served Sept.

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Thus, no party has established that D&H's discontinuances would result in a substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States. And even if any anticompetitive effects have been established, which they have not, no party has shown that such effects would outweigh the public interest benefits of the Transaction so as to require denial of the Application.

C. Effects Arising From The D&H Trackage Rights Discontinuances Have Been Fully Addressed

Finally, any claims that D&H's discontinuances should have been included as part of the Application, or that the Application was incomplete for failure to include D&H's discontinuance request, are moot because the record includes all of the information necessary to review the effects, if any, of D&H's discontinuances. In the Application, NS described to the Board and the public generally which trackage rights would be the subject of D&H's discontinuance request,⁹ see NS-1, at 28; and, Dr. Grimm's initial competitive analysis included the effects of the discontinuances, see NS-1, at 90-92. The rebuttal Verified Statements of Dr. Grimm and Mr. Mutén further address the competitive effects of the discontinuances. See RVS Grimm, at 6-7; RVS Mutén, at 2-3. As such, the record is more than complete with respect to the effects of D&H's discontinuances. In addition, now that D&H has filed for discontinuance authority, parties can raise any related concerns in that proceeding. The Board can contemporaneously review the competitive effects of D&H's discontinuances along with the competitive effects of

7, 2001) ("CN/Wisconsin Central") (refusing to condition approval of the transaction on applicants' agreeing not to cancel certain rights, noting that "an option that has not been used in 7 years appears to be 'competitive' only in the most theoretical sense"). See also RVS Grimm, at 6-7; RVS Mutén, attached hereto as Exhibit B, at 2-3 (rebutting theoretical and unsubstantiated claims by the NGFA that the discontinuances will result in a competitive harm).

⁹ The actual trackage rights agreements also were available, although no party filed discovery requesting a copy of such agreements.

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the Transaction, albeit in appropriately separate proceedings. Thus, there is no need to reject or modify the Application based on the D&H trackage rights discontinuances.

III. ALL REQUESTS FOR CONDITIONS SHOULD BE DENIED.

As discussed in this Rebuttal, all of the requested conditions are either attempts to remedy pre-existing competitive situations that have no nexus with the Transaction, attempts to remedy effects arising from D&H's discontinuances or the termination of the haulage agreement, which are outside of the Board's conditioning authority in this proceeding, or attempts to protect a particular carrier's revenues rather than competition. As such, no party has met its burden to establish a competitive harm that arises from the Transaction, and is both likely and substantial, warranting the imposition of a condition. Even if a party had met this burden, none of the parties has proposed a condition that is narrowly tailored to simply preserve the pre-Transaction competitive landscape. As such, the requests for conditions should be denied consistent with well-established Board precedent.

The Board grants conditions to remedy competitive harms that are caused or exacerbated by the Transaction, not to remedy pre-existing problems unaffected by the Transaction. See e.g., Genesee & Wyoming Inc. – Control – Rail America, Inc., et al., FD No. 35654, Decision No. 5, 2012 STB LEXIS 457, at *5 (STB served Dec. 20, 2012) (“Rail America”) (“harms caused by the merger must be distinguished from pre-existing disadvantages that other railroads, shippers, or communities may have been experiencing that are not ‘merger-related’”); Canadian National Railway Co. and Grand Trunk Corp. – Control – EJ&E West Co., FD No. 35087, 2008 STB LEXIS 220, at *10 (STB served Apr. 25, 2008) (“CN/EJ&E”) (“Board’s power to impose conditions is not limitless: there must be a sufficient nexus between the condition imposed and

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the transaction before the agency, mitigation is not imposed to correct pre-existing conditions, and the condition imposed must be reasonable.”).

To justify a condition, a party must show that the alleged competitive harm not only has a nexus to the transaction, but that the harm to be remedied is both “likely and substantial.” CSX Transportation, Inc. – Acquisition of Operating Easement – Grand Trunk Western Railroad Co., FD No. 35522, Decision No. 5, at *5 (STB served Feb. 8, 2013). A “substantial” harm is not small or merely transitory. See, e.g., E.I. Dupont de Nemours and Co. v. CSX Transp., Inc., 2008 STB LEXIS 361, at *10 (STB served June 30, 2008) (rejecting Dupont’s argument that it became a captive shipper when its ability to use barge was temporarily hindered due to water-level changes and other physical conditions, as these are “transitory and short-term problems that this agency has long held are insufficient to establish the absence of effective competition”).

Finally, the harm must be to competition, not harm to a particular railroad competitor. See, e.g., Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co., FD No. 33556, 1999 STB LEXIS 305, at *44 (STB served May 25, 1999) (“CN/Grand Trunk”) (noting that “conditions are not warranted to indemnify competitors for revenue losses absent a showing that essential service would be impaired”). See also Wisconsin Central Transp. Corp., et al. – Continuance in Control – Fox Valley & Western Ltd., FD No. 32036, 1992 ICC LEXIS 279, at *10 (ICC served Dec. 4, 1992) (“Wisconsin Central”) (“A showing of expected substantial harm to a particular competitor as a result of a transaction is not equivalent to a showing of harm to competition.”).

Further, even if a party establishes that a condition is warranted, the scope of the Board’s conditioning power is limited. Where appropriate, the Board imposes conditions that are

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narrowly tailored to remedy only the specific adverse harm that results from the transaction. The Board's focus is on preserving the pre-transaction status quo. The Board does not grant conditions that significantly improve the competitive position of the party seeking the condition. See, e.g., Burlington Northern Inc. and Burlington Northern R.R. Co. – Control and Merger – Santa Fe Pacific Corp. and the Atchison, Topeka and Santa Fe Ry. Co., FD No. 32549, 1995 ICC LEXIS 214, at *174-75 (served Aug. 23, 1995) (“BN/SF”) (noting that the conditioning power is only “used to preserve competitive options (not to expand them)”).

As discussed in more detail below, no party has established a likely and substantial competitive harm resulting from the Transaction that warrants a condition. Even if a party had met this burden, no party has requested a condition that is narrowly tailored to remedy only the specific competitive harm resulting from the Transaction, of which there are none, and simply preserves its pre-Transaction competitive position.

A. Several Requested Conditions Are Intended To Resolve Pre-Existing Conditions That Have No Nexus To The Transaction

1. Saratoga & North Creek Railway

Saratoga & North Creek Railway (“S&NC”) operates an 89-mile branch line from Tahawus, NY to Saratoga Springs, NY. It currently only connects and interchanges traffic with D&H in Saratoga Springs Yard and will continue to do so after Transaction. NS also interchanges with D&H in Saratoga Springs Yard and will continue to do so after the Transaction. However, S&NC and NS cannot interchange with each other in Saratoga Springs Yard. S&NC asks the Board to require D&H to allow S&NC to interchange traffic directly with

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NS at Saratoga Springs Yard in order to develop additional business opportunities. NYSDOT supports S&NC's request.¹⁰

The lack of S&NC's ability to interchange with NS in Saratoga Springs Yard is not created by the Transaction, or even affected by the Transaction in any manner. The D&H South Lines which NS is seeking to acquire do not even reach Saratoga Springs. NS serves Saratoga Springs via an existing trackage rights agreement that is being modified as part of the Transaction only to change the beginning and ending mileposts.¹¹ S&NC serves Saratoga Springs as a result of its acquisition of the properties formerly owned and/or operated by D&H or its predecessors.¹²

S&NC and NS cannot interchange in D&H's Saratoga Springs Yard for one simple reason: S&NC, in its business dealings with D&H, did not obtain the legal right to do so, notwithstanding that it knew NS was interchanging with D&H in the yard at the time S&NC acquired its properties. S&NC could have negotiated for rights to interchange with NS, but for whatever reason, it did not obtain those rights. Having not obtained such rights previously, S&NC now wants to use the Transaction to obtain those rights; but, the Transaction does not affect Saratoga Springs in any manner and will have no effect on the pre-existing competitive

¹⁰ With specific reference to the comments of NYSDOT, it is important to note that NYSDOT does not oppose the Transaction and specifically states that "the acquisition of the D&H South Lines by NS is in the public interest" and "the Board should approve this minor transaction, with conditions." NYSDOT, at 1.

¹¹ The underlying trackage rights by which NS serves Saratoga Springs were authorized in Norfolk Southern Ry. Co. – Trackage Rights Exemption – Delaware And Hudson Ry. Co., Inc., FD No. 34562 (STB served Oct. 21, 2004) ("Saratoga-East Binghamton Trackage Rights"). As part of the Application, NS is seeking approval to modify those rights.

¹² See Saratoga and North Creek Ry., LLC – Acquisition and Operation Exemption – Delaware and Hudson Ry. Co., Inc. d/b/a Canadian Pacific, FD No. 35500 (STB served June 1, 2011); Saratoga and North Creek Ry., LLC – Operation Exemption – Warren County, NY, FD No. 35500 (Sub-No. 1) (STB served June 1, 2011); Saratoga and North Creek Ry., LLC – Operation Exemption – Tahawus Line, FD No. 35631 (STB served June 1, 2012).

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landscape. As such, S&NC's requested relief to address an issue miles removed from the D&H South Lines is beyond the scope of the Transaction and the Board's conditioning power in this proceeding. See e.g., RailAmerica (distinguishing pre-existing harms); CN/EJ&E (noting that mitigation is not imposed to correct pre-existing conditions). Accordingly, S&NC's requested condition must be denied.

2. East of Hudson Task Force

Similarly, the request by East of Hudson Rail Freight Service Task Force, Inc. ("EOH")¹³ for the transfer to NS of D&H trackage rights from Selkirk to Fresh Pond Junction, NY does not relate to a competitive harm resulting from the Transaction. Those trackage rights were granted to D&H in the Conrail transaction to restore two-carrier competition for East of the Hudson shippers and to ensure that East of the Hudson shippers were not disadvantaged vis-à-vis the West of the Hudson shippers, who were obtaining two-carrier competition as a result of the Conrail transaction. See generally CSX Corp. – Control – Conrail Inc., 3 S.T.B. 196 (1998).

The Transaction does not affect these D&H trackage rights in any manner. The D&H South Lines are not connective with D&H's trackage rights from Selkirk to Fresh Pond Junction, and that will not change as a result of the Transaction. There is nothing in the APA dealing with these rights, and D&H is not seeking to discontinue these rights. Both CSX and D&H will continue to provide service along the East of the Hudson after the Transaction. Simply put, EOH's requested relief is for service that is provided over lines that are not part of the Transaction and are not affected by the Transaction. Therefore, EOH's requested condition is beyond the scope of the Board's conditioning power in this proceeding. Accordingly, EOH's requested condition must be denied.

¹³ It is important to note that EOH does not oppose the Transaction and believes that the "transaction, unmodified, will improve service to northern New England."

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3. Riffin's Request for Use of D&H Trackage Rights from Baltimore, MD to Enola, PA or Perryville, MD

Riffin asks that the Board grant the State of Maryland or Riffin use of D&H's trackage rights around Baltimore in order to permit the State of Maryland to improve intermodal service to the Midwest and to eliminate an alleged service issue for the Port of Baltimore. Riffin does not allege any nexus between this requested condition and the Transaction; and, NS cannot imagine any.¹⁴ More importantly, Riffin does not represent the State of Maryland, and the State of Maryland has not filed any comments or request for conditions in this proceeding. Therefore, Riffin's requested condition must be denied.

B. Genesee & Wyoming Inc. Has Not Established That Conditions Are Warranted To Remedy Alleged Effects For Its Three Short Lines

Genesee & Wyoming Inc. ("GWI") filed comments on behalf of three of its short line subsidiaries¹⁵ ("GWI Subsidiaries").¹⁶ GWI requests that the Board impose three conditions on the Transaction: (1) continue CP haulage rights over NS's Southern Tier Line; (2) preserve existing routings and rate authorities for traffic currently moving over the Southern Tier Line; and (3) maintain existing rate divisions paid to the GWI Subsidiaries for traffic currently moved between the GWI Subsidiaries and CP. GWI's request should be denied because it seeks to address alleged effects arising from the termination of private agreements outside of the Board's jurisdiction and further seeks to protect the revenues of the GWI Subsidiaries as opposed to

¹⁴ Apparently, Riffin does not consider lack of interest in a particular proceeding to bar participation. See, e.g., Denver Rio Grande Ry. Historical Foundation – Petition for Declaratory Order, FD No. 35496, slip op. at 2 (STB served Mar. 24, 2015) ("Denver Rio Grande") ("Riffin has not demonstrated a sufficient interest in the proceeding to warrant granting leave to intervene Riffin has no business or employment relationship with DRGHF").

¹⁵ Buffalo & Pittsburgh Railroad, Inc. ("BPRR"); Rochester & Southern Railroad, Inc. ("RSR"); and Wellsboro & Corning Railroad LLC ("WCOR").

¹⁶ It is important to note that, by its own admission, GWI "takes no position" on whether the Application should be approved or denied.

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protecting competition. In fact, GWI has not even shown that there would be a competitive harm to remedy.

GWI believes that it is entitled to the three requested conditions because of alleged anticompetitive effects arising from the “termination of the joint marketing and haulage arrangements between NS and CP related to the Southern Tier...” GWI, at 13. However, the termination of such private commercial agreements is not subject to the Board’s jurisdiction.¹⁷ The Board has recognized that haulage agreements are “entirely voluntary on the part of the carriers and no regulatory rights and responsibilities are created that would require the carriers to keep the arrangement in place.”¹⁸ This makes sense as a matter of policy: if parties can enter into such arrangements without Board approval, they should be free to terminate those arrangements without Board involvement. The mere fact that D&H and NS chose now to exercise their right to terminate the Southern Tier Haulage Agreement as part of the APA does not confer a regulatory right with respect to that termination on impacted third parties, and GWI has not cited any precedent for such a proposition. As such, the Board has no authority to impose conditions on the Transaction based on the termination of the Southern Tier Haulage Agreement, which should end the matter.

However, even assuming the Board did have such authority, GWI has not established that the termination of the Southern Tier Haulage Agreement results in a harm to competition so as to warrant a condition. GWI’s request for conditions is inappropriate because it clearly reflects a

¹⁷ E.g., 2005 D&H Discontinuances, at *22 (“Board authorization is not required for the initiation or termination of a haulage agreement”); Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor and Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook County, Maine; Canadian National Ry. – Adverse Discontinuance – Lines of Bangor and Aroostook R.R. Co. and Van Buren Bridge Co. in Aroostook County, Maine, AB-124 (Sub-No. 2); AB-279 (Sub-No. 3), 2003 STB LEXIS 222, at *2 (STB served May 6, 2003) (“Haulage agreements are not subject to our jurisdiction”).

¹⁸ 2005 D&H Discontinuances, at *22-23.

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desire to protect revenues rather than any harm to competition. GWI's recurring theme is that, without CP haulage rights over the Southern Tier Line, existing CP routes will be split with an additional carrier, which will "likely drive rates too high [for the GWI Subsidiaries] to compete for the traffic," and the "loss of this move would result in a significant revenue loss" for each of the GWI Subsidiaries. GWI, at 7-9. WCOR additionally complains that "with cancellation of the haulage, all traffic will be covered by its handling line agreement with NS. Because WCOR generally gets a lower fee from NS than it receives from CP, the shift will cause WCOR's revenues to be substantially reduced." GWI, at 10.

However, mere losses in revenue for particular carriers, as opposed to poorer service or higher rates for shippers, are not a harm to competition and do not warrant a condition. See CN/Grand Trunk ("conditions are not warranted to indemnify competitors for revenue losses"); Norfolk Southern Ry. Co., Pan Am Railways, Inc., et al. – Joint Control and Operating/Pooling Agreements – Pan Am Southern LLC, FD No. 35147, 2009 STB LEXIS 39, at *13-14 (STB served Mar. 10, 2009) (declining to impose conditions to ensure that a transaction would not result in the re-routing of traffic away from connecting short lines, where such conditions were not necessary to remedy any potential anticompetitive effects); Wisconsin Central ("showing of expected substantial harm to a particular competitor as a result of a transaction is not equivalent to a showing of harm to competition. For example, a rail or truck competitor might lose traffic precisely because a transaction promises the significant public benefit of a new, improved transport alternative.").

As discussed in the rebuttal Verified Statements of Dr. Grimm and Mr. Mutén, GWI has not demonstrated that the termination of the Southern Tier Haulage Agreement will result in any actual competitive harm to shippers, even if it may result in the loss or change of a specific

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routing. Dr. Grimm does not predict any 2-to-1 effects resulting from the termination of the Haulage Agreement.¹⁹ See RVS Grimm, at 7-9. At most, termination of the Southern Tier Haulage Agreement may reduce RSR's competitive rail connection options from 3-to-2, which GWI has not shown would be anticompetitive. See RVS Grimm, at 8-9. See also Major Rail Consolidation Procedures; UP/SP (both noting that the STB focuses on preserving two-railroad competition, and only preserves three-railroad competition on a limited case-by-case basis). This is because RSR currently enjoys a direct connection with CSX and will continue to enjoy that connection after the Transaction. Similarly, BPRR's claims of competitive harm ring hollow because it will maintain its existing connections to CP, CN, NS, and CSX, as well as numerous other short lines. See RVS Grimm, at 7-8. And finally, even after termination of the Haulage Agreement, frac sand shippers will continue to be able to use CP origins and single-line movements under the Direct Short Line Access Agreement. See RVS Grimm, at 7-8; RVS Mutén, at 2 (also discussing the extensive source and geographic competition for frac sand movements). Thus, there is no harm to competition resulting from the termination of the Haulage Agreement.

Further, none of the shippers involved in the moves cited by GWI have opposed the Transaction or otherwise complained about CP's loss of haulage rights over the Southern Tier. In fact, RSR's largest shipper, American Rock Salt Co. LLC, has filed a letter supporting the Transaction, pointedly stating that "there are no competitive harms that would arise from this acquisition." Thus, the termination of the Haulage Agreement results in no competitive harms requiring a condition – a conclusion which the Board itself has previously acknowledged. See

¹⁹ Contrary to GWI's claims, Dr. Grimm's initial competitive analysis also considered the termination of the Haulage Agreement (along with the line acquisition and the D&H trackage rights discontinuances) and found no 2-to-1 effects. See NS-1, at 90-92.

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2005 D&H Discontinuances, at *23-24 (“Even without the haulage arrangement here, we are satisfied that there will be sufficient competition in the region through CSX service over a parallel line across New York, and through intermodal competition.”).

For all these reasons, GWI’s requested conditions must be denied.

C. CNJ Rail Has Not Established Competitive Harm For Oak Island Shippers

CNJ Rail, endorsed by Riffin, requests conditions to remedy the loss of competition that it alleges results from D&H’s trackage rights discontinuances, which again are not part of the Transaction subject to this proceeding. Specifically, CNJ Rail requests that the Board require D&H to assign its trackage rights over NS between Oak Island, NJ, and Easton, PA, and require NS to grant CNJ Rail overhead trackage rights between Easton, PA, and a point of connection with the D-L at or near Portland, PA. Alternatively, CNJ Rail asks that the Board require D&H to assign its trackage rights over NS between Oak Island and a point of connection with RBMN at or near Lehighton, PA. Assuming arguendo that the Board can even condition the Transaction to address effects of the D&H discontinuances, the Board should reject CNJ Rail’s request for several additional reasons.

First, loss of D&H service out of Oak Island was caused by “exogenous” market conditions unrelated to the Transaction, including the 2012 bankruptcy of D&H’s transload operator of the Oak Island facility, as acknowledged even by CNJ Rail’s President Mr. Strohmeyer and expert Mr. Nelson. See VS Strohmeyer, at 3-4; VS Nelson, at 3. Second, even after D&H’s discontinuance of its Oak Island trackage rights, Oak Island will be served by two Class I carriers, NS and CSX.²⁰ At most, CNJ Rail has identified a 3-to-2 reduction in

²⁰ NS and CSX compete against each other for municipal solid waste (“MSW”) and construction and demolition debris (“C&D”) traffic. The analysis performed by Mr. Mutén shows that CSX and NYSW moved a collective total of 10,500 cars of MSW and C&D from the Oak

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competitive alternatives, which CNJ has not shown would result in competitive harm.²¹ See e.g., Major Rail Consolidation Procedures; UP/SP (both noting that the STB focuses on preserving two-railroad competition, and only preserves three-railroad competition on a limited case-by-case basis). Third, the traffic CNJ Rail proposes to move is purely hypothetical. Currently, the receiver, the Keystone Landfill in Dunmore, PA, is not served by rail at all and has no plans for future rail service.²² RVS Grimm, at 6. Even if it were, the short distance of the move from Oak Island to the Keystone Landfill renders it highly susceptible to competition from truck.

Finally, it is not clear that CNJ Rail is even capable of performing rail service via trackage rights. In prior proceedings before the Board, the Board has noted that “[n]otwithstanding the name it has chosen, CNJ does not own any rail assets or conduct any rail operations.” Maryland Transit Admin. – Petition for Declaratory Order, FD No. 34975 (served Sept. 19, 2008). Mr. Strohmeyer’s verified statement does not contradict the Board’s earlier observation.

In short, CNJ Rail has not justified its requested conditions, which must be denied.

Island/Newark, NJ area in 2013. RVS Mutén, at 4. Further, such traffic benefits from “intense source and geographic competition,” as MSW and C&D traffic can be transported to various destinations via truck, barge, and rail. See RVS Grimm, at 6; VS Nelson, at 4.

²¹ Although Riffin noted that the grant of Oak Island trackage rights to CNJ Rail would benefit “Allegro and Pace Glass, two new shippers who desire rail service,” neither of these shippers filed comments supporting CNJ Rail’s request. Although Pace Glass, Inc. initially joined a motion filed by CNJ Rail to reject the Application as incomplete, Pace later withdrew as a party because it “no longer desire[d] to participate in this proceeding,” as noted in CNJ Rail’s letter to the Board filed December 30, 2014.

²² Kyle Wind, No rail line for Keystone landfill, The Times-Tribune.com (Aug. 11, 2014), available at <http://thetimes-tribune.com/news/no-rail-line-for-keystone-landfill-1.1733857>. Thus, there can hardly be a 2-to-1 reduction in competitive alternatives for the Keystone Landfill, despite Mr. Strohmeyer’s claims to the contrary.

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D. NGFA Has Not Established Competitive Harm

NGFA claims that the “presence of the CP via the D&H trackage rights provides a *potentially competitive alternative* to the NS as well as a general cap on the rates NS can charge....” NGFA, at 2 (emphasis supplied). NGFA does not disclose any particular shipper that this statement applies to; nor does it provide any evidence that substantiates its theoretical, general assertion. See CN/Wisconsin Central (refusing to condition approval of the transaction on applicants’ agreeing not to cancel certain rights, noting that “an option that has not been used in 7 years appears to be ‘competitive’ only in the most theoretical sense”). Dr. Grimm’s initial competitive analysis, as bolstered by his Rebuttal Verified Statement, concludes that no shipper will see its independent competitive routing options reduced from 2-to-1, as a result of D&H’s discontinuances. See RVS Grimm, at 8-10.

Because NGFA has not provided any specific shipper data, routings, or information, it is difficult to determine the accuracy of NGFA’s comments. In fact, contrary to NGFA’s theoretical and unsubstantiated claims of competitive harm, several members of the NGFA have filed statements supporting approval of the Transaction without conditions, including AGRIServices of Brunswick, LLC; Alfagreen Supreme; Bartlett Grain Co., LP; Interstate Commodities Inc.; and The Mennel Milling Co.

A competitive analysis of the effect of D&H’s discontinuances does not support NGFA’s claims. Mr. Mutén conducted an analysis of all grain and grain-related traffic that could potentially be impacted by D&H’s trackage rights discontinuances. Over 90% of this traffic terminates at a single mill on the D-L, and thus, shippers for such traffic will continue to be able to use CP, even after D&H’s discontinuances, via the Direct Short Line Access Agreement. See RVS Mutén, at 3. NGFA itself admits this fact. See NGFA, at 3. The remaining less-than-10%

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of traffic either originates or terminates on a 3-to-2 short line or station, terminates at an exclusive CP station located on the D&H South Lines, or originates at another station exclusively served by one railroad. See RVS Mutén, at 3. Based on this analysis of the relevant traffic, even if the Board could impose a condition based upon competitive effects from D&H's discontinuances, which it cannot, there is no competitive harm with regard to the grain, feed, or oilseed traffic at issue that would justify a condition. See RVS Grimm, at 7.

E. PPL's Request For A Condition Should Be Denied Because It Impermissibly Seeks To Improve Its Competitive Position

PPL EnergyPlus, LLC's ("PPL") power plant in Washingtonville, Montour County, Pennsylvania (the "Montour Plant") is currently solely served by NS. Neither CSX nor CP currently serves the Montour Plant. PPL alleges that it has a feasible build-out option that would enable it to receive rail service from a location on the D&H South Lines (i.e., it is not on a line served by D&H via trackage or haulage rights) and that NS's purchase of the D&H South Lines will foreclose this build-out opportunity. Accordingly, PPL requests that the Board impose two conditions on the Transaction to preserve its build-out option: (1) NS must grant trackage or haulage rights to CSX over the D&H South Lines to access the Montour Plant; and (2) NS must grant CP haulage rights over the Southern Tier Line and the D&H South Lines and to access the Montour Plant, both being contingent on PPL's constructing the build-out line between the Montour Plant and the D&H South Lines. PPL, at 2, 14. The Board should deny PPL's request for conditions because PPL has not shown that its build-out option provided a competitively significant option so as to constrain NS's rates. Even if PPL had shown the potential for competitive harm, the PPL requested conditions are not narrowly tailored, contravene Board precedent, and impermissibly seek to improve its post-Transaction competitive position.

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1. PPL's Build-Out Option Does Not Represent a Significant Competitive Alternative so as To Constrain NS's Rates

NS does not dispute that the Montour Plant is served solely by NS. However, PPL would like the Board to believe that its build-out option is both financially and operationally feasible so that the threat of this build-out provided a competitive constraint on NS's rates. This competitive constraint would, according to PPL, be eliminated if NS purchases the D&H South Lines to which PPL purportedly intends to build-out. Upon closer examination, it is clear that there are numerous operational difficulties associated with PPL's build-out that call into question whether the project is even possible. As such, the build-out option did not and does not effectively constrain NS's rates. Rather, NS's rates are constrained by other market forces which will continue in a post-Transaction environment. As such, PPL has not established a competitive harm that is both substantial and likely so as to warrant imposition of a condition.

PPL submitted a Verified Statement from its consultant to support the feasibility of its build-out option. NS in-house personnel are only privy to the public version of the statement, so it is not able to review all of the details of PPL's build-out option. However, based on NS's knowledge of PPL's alleged build-out option, including a recent inspection of the actual sites involved, NS questions whether PPL's build-out would be operationally practical and efficient. See VS Tubman, attached as Exhibit C. There are a number of factors that make construction difficult, if not impossible, including the rehabilitation of a bridge, or the construction of a new bridge, over the Susquehanna River, the acquisition of the necessary corridor property, the layout and geography of the existing track, and the need for reverse moves in two locations. See VS Tubman, at 2-4. Even if PPL were to construct the challenging build-out, the existing direct NS route to Montour Plant would remain the shortest of the alternative routes made possible by the build-out for the existing coal origins currently used by PPL. See VS Tubman, at 4-5. As such,

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while a feasible route for the build-out can be constructed on paper, in reality, the existence of many obstacles to actually constructing the build-out contradicts the notion that the build-out is both operationally and financially feasible. The mere existence of a potential build-out on paper, without more, is not enough to justify a condition.²³

Further, while PPL has previously discussed the build-out option in the context of its rate negotiations with NS, the notion that it was the build-out option that provided PPL with competitive leverage is simply not accurate. NS has not viewed the build-out as both operationally and financially feasible such that it was a competitive constraint to NS's rates. Rather, NS's rates have been constrained by prevalent macroeconomic factors, especially natural gas prices and the ability of utility plants to "wheel" electricity and switch production among their various facilities. The Board itself has recently acknowledged that such "indirect competition," including product competition, can "effectively constrain rail rates for transportation of coal for electric power generation." Petition of the Association of American Railroads to Institute a Rulemaking Proceeding to Reintroduce Indirect Competition as a Factor Considered in Market Dominance Determinations for Coal Transported to Utility Generation Facilities, EP No. 717, 2013 STB LEXIS 80, at *16 (STB served Mar. 19, 2013). PPL's own statements in its 2012 Annual Report seem to validate the Board's observation. See VS Zehringer, attached as Exhibit D, at 3. NS also can attest that these observations are accurate. In the most recent rate negotiations with PPL, the [[

]] See VS Zehringer, at 2-3. Most tellingly, [[

²³ See, e.g., Canadian National Ry. Co., Grand Trunk Corp., and Grand Trunk Western R.R. Inc. – Control – Illinois Central Corp., Illinois Central R.R. Co., Chicago, Central and Pacific R.R. Co., and Cedar River R.R. Co., FD No. 33556, 2002 STB LEXIS 500, at *16-17 (STB served Aug. 27, 2002) ("CN/IC") (rejecting an argument that the Board had expanded the reach of build-out conditions to apply to any shipper that could actually build a track to the line of a pre-merger competitor)

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]] Id. These “indirect forms” of competition and macroeconomic conditions will not change in a post-Transaction environment and will continue to constrain NS’s rates, regardless of the existence of the build-out. As such, PPL has not shown that its build-out option has served as a competitive constraint so that its elimination will cause competitive harm that is both likely and substantial. As such, PPL’s request for conditions should be denied.

2. PPL’s Requested Relief Impermissibly Improves its Competitive Position by Enabling Access to Three Class I Carriers When Today It Is Served Solely by NS

Even if the Board were to find that the build-out is both operationally and financially feasible, PPL impermissibly seeks more than just the preservation of the current competitive landscape.

Currently, NS is the only Class I carrier serving the Montour Plant. PPL’s requested conditions would provide direct access to the Montour Plant to two additional Class I carriers – CSX²⁴ and CP (via a build-out to reach D&H). PPL is not entitled under Board precedent to receive direct service from any other carrier but NS. Providing CSX and CP with direct access to the Montour Plant is an improvement – not a preservation – of PPL’s pre-Transaction position. It is not relevant to the Board’s analysis that PPL cannot determine whether the CSX routing or the CP routing would be the most effective in the long-term or that both routings may be used for different traffic. See PPL, at 13. Under BN/SF, the Board’s focus in granting build-out conditions is solely on preserving the shipper’s pre-transaction competitive options. PPL cannot leverage this proceeding to gain access to two – much less three – Class I carriers (NS, CSX, and

²⁴ Today, CSX does not directly access Montour Plant, although PPL has the option to route coal via CSX through an interchange with NS at Lurgan, Pennsylvania (“Lurgan Option”). PPL, at 3. PPL will retain the ability to use this indirect CSX route even after the Transaction.

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CP) when it currently enjoys direct service from only one (NS) and allegedly has a build-out option to reach D&H to access another (CP). At most, PPL is entitled to a condition that preserves its ability to construct a build-out line to reach D&H as described below.

3. If Relief Is Granted to PPL, It Should Be Narrowly Tailored

Even if the Board finds that PPL is entitled to relief, which NS disputes, PPL's relief should be narrowly tailored to remedy only that harm, if any, resulting from the Transaction. See, e.g., BN/SF. Even when imposed upon the required showing, build-out conditions have been extremely limited and (1) apply only if the build-out is actually constructed and (2) provide rights only to the point at which the build-out would connect. See, e.g., CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Ry. Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., FD No. 33388, 1999 STB LEXIS 293, at *1-2 (STB served May 20, 1999) (“Specifically, we imposed a condition preserving the existing build-out option by permitting Indiana Southern Railroad, Inc. (ISRR) or NS to service IP&L if a build-out is constructed.”)

Therefore, PPL at most would be entitled only to a condition that preserves its build-out option to reach D&H, for example, by granting D&H trackage rights from Schenectady, NY to the point of the build-out on the D&H South Lines.²⁵ As D&H connects with CSX at Schenectady, PPL would retain its ability to source coal from CSX origins as well. Consistent

²⁵ UP/SP. See also San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Co. Operation Exemption – Build-Out to the Bayport Loop near Houston, Harris County, TX, FD No. 34079, 2003 STB LEXIS 390, at *5-6 (STB served July 9, 2003) (noting that the condition granted gave BNSF a right to use UP lines to reach a “build-in/build-out” point); Burlington Northern Inc. and Burlington Northern R.R. Co. – Control and Merger – Santa Fe Pacific Corp. and the Atchison, Topeka and Santa Fe Ry. Co., FD No. 32549, 1 STB 998, at *1001 (STB served Dec. 30, 1996) (describing that the condition required applicants to grant trackage rights to a carrier over their line to a point of connection with the build-out line).

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with Board precedent, which recognizes that the ultimate test of feasibility is actual construction,²⁶ this condition should be contingent on PPL's actual construction of the build-out line from the Montour Plant to the point of connection with the D&H South Lines.

In sum, PPL's request for conditions must be denied because there is no viable build-out option and the real competitive constraint on NS's rates is natural gas. Even if a condition is warranted, it must be limited to preserving the alleged build-out option to CP and must be contingent on PPL's construction of that build-out.

F. Applicable Labor Protection Standards Are New York Dock, As Modified By Wilmington Terminal

One labor party, District Lodge 19 of The International Association of Machinists And Aerospace Workers, AFL-CIO, which represents certain mechanical employees that NS intends to hire, requests that if the Transaction is approved, the Board impose the labor protective conditions mandated in New York Dock Ry. – Control – Brooklyn Eastern District Terminal, FD No. 28250, 360 I.C.C. 60 (ICC served Feb. 9, 1979), aff'd, New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979), as modified by Wilmington Terminal R.R. – Purchase & Lease – CSX Transp., Inc., FD No. 31530, 6 I.C.C.2d 799 (ICC served June 20, 1990), aff'd sub nom., Railway Labor Executives' Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991) (“NY Dock, as modified by Wilmington Terminal”). NS agrees that NY Dock, as modified by Wilmington Terminal, is the appropriate labor protective conditions standard, see NS-1, at 46, and accordingly, supports this request.

In contrast, Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (“Nasca”) requests that the New York Dock labor protective conditions

²⁶ CSX Corp. and CSX Transp., Inc., Norfolk Southern Corp. and Norfolk Southern Railway Co. – Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corp., FD No. 33388, 1998 STB LEXIS 1559, at *274 n. 179 (STB served July 23, 1998)

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apply, without the Wilmington Terminal modification, with respect to NS's acquisition of the D&H South Lines. Nasca argues that there is "coordination" between NS and D&H today, which will continue post-Transaction, and this alleged "coordination" requires imposition of New York Dock. Mr. Nasca further argues that the Transaction is distinguishable from the circumstances in Wilmington Terminal, again requiring imposition of New York Dock. With respect to NS's trackage rights requests in Dockets FD No. 34209 (Sub-No. 1) and FD No. 34562 (Sub-No. 1), Nasca requests application of Oregon Short Line²⁷ labor protection standards along with N&W/Mendocino.²⁸ Under longstanding Board precedent, Nasca applies the wrong labor conditions, both for NS's acquisition of the D&H South Lines and modification of related trackage rights.

With respect to the labor protective conditions applicable to NS's acquisition of the D&H South Lines, Nasca impermissibly attempts to conflate the ordinary cooperation necessary to operate a railroad in a network system²⁹ with the "coordination," as defined in the Washington Job Protection Agreement of 1936.³⁰ The latter form of "coordination" does not exist between NS and D&H. There will be no unification, co-ownership, or joint control of separate D&H and

²⁷ Oregon Short Line R.R. and the Union Pacific R.R. Co. – Abandonment Portion Goshen Branch Between Firth and Ammon, in Bingham and Bonneville Counties, Idaho, AB-36 (Sub-No. 2), 360 I.C.C. 91 (ICC served Feb. 9, 1979).

²⁸ Norfolk and Western Ry. – Trackage Rights – Burlington Northern, Inc., FD No. 28387, 354 I.C.C. 605 (ICC served June 6, 1978), as modified by Mendocino Coast Ry., Inc. – Lease and Operate – California Western R.R., FD No. 28256, 360 I.C.C. 653 (ICC served Feb. 6, 1980), aff'd sub nom., Railway Labor Executives' Ass'n v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

²⁹ For example, railroads generally coordinate with each other to some degree with respect to dispatching, interchange, joint use of tracks, and maintenance and capital investment.

³⁰ The term "coordination" as used herein means joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities. Section 2(a).

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NS facilities, operations, or services as a result of the Transaction. Nasca provides no support for his assertion that such coordination will occur.

The Transaction is a simple line sale, where NS acquires the D&H South Lines. The Board has consistently applied New York Dock, as modified by Wilmington Terminal to such line sales. E.g., Massachusetts Coastal R.R., LLC – Acquisition – CSX Transp., Inc., FD No. 35314, 2010 STB LEXIS 208, at *2-3 (STB served May 19, 2010) (“In approving lines sales under §§ 11323-25 that involve a Class I rail carrier, the appropriate employee protection conditions under § 11326(a) are New York Dock, as modified by Wilmington Terminal. We note that whether or not the Board cites to Wilmington Terminal in approving line sales, the modification is to apply unless expressly stated otherwise.”) As in Wilmington Terminal, there is no privity of contract, and no other employment relationship, between D&H employees and NS. NS cannot, does not, and will not supervise and direct D&H employees, or vice versa. D&H employees bargain with D&H regarding the terms of their employment; and, NS employees bargain with NS regarding the same. Nasca cites no precedent supporting his position to drop the Wilmington Terminal modification. As such, Nasca’s arguments are without merit and the applicable employee protective condition is New York Dock, as modified by Wilmington Terminal.

With respect to the labor protective conditions applicable to NS’s modification of existing trackage rights, Nasca’s arguments are similarly without merit. Oregon Short Line applies only for discontinuances of trackage rights. In contrast, NS is seeking only to modify the end points of existing trackage rights. Any existing trackage rights that may be excluded from the amended trackage rights agreements will be subsumed within NS’s larger acquisition of the D&H South Lines. NS does not need to seek discontinuance authority with respect to any such

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subsumed trackage rights. See, e.g., Burlington Northern R.R. Co. – Purchase Exemption – Soo Line R.R. Co., FD No. 32003 (STB served Apr. 2, 1992) (BNSF purchased a 21.8 mile line on which it previously operated pursuant to a trackage rights agreement with Soo; BNSF was not required to separately discontinue its trackage rights; and NY Dock, as modified by Wilmington Terminal was considered sufficient protection for adversely impacted employees); Union Pacific R.R. Co. – Amendment of Trackage Rights Exemption – BNSF Ry. Co., FD No. 30868 (Sub-No. 1) (STB served July 20, 2006) (applying N&W-Mendocino to amend the scope of previously granted trackage rights without requiring a discontinuance in addition to the amendment). Thus, the applicable labor protective condition for NS's modification of existing trackage rights is N&W/Mendocino.

NS does not forecast any labor impacts as a result of its modification of existing trackage rights. As such, NS expects that NY Dock, as modified by Wilmington Terminal will apply to any adversely impacted employee.

IV. VARIOUS PROCEDURAL AND OTHER MISCELLANEOUS ARGUMENTS DO NOT JUSTIFY DENIAL OF THE APPLICATION.

Nasca, Riffin, and CNJ Rail have filed numerous pleadings in this proceeding addressing procedural and other miscellaneous issues not relating to the competitive effects of the Transaction. As such, these pleadings are not relevant to the Board's statutory focus in reviewing the Transaction under 49 C.F.R. § 11324(d). The arguments in such pleadings already have been addressed by NS in NS-9, NS-10, NS-11, NS-12, and NS-15 and rejected by the Board in its December 16 Decision and January 14 Decision.

Notwithstanding the Board's prior decisions dismissing their arguments, Nasca, Riffin, and CNJ Rail have repeated these arguments in their January 21, 2015 comments. In effect, these parties are asking for reconsideration of the Board's decisions. However, none of these

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parties have established changed circumstances, new evidence, or material error as would justify a reconsideration. See 49 C.F.R. § 1115.3(b); §1115.4; 49 U.S.C. § 722(c); Denver & Rio Grande, slip op. at 4 (“A party may seek to have the Board reconsider a decision by submitting a timely petition demonstrating material error in the prior decision or identifying new evidence or substantially changed circumstances that would materially affect the case.”). Thus, these arguments should again be denied by the Board, as they remain without merit.³¹

Solely for the sake of the public record, NS will briefly respond to each of the claims:

1. Did parties have a meaningful opportunity for discovery under the Board’s procedural schedule? Yes. Although the Board’s procedural schedule did not specifically provide for discovery, discovery is provided for in 49 C.F.R. § 1114, Subpart B (“Parties may obtain discovery . . . in a proceeding,” and discovery is available “without filing a petition and obtaining prior Board approval”). This “proceeding” began upon NS’s filing of the Application on November 17, 2014. As comments were not due until January 21, 2015, parties had over 60 days to undertake discovery.
2. Did parties have sufficient time to file notices of intent to participate in this proceeding? Yes. The governing statutes do not stipulate a minimum time period for parties to file notices of intent to participate. The Board adopted a standard procedural timeline for this minor Transaction. Further, NS did not object to petitions for leave to late-file notices of intent to participate from NGFA, EOH, and the Port Authority of New York and New Jersey.
3. Did parties have at least 30 days between the Federal Register publication of notice of the Application and the due date for comments as provided for in 49

³¹ This is not surprising as CNJ Rail and Riffin are known for filing self-serving claims without merit. Indeed, the Board has pledged to “closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board.” Norfolk Southern Railway Co. – Abandonment Exemption – in Norfolk & Va. Beach, Va., AB-290 (Sub-No. 293X), slip op. at 8 (STB served Nov. 6, 2007), pet. for review dismissed, sub nom. Riffin v. STB, No. 07-1483 (D.C. Cir. Apr. 22, 2009). Likewise, the STB has rejected several previous petitions by CNJ Rail on the grounds that such petitions were lacking in evidence and merit. See, e.g., Consolidated Rail Corp. – Abandonment Exemption – in Hudson County, NJ, AB-167 (Sub-No. 1190X) (STB served May 17, 2010); Consolidated Rail Corp. – Abandonment Exemption – in Philadelphia, PA; CSX Transp., Inc. – Discontinuance of Service Exemption – in Philadelphia, PA; Norfolk Southern Ry. Co. – Discontinuance of Service Exemption – in Philadelphia, PA, AB-167 (Sub-No. 1191X), AB-55 (Sub-No. 710X), AB-290 (Sub-No. 552X) (STB served Mar. 14, 2012).

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U.S.C. §11325(a)(1)? Yes. Publication in the Federal Register occurred on December 22, 2014 and comments were due on January 21, 2015.

4. Was the procedural schedule expedited so as to deprive parties of an opportunity to meaningfully participate in this proceeding? No. The Board's procedural schedule was consistent with the statute. Indeed, because the Federal Register publication of notice of the Application came later than 30 days after NS's filing of the Application, and the Board accordingly extended the comment period for a week, parties actually had more time to file comments than the normal 60 days provided by statute.
5. Should the procedural schedule have been adjusted because NS filed supporting statements on January 21, 2015? No. The procedural schedule provided that any party could file comments on that date. Furthermore, if the supporting statements were not filed on that date, NS could have filed them as a supplement to this Rebuttal. Thus, there was no due process harm to any party because NS filed such statements at an earlier stage in this proceeding.
6. Was the Application complete? Yes. D&H is not required to be an "Applicant" in this line sale Transaction, under Board precedent. NS's Application included a full competitive analysis of the Transaction, and found no anticompetitive effects. Although not required, the analysis considered the competitive effects of D&H's discontinuances and the termination of certain private commercial agreements. See NS-1, at 90-92. NS's Application also contained all requests for trackage rights modifications and a request for assignment of D&H's trackage rights over RBMN. See NS-1, at 27, 28 n.25. Under Board precedent, no separate application was required for the assignment of RBMN trackage rights.³²
7. Was the Application complete with respect to labor impacts? Yes. To the best of NS's knowledge, the Application disclosed the number of potentially adversely impacted employees, categorized by craft, trade, and geographic location. Any more specific information would have been impossible to determine. The Application noted that labor implementing agreements had not been reached yet

³² See, e.g., The Indiana R.R. Co. – Acquisition – Soo Line R.R. Co., FD No. 34783, slip op. at 2, (STB served April 11, 2006) (Board allowed IRRC to file a single application to simultaneously acquire 92.3 miles of railroad and acquire by assignment all of Soo's right, title, and interest in certain ancillary trackage rights); Grand Trunk Western R.R. Inc. – Adverse Discontinuance of Trackage Rights Application – a Line of Norfolk and Western Ry. Co. in Cincinnati, Hamilton County, OH, AB-31 (Sub-No. 30), slip op. at 1 (STB served Feb. 12, 1998) (a purchaser can acquire its interest in a trackage rights agreement through automatic assignment, as successor, to the company it purchases); Iowa, Chicago & Eastern R.R. Corp. – Acquisition and Operation Exemption – Lines of I&M Rail Link, LLC, FD No. 34177, slip op. at 2, 19 (STB served July 22, 2002) (purchaser acquired 1,125 miles of trackage and assignment of 275 miles of trackage rights in single notice of exemption).

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and described the labor protection standards that would apply for any adversely impacted employees.

8. Will the Transaction result in the de facto abandonment of D&H's trackage rights? No, as discussed above in Part II, A. D&H is discontinuing its trackage rights because they are uneconomic due to lack of use, as demonstrated by its use of the two-year out-of-service notice of exemption process. This lack of use began long before D&H entered into, or even began negotiating, the APA. If the Transaction is approved, D&H will consummate its discontinuance authority. However, if the Transaction is not approved, D&H may choose not to exercise its permissive discontinuance authority.
9. Should the Transaction be reclassified as significant? No. Based on the lack of anticompetitive effects and the extensive public interest benefits, the Transaction is properly classified as minor. The Transaction's extensive public interest benefits for shippers, competition in the Northeast market, and labor have been recognized by over 125 parties. Further, the Transaction is not of regional or national transportation significance, given that only 282.55 miles of rail line in just two states are involved.

CONCLUSION

Only 10 parties filed comments either in opposition to the Application or requesting conditions. Of those 10, only one was a shipper, which is not even located on the D&H South Lines. None of the commenters have established a substantial competitive harm that is likely to result from the Transaction so as to necessitate the imposition of a condition. All of the commenters (except for the two labor interests) impermissibly seek conditions to either remedy pre-existing conditions or significantly improve their pre-Transaction competitive position, or seek conditions based upon alleged competitive harms caused by D&H's independent decision to discontinue certain uneconomic trackage rights or NS's and D&H's decision to cancel certain private commercial agreements, which are beyond the Board's approval and remedial authority in this proceeding.

In contrast to the 10 commenters in opposition or requesting conditions, over 125 parties representing a broad range of interests have supported the Transaction. Shippers representing

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approximately 70% of traffic over the D&H South Lines have filed letters in support of the Transaction. Further, all of the short lines that connect to the D&H South Lines have filed letters in support of the Transaction. And, numerous state departments of transportation, including the Pennsylvania Department of Transportation, have filed statements supporting approval of the Transaction without conditions. Even the New York State Department of Transportation supports approval of the Transaction with one unrelated condition. The Transaction also has received support from numerous New York and Pennsylvania Congressmen and both U.S. Senators from Pennsylvania.

Based upon the record, the Application should be approved without conditions. The record shows that there are no anticompetitive effects, as the Transaction is essentially end-to-end and there are no 2-to-1 shippers on the D&H South Lines. Although not part of the Transaction, D&H's discontinuances and the termination of the private haulage agreement between NS and D&H also will not result in any 2-to-1 shippers. Further, the Transaction produces significant public interest benefits, which no party has credibly disputed. The Transaction (1) benefits shippers by aligning ownership with usage, which promotes operating efficiencies, improved maintenance, and more reliable and sustainable service; (2) preserves and enhances competition in the Northeast surface transportation market by creating a single-line route for NS in the region and by allowing D&H to focus on more successful routes; and (3) preserves and possibly increases jobs on the D&H South lines by providing D&H employees on the lines with opportunities for continued employment with NS and by restoring local service levels on the lines. Thus, even if there were any anticompetitive effects from the Transaction, which there are not, its benefits would clearly outweigh any such effects.

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In conclusion, when viewed in its entirety, it is clear that the Transaction will not result in a substantial lessening of competition, creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the United States. As such, the Board should approve the Transaction without conditions.

Respectfully submitted,

James A. Hixon
William A. Galanko
John M. Scheib
Maquiling B. Parkerson
Aarthy S. Thamodaran
NORFOLK SOUTHERN CORPORATION
Three Commercial Place
Norfolk, VA 23510
Tel: (757) 533-4939
Fax: (757) 533-4872



William A. Mullins
Amber L. McDonald
Crystal M. Zorbaugh
BAKER & MILLER PLLC
2401 Pennsylvania Ave, NW
Suite 300
Washington, DC 20037
Tel: (202) 663-7820
Fax: (202) 663-7849

Attorneys for Norfolk Southern Railway Company

March 31, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Response To Comments And Rebuttal In Support Of Application in STB Finance Docket No. 35873, by first class mail, properly addressed with postage prepaid, or other more expeditious means upon all parties of record.



William A. Mullins

Attorney for Norfolk Southern Railway Company

March 31, 2015

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY

**RESPONSE TO COMMENTS
AND REBUTTAL IN SUPPORT OF APPLICATION**

EXHIBIT A

REBUTTAL VERIFIED STATEMENT OF CURTIS M. GRIMM

PUBLIC VERSION**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY**- ACQUISITION AND OPERATION -****CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY**

REBUTTAL VERIFIED STATEMENT OF CURTIS M. GRIMM

I. Introduction

My name is Curtis M. Grimm, and I am Professor and Charles A. Taff Chair of Economics and Strategy, Robert H. Smith School of Business, University of Maryland at College Park. I have been a member of this College since 1983. I received my B.A. in economics from the University of Wisconsin-Madison in 1975 and my Ph.D. in economics from the University of California-Berkeley in 1983. My Ph.D. dissertation investigated competitive impacts of railroad mergers.

I previously submitted a statement in this case on behalf of Norfolk Southern. More specifically, in that statement, I identified and discussed the potential 2-1 intramodal competitive impacts of the Transaction. Per the direction of Norfolk Southern, I took a very broad view of potential competitive impacts by examining the effects of both the Transaction, the discontinuance of trackage rights, and the termination or alteration of marketing and other agreements that are not within the Board's jurisdiction. Accordingly, with the assistance of Mr. Bengt Mutén, Senior Consultant at IHS Global, Inc., I examined the potential 2-1 impacts of the

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transaction as a whole, looking at the totality of all actions resulting from the D&H South Lines acquisition, the trackage rights discontinuance, and the termination of the marketing and haulage arrangements. My analysis showed that even when one considers the broad impacts from all aspects of the transaction as a whole, there are minimal 2-1 impacts.

The rebuttal statement which follows has two primary purposes. First, I will discuss and address the Verified Statement by Michael A. Nelson submitted as Appendix 1 to CNJ Rail Corporation's January 21, 2015 Objections And Request For Condition. Mr. Nelson raised a number of issues with regard to my competitive analysis. I will show that there is no validity to his critiques and that my conclusion in the original statement still stands. Second, I will discuss the specifics of the requests for conditions, in particular, from CNJ Rail Corporation, National Grain and Feed, and GWI Subsidiaries. My conclusion is that there is scant justification for any of these requested conditions.

II. Response to Mr. Nelson's Critique

Mr. Nelson's primary criticism is as follows: "More generally, the type of analysis by Professor Grimm assumes, implicitly if not explicitly, that traffic moving in a given year reflects and represents the competitive significance and effectiveness of alternative routes." (p. 5) Mr. Nelson criticizes my methodology for not taking into account potential "data coding issues," facility operations facing unusual circumstance, or future traffic flows. Mr. Nelson states: "Due to all of the above considerations, blind adherence to Professor Grimm's methodology is virtually certain to overlook real-world losses of competition." (p. 5).

Indeed, a structural analysis as I performed is based on traffic moving in a given year. This is consistent with standard practice in Department of Justice Antitrust Division analyses of mergers, which relies on market shares and market analysis in a given recent time period. It is

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also consistent with STB merger practice and regulation which requires use of a base year for traffic analysis. A structural approach evaluates transactions in broader economic and strategic terms and provides a more refined assessment of the impact of a transaction on market structure, as opposed to merely delineating “2-1” shippers at a specific station or even a specific shipper facility. Such a structural approach is commonplace for assessing mergers in other industries and other countries and is the approach used by the Department of Justice in assessing rail mergers.¹ A systematic and consistent analysis based on actual data is essential to proper analysis of acquisitions.

However, I am not in any way advocating “blind adherence” to this systematic structural analysis. It is quite appropriate to complement the overall structural approach with evaluation of specific evidence brought to the Board by parties who allege competitive harm from a transaction. This more micro analysis of the circumstances of a specific alleged harm can take into account the exceptional factors discussed by Mr. Nelson, where traffic moving in a given year does not fully reflect the competitive circumstances.

Where shippers bring to the Board specifics, along with request for conditions, we can examine in more detail whether the allegations are true and the role of other competitive factors, such as source or geographic competition, transloading capabilities, and the role of truck competition for the specific commodities being shipped. In my initial statement, I discussed the sources of rail intramodal competition in conjunction with a series of diagrams. Railroads can compete via *direct service, reciprocal switching, or terminal switching*. These forms of railroad competition are thought to be the most intense, but shippers solely served by one railroad can

¹ This approach was employed by the United States Department of Justice in the SF/SP case, *Santa Fe Southern Pacific Corp.--Control--SPT Co.*, 2 I.C.C. 2d 709 (1986), 3 I.C.C. 2d 926 (1987)(“SF/SP”) and every merger case that the DOJ participated in since SF/SP, including the UP/SP merger.

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also benefit from indirect competition supplied by a nearby carrier. These include truck transload to facilities in the vicinity or the potential for build-outs/build-ins. Shippers can also stimulate railroad competition in some cases through product or geographic competition. For example, in some circumstances, an industrial site served only by Railroad A in a given market may be able to use a substitute product shipped from a different origin by Railroad B, or the site could obtain the same product from an alternative origin served by Railroad B. Another example might be a utility plant producing electricity through rail delivered coal generation competing against plants using natural gas. In such circumstances, the industrial site may be served by one railroad, but these other factors may constrain that railroad's rates.

The Board can and should examine the competitive circumstances of particular shippers who participate in the proceeding and should examine all forms of competitive evidence. Such evidence appropriately complements the structural analysis I provided in the Application and allows for full examination of potential competitive harms to the shippers and for which Mr. Nelson purports to be impacted by this transaction.

Given this background, the first important indicator of competitive harm is whether the shipper itself has filed comments. In this case, importantly, all of the shippers who participated in the proceeding supported the transaction, except for one – Pennsylvania Power & Light. Other than PP&L, no shipper provided arguments or evidence of competitive harm. This in and of itself provides strong validation for the conclusion I reached in my structural analysis and undercuts Mr. Nelson's contention regarding large volumes of shippers who will suffer competitive harms.

In the remainder of the statement, I will examine the evidence provided by parties other than shippers regarding potential competitive harms and requests for conditions. As with my

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previous analysis, I will continue to take a very broad view of potential competitive impacts by examining the effects of the Transaction, the discontinuance of trackage rights, and the termination or alteration of marketing and other agreements that are not within the Board's jurisdiction.

III. Discussion of Requests from CNJ, National Grain and Feed, and GWICNJ

There is a disconnect between the first section of Mr. Nelson's statement, which emphasizes input from shippers facing 2-1 reductions in rail alternatives, and the second section, which discusses CNJ's requested condition. CNJ is clearly not a shipper facing reductions in rail competition, nor is it a rail carrier. The primary focus of the competitive concern and corresponding request for condition is a former Oak Island municipal waste facility that is now bankrupt and inactive.

Leaving aside the issues of CNJ's standing and the financial condition of the waste facility, information provided by Mr. Mutén in his Verified Statement indicates that source/geographic competition is highly relevant to the competitive status of the waste facility. Municipal Solid Waste ("MSW") as well as Construction and Demolition Debris ("C&D") almost inevitably originates its moves with a truck haul. It can be transferred to and moved by rail, barge, or truck to landfills, incinerators, or recycling facilities. With respect to movements by rail, in 2013, NS originated or received about 7,500 cars of MSW and C&D from Greater Northern New Jersey, tendered by seven different shippers at five different freight stations, and delivered to landfills in three different locations. Mr. Mutén also estimates that CSX and NYSW moved an additional 10,500 cars in the same period.

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CNJ focuses attention on the specific Oak Island to Keystone Landfill route, which rail route is not present today and exists only as a theoretical potential rail move. If the transaction results in the loss of that theoretical rail route that does not equate to a loss of competitive options for MSW and C&D shippers. The Greater Northern New Jersey market is clearly a market where elements of source and geographic competition are salient. Facilities generating MSW and C&D in the Greater Northern New Jersey market can either truck such materials directly to the multiple landfills, incinerators, or recycling facilities or to multiple railroad or barge served facilities for transportation to the various landfills, incinerators, or recycling facilities. Clearly, CSX origins and destinations compete against NS origins and destinations. Additionally, NS, CSX, and NYSW will continue to serve the Greater Northern New Jersey markets providing more than sufficient intramodal rail competition. Given the numerous intramodal and intermodal competitive options that will remain available if the D&H trackage rights are discontinued and the intense source and geographic competition in this market, there is no competitive justification for the requested condition.

NGFA

The National Grain and Feed Association (NGFA) contends that there is a competitive effect with regard to discontinuance of the D&H trackage rights agreements. NGFA does not disclose any particular shipper which would be affected by the discontinuance, nor is there any supporting evidence from specific shippers. However, Mr. Mutén's analysis of all traffic of the relevant commodities (STCC 01121-01194, 01991, 20421) shows 4,083 cars in 2013 that could potentially be impacted by the transaction carried by NS, CP, or both. Over 90% of this traffic is terminated at a single mill on the Delaware and Lackawanna Railroad ("DL"), traffic for which shippers will continue to have the option to use CP via the Direct Short Line Access Agreement.

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The remaining traffic either originates or terminates on a 3-2 short line or station, terminates at an exclusive CP station located on the D&H South Lines, or originates at another station exclusively served by one railroad. Based on this analysis of the relevant traffic, there is no competitive harm with regard to the grain, feed, or oilseed traffic at issue here and therefore no justification for the requested condition.

GWI Subsidiaries

We next turn to the conditions requested by GWI Subsidiaries, filed on behalf of three short lines – Buffalo & Pittsburg Railroad, Inc. (BPRR), Rochester and Southern Railroad (RSR), and Wellsboro & Corning Railroad LLC (WCOR). BPRR interchanges in Buffalo with NS, CN, CP, and CSX. As GWI accurately notes, the BPRR interchanges will not change and it will continue to be able to interchange with all carriers serving Buffalo, even if the Southern Tier haulage agreement is terminated. More specifically, it is concerned about one coal origination routing involving the BPRR and CP, from Buffalo to Glenn Falls, NY that, upon termination of the haulage agreement, could become a three carrier routing rather than a two carrier routing, or be lost altogether.

As to RSR, it currently physically interchanges with NS and CSXT and with D&H (CP) via the haulage arrangement, all in Rochester, NY. RSR admits that most of its traffic is interchanged with NS. It is concerned that the termination of the marketing and haulage agreements will result in it having to interchange all such destined traffic to NS and “NS would be able to provide the single carrier service from Silver Springs to destination.” For other types of traffic, RSR is concerned that what are now two carrier movements involving CP-RSR will become three carrier movements and that it may have to split the revenue between three carriers

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rather than two, or potentially lose some of this traffic which may “result in a significant revenue loss to RSR and less competitive options for the customer.”

For WCOR, WCOR physically interchanges with only one carrier, NS, but has commercial access to CP. Upon the termination of the CP haulage rights, WCOR will only have an NS connection. According to WCOR it moved 500 cars with CP in 2014 to Buffalo. Of these, the large majority of the moves were frac sand. WCOR admits that it also moves frac sand with NS. For other moves, it too complains that what is today a CP-WCOR move could become a CP-NS-WCOR and that it is concerned that the revenue would now have to be split among more carriers. It also complains that if it has to interchange only with NS, it will only get its fixed division and that “because WCOR generally gets a lower fee from NS than it receives from CP, the shift will cause WCOR's revenues to be substantially reduced.”

As an initial matter, we note that no evidence is provided regarding competitive effects from shippers served by these short lines. In fact, RSR’s largest shipper, American Rock Salt Co. LLC, has filed a letter supporting the Transaction. The concerns expressed by the short lines are primarily adverse effects not on competition, but on competitors, such as diversion of traffic to competing routes and less favorable divisions of revenues. Throughout the post-Staggers period, ICC and STB policy has consistently rejected conditions designed to protect competitors from the loss of revenue as opposed to a loss of a critical competitive alternative and it should continue with that policy here.

While we do not have details regarding potential impacts on shippers located on these short lines, there are salient facts which undermine any justification for competitive conditions. One is the continued access of BPRR and RSR to interchange with CSX, providing a clear competitive alternative to an NS routing. At most, these would be 4-to-3 or 3-to-2 effects, which

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BPRR or RSR have not shown will result in anticompetitive effects. With regard to WCOR, the primary commodity at issue frac sand. As discussed by Mr. Mutén, frac sand originates primarily at mines in Illinois, Wisconsin, and Michigan, operated by a number of competing companies, and served by a variety of origin rail carriers. At origin, it is either loaded directly to rail or carried by truck to transload points, railed to destinations in the Northeastern region, and then transloaded into truck for movement to the wellheads. No wellheads are directly served by rail – all sand is transloaded. As shown by Mr. Mutén’s diagram, the Northeastern region of the Marcellus shale is served by a number of transload facilities on NS, NYSW, RBMN, LVRR, and LRWY railroads, as well as WCOR. All of these are capable of receiving frac sand originated on CP-served mines.

Specific to WCOR, today, it physically interchanges with only one carrier, NS, but has commercial access to CP. Upon the termination of the CP haulage rights, WCOR will maintain its NS connection. It is concerned that what is today a CP-WCOR move could become a CP-NS-WCOR move in the future, which it believes will result in a loss of revenues or the movement will be lost altogether. While this is possible, customers of CP originated frac sand will not see a reduction in their ability to use CP origins. A driller desiring to receive frac sand from a CP served mine via a CP commercial single line route (technically, CP and WCOR are both in the move but it is billed as a single-line CP movement) will still be able to do so using the DSLAA to reach the transload facilities located on LVRR or RBMN. There are also other transload facilities located on NS and NYSW available to receive frac sand via CP interline movements or that can receive frac sand from mines originated on other railroads. In short, when one examines the particular competitive details as recommended by Mr. Nelson, there is no justification for

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finding competitive harm to competition, as opposed to a potential loss of revenue to a particular competitor. As such, the requested condition is not justified.

IV. Conclusion

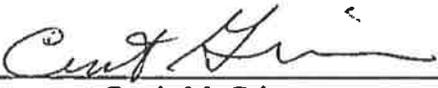
In my previously submitted statement, I performed a structural analysis of the competitive impacts in this case. More specifically, in that statement, I identified and discussed the potential 2-1 intramodal competitive impacts of the Transaction. My analysis showed that even when one considers the broad impacts from all aspects of the transaction as a whole (meaning the line purchase, the trackage rights discontinuances, and the cancellation of the haulage and marketing agreements), there are minimal competitive impacts.

I agree with the view of Mr. Nelson that the Board should also consider input from shippers who provide evidence that they will “experience 2-1 reductions in alternative rail carriers.” The emphasis should be on competitive effects, instances where shippers may pay higher rates due to loss of rail options, as opposed to effects on competitors, the loss of revenues by existing carriers. More fine-grained micro analyses can and should include competitive factors specific to the shipper’s circumstances, such as source, geographic, and intermodal competition. However, other than PP&L, no shipper provided arguments or evidence of competitive harm. When examining input from shipper associations, short line railroads, and other entities, my previous conclusion remains that the transaction is not anticompetitive and will not result in a substantial lessening of competition, creation of a monopoly, or a restraint of trade in freight surface transportation in any region of the U.S. It should be approved without the conditions requested by CNJ Rail Corporation, National Grain and Feed, and GWI Subsidiaries.

VERIFICATION

I, Curtis M. Grimm, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed this 27th day of March, 2015.



Curtis M. Grimm

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY

**RESPONSE TO COMMENTS
AND REBUTTAL IN SUPPORT OF APPLICATION**

EXHIBIT B

REBUTTAL VERIFIED STATEMENT OF BENGT MUTÉN

PUBLIC VERSION**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY**- ACQUISITION AND OPERATION -****CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY**

REBUTTAL VERIFIED STATEMENT OF BENGT MUTÉN

I. Introduction

My name is Bengt Mutén. I am a Senior Consultant with IHS Global, Inc. (“IHS”) in Lexington, Massachusetts. I have been employed by IHS and its predecessor companies since 1997, and have worked as a consultant dealing with railroad traffic analysis since 1980. Prior to that I received an S.B. in Management from the Massachusetts Institute of Technology and an M.S. in Civil Engineering from University of California at Berkeley.

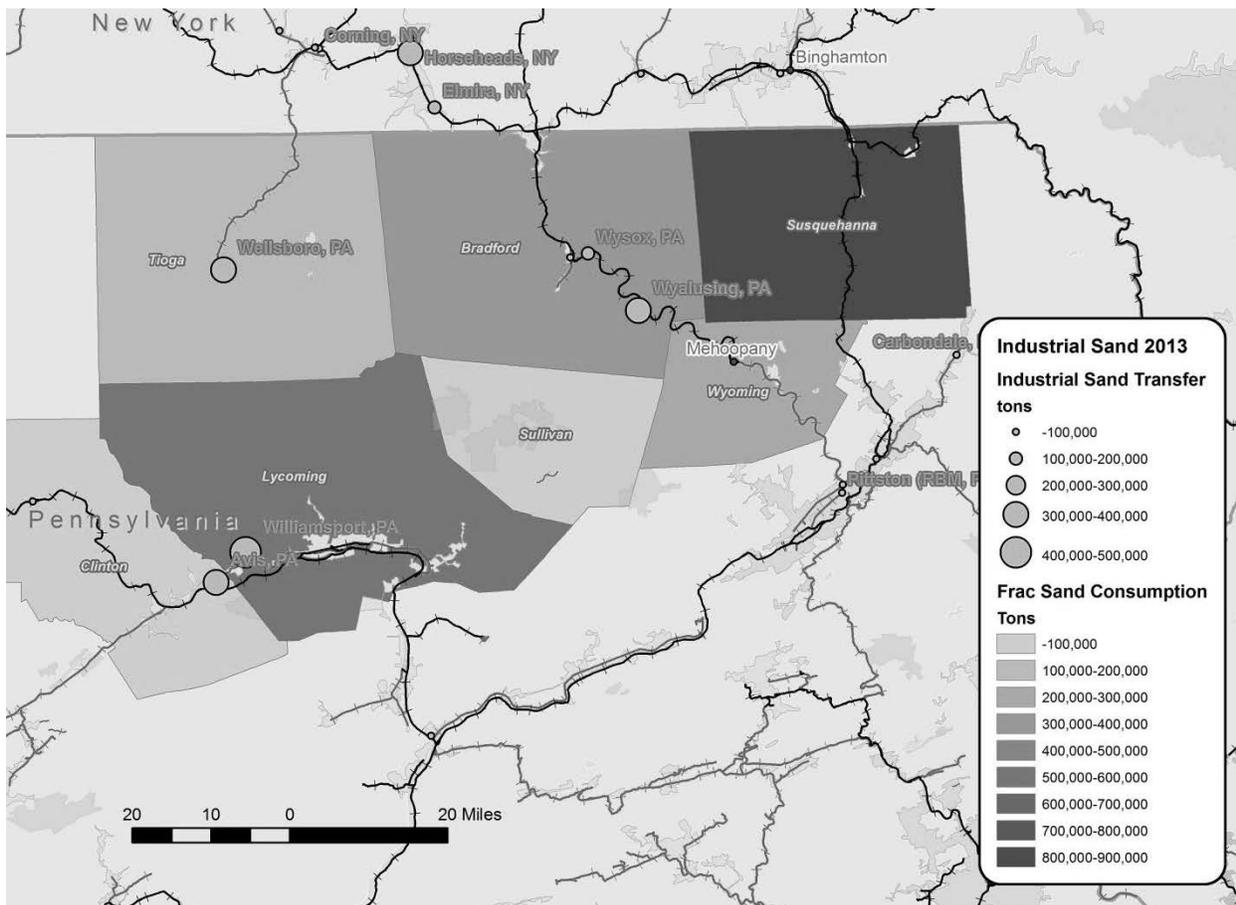
IHS was provided with waybill data for CP and NS for the years 2012 and 2013. The following analysis uses the actual waybills for 2013 for CP and NS traffic. Other carriers’ traffic is an estimate using IHS’ Transearch freight flow data base. The IHS energy group provided frac sand consumption estimates for Pennsylvania gas fields using well counts and average well consumption.

II. Wellsboro & Corning Railroad

As stated by Genesee and Wyoming, the primary business of the Wellsboro & Corning Railroad LLC (“WCOR”) is industrial sand used in extracting natural gas through hydraulic fracturing (“frac sand”). Sand to requisite standards originates primarily at mines in Illinois,

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Wisconsin, and Michigan, operated by a number of competing companies, and served by a variety of carriers. At origin, it is either loaded directly to rail or carried by truck to transload points, railed to destinations in the Northeastern region, and then transloaded into truck for movement to the wellheads. As shown by the below diagram, the Northeastern region of the Marcellus shale basin for which WCOR delivers frac sand is served by a number of transload facilities on NS, NYSW, RBMN, LVRR, and LRWY railroads, as well as WCOR.



Sources: NS and CPRS traffic (Highly Confidential); IHS Energy

III. National Grain and Feed Association

It was not clear which traffic the National Grain and Feed Association was concerned about, but an analysis of all traffic of the relevant commodities (STCC 01121-01194, 01991, 20421) shows 4,083 cars in 2013 that are carried by NS, CP, or both and that could potentially be

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impacted by the transaction. Over 90% of this traffic is terminated at a single mill located on the Delaware and Lackawanna Railroad (“DL”), traffic for which CP will continue to have commercial access to under the DSLAA and the TDRA. Of the remaining traffic, it either originates or terminates on a 3-2 short line or station, terminates at an exclusive CP station on the D&H South that is not also served by NS or another carrier, or originates at an exclusive station served only by CP or other carrier. Thus, I could find no grain, feed, or oilseed traffic for which competitive options currently exist but would be lost in the event the transaction is approved.

IV. North Jersey Municipal Solid Waste and Construction and Demolition Debris

Municipal Solid Waste (“MSW”) as well as Construction and Demolition Debris (“C&D”) originates from dispersed and changing sources, and are thus almost inevitably originated with a truck haul. It is then carried either directly by truck or transferred to barge and rail for final delivery to landfills, incinerators, or recycling facilities. In 2013, NS originated or received about 7,500 cars of MSW and C&D from the Greater Northern New Jersey markets, tendered by seven different shippers at five different freight stations, and delivered to landfills in three different locations. We also estimate that CSX and NYSW moved a collective total of 10,500 cars in the same period.

V. Rochester Southern

In 2013, 52% of cars interchanged between RSR and NS at Silver Springs, NY were billed via NS, while 48% were billed via CP.¹

¹ This does not include RSR traffic carried to BPRR by NS on behalf of RSR. This also does not include RSR traffic interchanged directly with CSXT, with which RSR will maintain a direct connection.

VERIFICATION

I, Bengt Mutén, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement.

Executed this 30th day of March, 2015.

A handwritten signature in black ink, appearing to be 'Bengt Mutén', written over a horizontal line.

Bengt Mutén

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

RESPONSE TO COMMENTS AND REBUTTAL IN SUPPORT OF APPLICATION

EXHIBIT C

VERIFIED STATEMENT OF CHARLES S. TUBMAN JR

PUBLIC VERSION**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY**- ACQUISITION AND OPERATION -****CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

VERIFIED STATEMENT OF CHARLES S. TUBMAN JR.

My name is Charles S. Tubman Jr. I have a B.S. Degree in Education from the University of Wisconsin - Oshkosh and an MBA, with a concentration in Transportation/Logistics and Marketing, from the University of Tennessee - Haslam College of Business. I am employed by Norfolk Southern Corporation ("NS") in the capacity of Market Manager, Metallurgical Coal. My office is in Roanoke, Virginia. I have been employed by NS since 1988 and have been a member of the NS Coal Business Group since 2004. During my employment with NS, I have served in a variety of positions in Economics, Marketing, Short Lines, and Transportation. Since 2009, my responsibilities have included support work in Transportation Planning and Pricing as well as responsibility for the pricing and marketing of anthracite coal. As such, I have a thorough understanding of railroad operations in the Pennsylvania anthracite region and nearby environs in Northeast Pennsylvania.

Based on my knowledge of PPL's alleged option to build-out from Montour Plant to the D&H South Lines to access CP, including a recent inspection of the actual sites involved, I

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believe that there are critical operational challenges to PPL's construction of the build-out. Such challenges render the build-out highly impractical and inefficient, even if theoretically possible.

I. PPL's Build-Out Option Has Critical Operational Challenges.

PPL would face several critical operational challenges if it decided to actually construct the build-out – challenges which are not fully addressed in the Verified Statement of Thomas D. Crowley.

First, Montour Plant is located to the north of the Susquehanna River whereas CP rail lines in this region are located to the south of the Susquehanna River. Therefore in order to access CP, PPL would need to construct a bridge, or rehabilitate an existing bridge at Rupert, Pennsylvania, over the Susquehanna River. The existing bridge, an abandoned Reading Railroad bridge, is now owned by a private individual not affiliated with NS or CP, so PPL would have to negotiate its purchase or rights for its use. Based on my recent inspection, the existing bridge appears to be in superficially poor condition, possibly necessitating an extensive rehabilitation.

Simply rehabilitating the existing bridge would not suffice to implement the build-out. PPL also would need to obtain the necessary access road and a signaled connection to the D&H South Lines in the Catawissa, PA area. In this area, the D&H South Lines run immediately adjacent to the south bank of the Susquehanna River. Based on the existing angle of the D&H South Lines to the Susquehanna River bridge, the only feasible site for a connection between the build-out track and the D&H South Lines would be in the southeast quadrant. See attached map, at #1. However, there is not enough property to build a connecting track in the immediate vicinity of the southeast quadrant. Thus in order to permit movement from the point at which the build-out track connects to the D&H South Lines, PPL would need to restore at least one mile of the former Reading Railroad's Catawissa line sufficient to hold an entire train. PPL would then

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have to cross the D&H South Lines coming off the Susquehanna River bridge and continue over the restored Reading line for at least one mile, before reversing direction to head north on the D&H South Lines toward Binghamton. Further, this connection problem likely would remain even if PPL constructed a new bridge over the Susquehanna River, because PPL intends to construct a “bridge in the same location and of similar size and design as the bridge that currently connects to the CP.” See VS Crowley, at 3.

Second, PPL would need to purchase a contiguous right-of-way to construct the build-out. Given the hilly surroundings of Bloomsburg, the options for a right-of-way that would even permit a viable rail line are limited. Assuming PPL intends to reclaim the former Conrail right-of-way³⁵ between Montour Plant and Paper Mill, PA for its build-out, which makes sense given the area’s topography, PPL also would need to obtain enough tail track property at Paper Mill to allow a reversal in direction for the move to Bloomsburg. The former Pennsylvania Railroad line from Montour connects with the former Reading line from Bloomsburg at Paper Mill. However, based on the angle of the existing connection, any PPL train from Montour would not be able to make a progressive move from the Pennsylvania line to the Reading line at Paper Mill. See attached map, at #2. Any PPL train from Montour would have to continue past where these two lines connect for at least one mile, before reversing direction in order to use the former Reading line from Paper Mill to Bloomsburg.

Third, as noted in the discussion above, the build-out would require two reverse moves: (1) at Paper Mill, coming from Montour and heading toward Bloomsburg; and (2) at Catawissa, coming off of the Susquehanna River bridge and moving onto the D&H South Lines. To achieve these reverse moves, PPL trains would need to be equipped with distributed power, the ability to

³⁵ Prior to Conrail, both the Pennsylvania Railroad and the Reading Railroad served the area.

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control a train from either end, and manned by two locomotive engineers. Such reverse moves are time-consuming and likely would lead to further operational difficulties and network congestion.

Thus, PPL would face various significant operational difficulties in constructing the build-out. As demonstrated in the above summary, the build-out is far more complicated than simply constructing 17.17 miles of track and crossing the Susquehanna River to reach CP.

II. PPL's Build-Out Option Does Not Yield Efficient Alternative Routes.

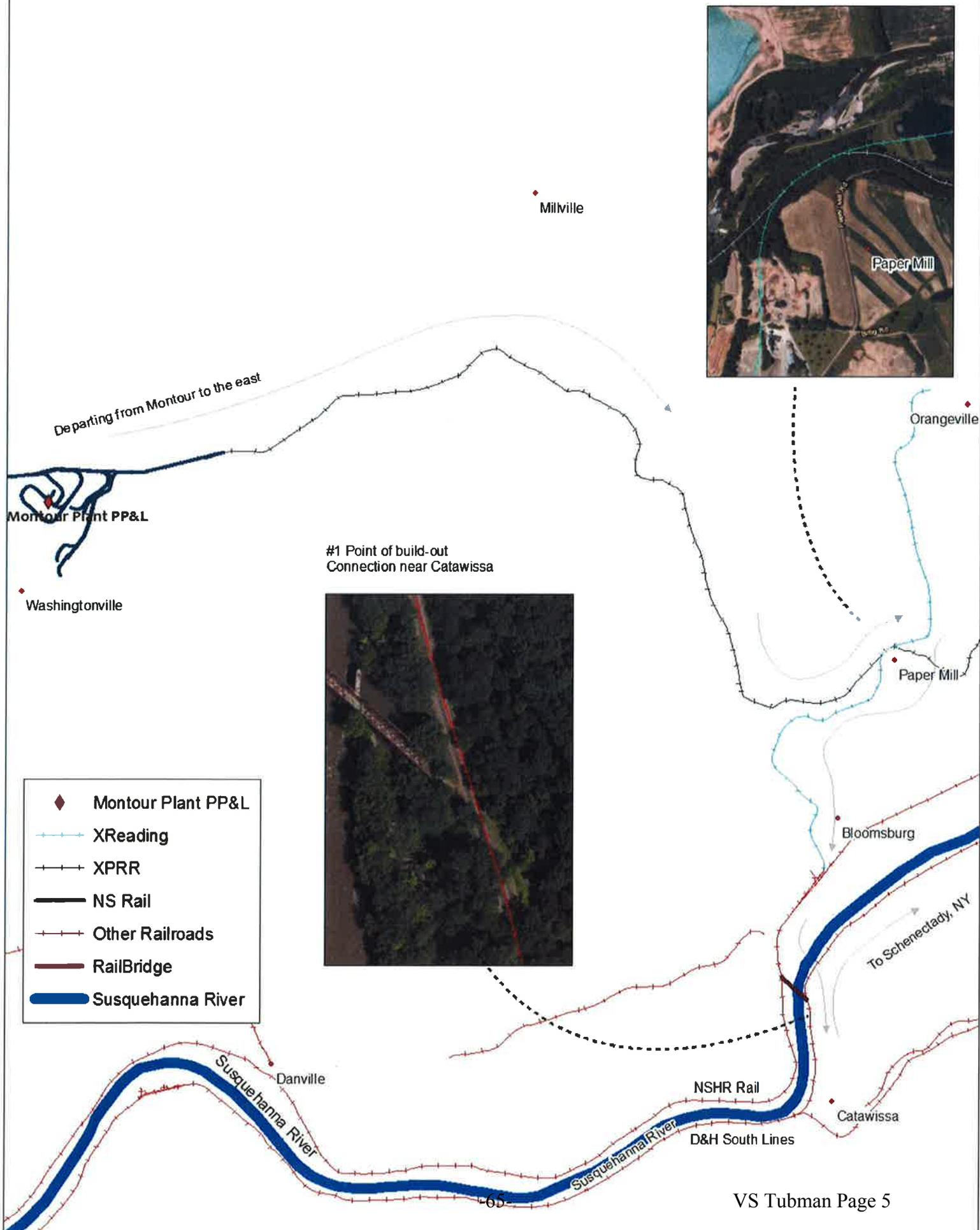
Even if PPL were to construct the challenging build-out, the existing direct NS route to Montour Plant would remain the shortest of the alternative routes made possible by the build-out for the existing coal origins currently used by PPL. For example, the direct NS route from Loveridge Mine in West Virginia to Montour Plant is 386.9 miles; but, the routes enabled by the build-out would be significantly longer. The build-out route over the Southern Tier Line between Buffalo and Binghamton would be 710.0 miles and the build-out route via Albany would be 960.5 miles. Thus, the existing direct NS service to Montour Plant would remain the most efficient and least expensive rail option for PPL's existing coal origins, even after the build-out.

CONCLUSION

In summary, PPL's alleged build-out option does not provide PPL with a potential source of competition to the existing NS service for Montour Plant. PPL would face significant operational challenges if it decided to construct the build-out; and, the build-out ultimately would not yield more efficient alternative routes. Although it may be possible to construct the build-out on paper, the build-out would be highly impractical and inefficient in reality. As a result, the Board should deny PPL's request for conditions to preserve the build-out option.

Proposed Build-out

#2 Track Connection at Paper Mill, PA



VERIFICATION

I, Charles S. Tubman Jr., declare under penalty of perjury that I am authorized to make this verification on behalf of Norfolk Southern Railway Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

A handwritten signature in cursive script, appearing to read "Charles S. Tubman Jr.", written over a horizontal line.

Charles S. Tubman Jr.
Market Manager, Metallurgical Coal
Norfolk Southern Corporation

Dated: March 30, 2015

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY

- ACQUISITION AND OPERATION -

**CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

RESPONSE TO COMMENTS AND REBUTTAL IN SUPPORT OF APPLICATION

EXHIBIT D

VERIFIED STATEMENT OF ROBIN ZEHRINGER

PUBLIC VERSION**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35873

NORFOLK SOUTHERN RAILWAY COMPANY**- ACQUISITION AND OPERATION -****CERTAIN RAIL LINES OF THE DELAWARE AND HUDSON RAILWAY
COMPANY, INC.**

VERIFIED STATEMENT OF ROBIN ZEHRINGER

My name is Robin Zehringer. I have a Bachelor's of Science in Business Administration from Bowling Green State University and an MBA from the Virginia Polytechnic Institute and State University, Pamplin College of Business. I am employed by Norfolk Southern Corporation ("NS") in the capacity of Group Vice President, Utility Coal Marketing. My office is in Roanoke, Virginia. I have been employed by NS since 1983 and have occupied my present position since 2012. During my employment with NS, I have served in a variety of engineering, financial, marketing, commercial, and administrative roles, including as Director, Metallurgical Coal Marketing. Since 2012, my responsibilities have included management of NS's Utility Coal Marketing Group, which is responsible for all sales and marketing functions for the movement of coal by rail in the U. S. utility coal sector. As such, I have a thorough understanding of the dynamics that influence rail rates for coal transportation and the negotiations and contractual arrangements between NS and PPL with respect to Montour Plant.

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Based on my knowledge of PPL's alleged option to build-out from Montour Plant to the D&H South Lines to access CP ("Build-Out Option"), my discussions with various NS and PPL personnel, and certain analyses undertaken by NS, NS's rates for coal transportation to Montour Plant are constrained by natural gas prices rather than PPL's threat to build-out to reach a second carrier. Thus, the Build-Out Option does not provide PPL with a potential source of competition to the existing NS service for Montour Plant.

I. PPL's Build-Out Option Provides No Competitive Leverage With NS.

The Build-Out Option provides no competitive leverage in negotiations with NS regarding rates for coal transportation to Montour Plant. Although PPL alluded to the Build-Out Option in 2013 rate negotiations with NS, NS did not view the Build-Out Option as a credible threat, in part due to its critical operational challenges and failure to yield efficient alternative routes, as outlined in the Verified Statement of Dutch S. Tubman. [[

³⁶ [[

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]] demonstrating that energy markets are the real constraint on NS's rates rather than the Build-Out Option. This macroeconomic reality is even acknowledged in PPL Corporation's 2012 Annual Report to Shareholders,³⁷ in which energy markets, and particularly natural gas prices, are highlighted as the primary factor influencing its Pennsylvania coal plants' coal-fired output and coal inventory:

Unregulated Gross Energy Margins associated with PPL Energy Supply's competitive generation and marketing business are impacted by changes in market prices and demand for electricity and natural gas, power plant availability, competition in the markets for retail customers, fuel costs and availability, fuel transportation costs and other costs. Current depressed wholesale market prices for electricity and natural gas have resulted from general weak economic conditions and other factors, including the impact of expanded domestic shale gas development and production. As a result of these factors, PPL Energy Supply has experienced a shift in the dispatching of its competitive generation from coal-fired to combined-cycle gas fired generation as illustrated in the following table:

| | <u>Average Utilization Factors (a)</u> | |
|----------------------------------|--|--------------------|
| | <u>2012</u> | <u>2009 - 2011</u> |
| Pennsylvania coal plants | 69% | 87% |
| Montana coal plants | 67% | 89% |
| Combined-cycle gas plants | 98% | 72% |

(a) All periods reflect the year ended December 31.

This reduction in coal-fired generation output had resulted in a surplus of coal inventory at certain of PPL Energy Supply's Pennsylvania coal plants. To mitigate the risk of exceeding available coal storage, PPL Energy Supply incurred pre-tax charges of \$29 million in 2012 to reduce its 2012 and 2013 contracted coal deliveries. PPL Energy Supply will continue to manage its coal inventory to mitigate the financial impact and physical implications of an oversupply; however, no additional coal contract modifications are expected at this time.³⁸

³⁷ PPL EnergyPlus, LLC is a subsidiary of PPL Energy Supply, LLC, which is a subsidiary of PPL Corporation. A subsidiary of PPL Energy Supply, PPL Generation, LLC, owns and operates Montour Plant.

³⁸ PPL Corp., Form ARS, at 12, filed Apr. 5, 2013, available at <https://www.sec.gov/Archives/edgar/vpr/13/9999999997-13-008099>.

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[[

]] Thus, even if PPL's Build-Out Option were foreclosed by the Transaction, NS would have the same incentives to agree to reasonable rates for Montour Plant as existed before the Transaction. Accordingly, PPL's Build-Out Option does not constrain the rates charged by NS for Montour Plant and need not be protected as a condition to the Transaction.

CONCLUSION

In summary, the Build-Out Option does not provide PPL with a potential source of competition to the existing NS service for Montour Plant. The Build-Out Option does not constrain the rates charged by NS for coal transportation to Montour Plant. As a result, the Board should deny PPL's request for conditions to preserve the Build-Out Option.

VERIFICATION

I, Robin Zehringer, declare under penalty of perjury that I am authorized to make this verification on behalf of Norfolk Southern Railway Company, and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.

A handwritten signature in cursive script, reading "Robin Zehringer", written over a horizontal line.

Robin Zehringer
Group Vice President, Utility Coal Marketing
Norfolk Southern Corporation

Dated: March 30, 2015