Before the

SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35873

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

COMMENTS AND REQUESTS FOR CONDITIONS OF "GWI SUBSIDIARIES"

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– ACQUISITION AND OPERATION –
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Buffalo & Pittsburgh Railroad, Inc. ("BPRR"), Rochester & Southern Railroad, Inc. ("RSR") and Wellsboro & Corning Railroad, LLC ("WCOR")[1], each a subsidiary of Genesee & Wyoming Inc. (collectively, the "GWI Subsidiaries"), hereby file these comments to the proposed transactions described by Norfolk Southern Railway Company ("NS") in the Application, and requests for conditions to alleviate the competitive harms that will be suffered by the individual GWI Subsidiaries, and the shippers they serve, as a result of the transactions.[2]

SUMMARY OF POSITION

The GWI Subsidiaries do not take a position on whether the Application should be approved, or whether the asserted public benefits outweigh any competitive harms that may result. However, the GWI Subsidiaries believe that any Board approval should be conditioned to mitigate the competitive harm that each of the GWI Subsidiaries will suffer as a result of the proposed transactions. The conditions proposed herein are directly related to the competitive

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1 BPRR is a Class II railroad. RSR and WCOR are Class III railroads.

2 Another GWI Subsidiary, New England Central Railroad, Inc. ("NECR") joined in the Noticc of Intcnt to Participate. However, NECR has determined not to seek conditions, and therefore is not a party to this filing.

harms, are feasible and will not reduce any of the asserted public benefits of the proposed transactions.

REQUESTED CONDITIONS

The GWI Subsidiaries request that any order approving the transactions be conditioned on the following:

1. For a period equal to the "Initial Term" of the Direct Short Line Access Agreement[3] (Application, Vol. II), the commercial relationship between the respective GWI Subsidiaries and Canadian Pacific Railway ("CP")[4] shall be preserved by requiring that NS and CP, at their option, maintain their existing haulage arrangements over the Southern Tier.[5] Specifically, the haulage arrangements would be (i) for traffic moving between CP at Buffalo, NY, and the interchanges with RSR at Silver Springs, NY, and with WCOR at Corning, NY, (ii) for traffic interchanged between RSR and CP at Silver Springs and Binghamton for further movement over the D&H South Line to Schenectady, and (iii) for traffic interchanged between BPRR and CP in Buffalo and moving between Buffalo and Binghamton for further movement over the D&H South Line to Schenectady. (The Direct Short Line Access Agreement should be amended to provide that NS will provide haulage for CP over the D&H South Line between Binghamton and Schenectady.) If NS and CP elect not to continue their existing haulage arrangements over the Southern Tier (or if the haulage rights were terminated prior to the

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3 The "Initial Term" is defined as 10 years from the Commencement Date as defined in the Asset Purchase Agreement ("APA").

4 In these Comments, references to "CP" include Canadian Pacific Railway Company and its affiliates and subsidiaries, including Delaware and Hudson Railway Company. Inc. ("D&H") which operates commercially, and does business as "Canadian Pacific."

5 The "Southern Tier" refers to the line of railroad of NS between Buffalo, NY and Binghamton, NY.

expiration of the Initial Term), NS should be required to provide haulage for each of the respective GWI Subsidiaries between the points indicated above.[6]

2. The terms of the Transitional Divisions and Routing Agreement (Application, Vol. II) shall be modified to make its terms applicable to existing traffic to moving to, from or over the Southern Tier.

3. NS and CP shall ensure that the divisions of rates or fees paid to the respective GWI Subsidiaries for traffic currently moving commercially between each GWI Subsidiary and CP, including without limitation, any traffic moving under any amended Transitional Divisions and Routing Agreement, will be not be reduced for a period of three years from the Commencement Date as defined in the APA.

STATEMENT OF FACTS

A. The Transactions and the NS-CP Agreements.

The core of the transactions proposed by NS is the acquisition and operation of 282.55 miles of D&H rail lines between Sunbury, PA and Schenectady, NY (the "D&H South Lines"). Application, Vol. I ("App.") at 9. However, the transactions go well beyond the acquisition of the D&H South Lines, and will result in a restructuring of rail service in large sections of Pennsylvania and New York, and with impacts on service options beyond those regions to New England and to the Southeast. NS and CP will also be adjusting some trackage rights arrangements, and NS will be acquiring three yards, as well as mechanical shop facilities. App. at 27 fn. 21. More importantly, as part of the transactions covered by the APA, CP will seek to discontinue certain trackage rights to Philadelphia and points south, and CP and NS will

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6 As discussed more fully below, the haulage requested for RSR between Silver Springs and Buffalo could be provided by a simple amendment to the existing "2006 Haulage Agreement" between NS and RSR.

terminate various marketing and rate agreements involving CP operations south of Schenectady, and over the Southern Tier (east of Buffalo to Binghamton). App at 10 fn. 3, 25, 28-29. Whether Board approval is required for NS and CP to take any or all of the additional actions, they are required actions pursuant to the APA[7], and are clearly are part and parcel of the proposed transactions covered by the Application. The Board, in its consideration of the Application, should consider the potential anti-competitive impacts of the complete set of transactions and actions contemplated by, and required to be taken under, the APA.

Although NS contends there will be no anti-competitive effects with respect to service over the D&H South Lines (App. at 11), it and CP propose to enter into two "voluntary" agreements that will provide continued commercial access to both NS and CP for customers who today have access to NS and CP over the D&H South Lines. The agreements are intended to mitigate any potential anti-competitive impacts related to NS's acquisition of the D&H South Lines. App. at 11, 18-19. The Transitional Divisions and Routing Agreement is drafted to protect existing contractual arrangements and rate authorities of shippers for the remaining term of such pricing authorities remain, up to a maximum of three years. The Direct Short Line Access Agreement is drafted to provide short lines that connect with both NS and the D&H South Lines will continue to have commercial access to CP (by means of haulage to be provided

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[7] That these additional actions are required under the APA may not be apparent from a review of the APA included with the Application, Vol. II, because the exhibits to the APA, including the Modification and Restatement of 2002 Trackage Rights Agreement, and Modification and Restatement of Norfolk Southern / CP Agreement on Northeast US Restructuring, have not been included. (Under 49 CFR § 1180.6(a)(7)(2) and fn. 3 thereto , any draft agreement included in an application is to include all significant terms.) The exhibits are part of the APA (APA, § 13.10), and delivery of the executed exhibits is a condition of closing. APA, §§ 9.03, 10.03. However, throughout the Application, as cited above, NS acknowledges that all of the additional actions are required to be taken pursuant to the APA.

by NS for CP between interchange and Schenectady) for future traffic not covered by existing contracts. App 11-12 fn 6; 18-19; Application Vol. II.

However, voluntary mitigation is not proposed by NS with respect to anti-competitive effects of any other aspects of the transactions, including most importantly to the GWI Subsidiaries, with respect to the termination of CP's commercial access over the Southern Tier.

B. Existing Transportation Patterns and Effects of the Transactions on Competitive Alternatives Available to GWI

As described in this Section, the GWI Subsidiaries each have interchange locations with NS along the Southern Tier. Currently, traffic can be interchanged directly with NS (both physically and commercially), and also with CP (commercially through the haulage that NS provides to CP over the Southern Tier[8]). The competitive alternative that CP provides to the NS interchange is not merely theoretical, rather it is one that is used significantly by the customers served by the GWI Subsidiaries. Attached hereto as Exhibit A is a map of the Southern Tier showing the interchanges with each GWI Subsidiary and the routes of the traffic they handle with CP. Attached hereto as Exhibit B is the Verified Statement of Dave Ebbrecht, President of each of the GWI Subsidiaries ("Ebbrecht VS"), including the spreadsheets of traffic attached as exhibits thereto, which support the description of operations for each GWI Subsidiary set forth below.[9]

The transactions will eliminate the ability of the GWI Subsidiaries and their customers to handle traffic commercially with CP over the Southern Tier, and adversely affect the CP

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[8] Prior to 2005 when CP discontinued its trackage rights over the Southern Tier, the GWI subsidiaries physically interchanged with CP as well as with NS as the CP trackage rights were not solely overhead, and permitted interchange with connecting carriers along the Southern Tier.

[9] Exhibit B is the Public Version of Mr. Ebbrecht's Verified Statement. A Highly Confidential Version of the Verified Statement is being filed separately under seal in accordance with the Protective Order entered by the Board in *Decision No. 2*.

competitive route by adding another carrier into the commercial route. Termination of the CP haulage will reduce the commercial rail alternatives for the GWI Subsidiaries and their customers from 2-to-1 or from 3-to-2.

1. BPRR

As relevant here, BPRR can physically interchange traffic in Buffalo with NS, CP and CSX Transportation Inc. ("CSXT"). As BPRR understands it, these interchanges will not change if the Application is approved. App. at 10. In 2014, BPRR interchanged approximately 1,555 cars with CP. Of those cars, the vast majority moved west from Buffalo, and will not be affected by the proposed transactions. However, there is one significant move – between Buffalo and Glens Falls, NY – that is currently handled jointly between BPRR and CP that will be adversely affected and likely lost if, as proposed, NS stops providing haulage for CP between Buffalo and Binghamton. This coal move originates on BPRR, is interchanged to CP in Buffalo, and remains in CP's account through delivery to the customer. CP is the only rail carrier that serves the customer at the delivery location in Glens Falls.

BPRR believes that termination of the CP's haulage would cause BPRR to lose the traffic. Without the CP haulage, the traffic could theoretically move either BPRR-Buffalo-NS-Schenectady-CP-Glens Falls or BPRR-Buffalo-CSXT-Albany–CP-Glens Falls; however, neither is a practical alternative. Both alternatives involve splitting the existing CP single line route into a joint route.[10] Adding an additional carrier to the commercial arrangements of a short-haul move that is only 560 miles long, will likely drive rates too high to compete for the traffic. Moreover, the primary competitor for this business is NS direct to CP. BPRR expects that NS

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[10] Or if BPRR is considered, making a two-carrier move into a three-carrier move.

will prefer its longer haul, and that if NS is in commercial route with BPRR, BPRR will not be able to make the three-carrier rate competitive.

2. RSR

At Silver Springs, NY, RSR currently interchanges with NS (physically and commercially), and with CP (commercially). RSR also is able to interchange with CSXT at the opposite end of its lines in Rochester, NY. RSR currently interchanges a significant amount of its traffic with NS at Silver Springs. Notwithstanding the routes NS can provide, during 2014, RSR handled over 3,000 cars in joint commercial service with CP. Just under one-half of those cars were moved in CP commercial service from the Silver Springs interchange east Binghamton, and then south over the D&H South Lines to destinations in Pennsylvania. If the transactions were approved without continuation of the haulage arrangements, CP would no longer be able to serve the destination, and NS would be able to provide the single carrier service from Silver Springs to destination.

Of the other half of the traffic, over 900 cars originate in Canada or the upper Midwest (almost all on CP), and are handled by CP through Buffalo to RSR in Silver Springs. Adding another carrier to the commercial route will likely raise the prices to the customers and make the routing and traffic less competitive. An alternative route using CSXT as the intermediate carrier between CP in Buffalo and RSR in Rochester would have the same problem of an additional carrier in the route. Loss of these moves would mean a significant loss of revenue to RSR, and less competitive options for the customer.

There are also approximately 600 cars that move via CP over Binghamton to other locations served by CP. The primary move is a salt move to Fort Ann, NY that CP can handle directly from Silver Springs to Fort Ann. CP is the only carrier that has authority to serve the customer in Fort Ann. Post-approval, if granted, the traffic could theoretically move either RSR-Silver Springs-NS-Schenectady-CP-Fort Ann, or RSR-Rochester-CSX-Albany–CP-Fort Ann; however, neither is a practical alternative as each would invloce splitting the existing CP haul and adding an additional carrier to the route. Adding an additional carrier to the commercial arrangements of a short-haul move that is only 380 miles long, will likely drive rates too high to compete for the traffic. Again, the loss of this move would result in a significant revenue loss to RSR, and less competitive options for the customer.

3. WCOR.

WCOR's only connection to the interstate rail network is at Corning, NY. At Corning, WCOR interchanges physically and commercially with NS. Because of the existing CP haulage rights, WCOR also has commercial access to CP at Corning. Upon the termination of the CP haulage rights, WCOR and its customers will go from having connections with two long-haul carriers to just one.

WCOR moved over 500 cars with CP in 2014, all of it being handled over Buffalo. Of these, the large majority of the moves were frac sand. WCOR also moved frac sand with NS. Having both CP and NS routes available provides competitive alternatives to WCOR's customers in terms of origins and pricing. WCOR believes that if NS were substituted for the CP, it would have the ability to make the CP route less competitive reducing the available options for WCOR's customers. WCOR has also been handling with CP carloads of nepheline syenite and soybean meal originating in Canada and the upper Midwest. While the traffic may not be lost, it is likely to become more expensive for the customer if CP's long haul were split and an additional carrier were added to the commercial route.

Another concern for WCOR arises from the different relationships that WCOR has with NS ad CP. WCOR a "handling line carrier" with NS meaning it gets a fixed division depending on the commodity as set forth in its handling line agreement with NS. With CP, WCOR has negotiated switching rates depending on the commodity. WCOR is concerned 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.

ARGUMENT

A. Statutory Criteria

The acquisition by a Class I rail carrier of a line of railroad of another rail carrier requires Board approval under 49 U.S.C. § 11323(a)(3). Because the proposed transactions in this proceeding do not involve the merger or control of two or more Class I railroads, the Board examines the Application under 49 U.S.C. § 11324(d), which directs that the Board should approve the Application unless it finds:

> (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.

In assessing transactions subject to Section 11324(d), the Board's primary focus is on whether the proposed transactions will have adverse competitive impacts that are both likely and substantial. Even if there will be likely and substantial anticompetitive impacts, the Board may not disapprove the transactions unless those impacts outweigh the public benefits and cannot be mitigated through the imposition of conditions. Moreover, "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' (i.e., pre-existing disadvantages that will neither be caused nor exacerbated by the merger)." *Canadian National Ry.—Control—Duluth, Missabe & Iron Range Ry., Bessemer and Lake Erie R.R. and the Pittsburgh & Conneaut Dock Co.*, STB Docket No. FD 34424 (served Apr. 9, 2004) at 14.

The Board found that the Application was complete and made a determination that the proposed transactions would not have any anticompetitive effects and that, to the extent any anticompetitive effects exist, they would be outweighed by the transaction's anticipated contribution to the public interest in meeting significant transportation needs. Decision served December 16, 2014 ("*Decision No. 1*") at 2. However, such findings were preliminary based on the evidence presented in the Application and the record to date. The Board made clear that those findings could be rebutted by subsequent filings and evidence submitted into the record for this proceeding, and that the Board would give careful consideration to any claims of anticompetitive effects that were not apparent to the Board from the Application. *Id.*

B. Criteria for Imposing Conditions

Even if the Board determines that the transaction overall does not adversely affect competition, or that the public benefits outweigh any competitive harm, and that the transactions should be approved, the Board can still consider appropriate conditions. Under 49 U.S.C. §11324(c), the Board has "broad authority to impose conditions" on a transaction subject to §11324(d) to ameliorate competitive harm that would result from the transactions. *See Genesee & Wyoming Inc. – Control – RailAmerica, Inc., et al*, STB Docket No. 35654, Decision No. 5 (served December 20, 2012), at 4; *Kan. City S.—Control—The Kan. City S. Ry.*, STB Docket No. FD 34342 (served Nov. 29, 2004), at 16; *Canadian Nat'l, et al. – Control – Ill. Cent. Corp., et al.*, 4 S.T.B. 122, 141 (1999) ("*CN/IC*"). The Board indicated as much when it accepted the

Application as a minor transaction. *Decision No. 1* at 11 ("The Board also may condition the Control Transaction to mitigate or eliminate any deleterious effects on regional or national transportation.").

In *Union Pacific Corp., et al. – Control - Chicago and Northwestern Trans. Co., et al.*, ICC Finance Docket No. 32133 (served March 7, 1995) ("*UP/CNW*"), at 56-57, the Commission described the prerequisites for the imposition of conditions:

> Criteria for imposing conditions to remedy anti-competitive effects are uncodified but were set out in our UP/WP/MP decision, 366 ICC at 562-565. There, we stated that we will not impose conditions on a railroad consolidation unless we find that the consolidation may produce effects harmful to the public interest (such as a significant reduction of competition in an effective market), that the conditions to be imposed will ameliorate or eliminate the harmful effects, that the conditions will be operationally feasible, and that the conditions will produce public benefits (through reduction or elimination of the possible harm) outweighing any reduction to the public benefits produced by the merger.

See also 49 C.F.R. §1180.1(d)(1).[11] The Board has recognized that reductions in independent rail routings or an increase in market concentration can indicate the likelihood of adverse change. *Burlington Northern, Inc. et al. - Control and Merger - Santa Fe Pacific Corp., et al.*, STB Finance Docket No. 32549, Decision No. 38 (served August 23, 1995) ("*BN/SF*") at 55.

The Board's conditioning power is very broad, and it can be used to impose conditions whenever the Board finds that the public interest would be benefitted without taking away the benefits of the proposed transaction. *See Union Pacific Corp., et al.-Control and Merger - Southern Pacific Transportation Co., et al.*, STB Finance Docket No. 32760, Decision No. 44 (served August 12, 1996) ("*UP/SP*") at 144; *BN/SF* at 55. *See also CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company –*

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[11] Although the cited regulations and decisions relate specifically to Class I mergers, they are generally instructive since the Board's conditioning powers in all transactions governed by 49 USC § 11323 are based on the same statutory powers set forth in 49 USC §11324(c).

Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (served July 20, 1998), Decision No. 89 ("*CSX/NS/Conrail*"), at 78 (the principal harms for which conditions are appropriate are "a significant loss of competition or the loss by another carrier of the ability to provide essential services").

The Board has looked particularly hard at the adverse effects of a transaction on short line railroads. When Conrail was split between NS and CSXT, the Board noted:

> In our merger decisions we have given special consideration to shortline interests, generally proving protections similar to those afforded shippers. For example if a merger would cause a short line to lose one of its two Class I connections, it has been our practice to impose conditions where feasible to preserve a second connection. Similarly, if a shortline carrier has a build-out option to reach a second Class I carrier, we have attemted to preserve that option as well. ...
>
> We are keenly aware that shortlines are an important part of the national rail transportation system. They provide a valuable service in gathering and distributing traffic that generally flows over the lines of the Class I carriers, and they are usually able to provide this type of service at a lower cost than the larger carriers can achieve. . . . Nevertheless, where conditions are warranted to protect the interests of particular shortlines, or shortlines in general, from the adverse impacts of this transaction, we will impose them as appropriate.

CSX/NS/Conrail at 76. Similarly, the Board should use its broad conditioning powers to impose on any approval of the Application, the conditions requested by the GWI Subsidiaries herein.

C. Adverse Effects of the Proposed Transactions

As described in the Statement of Facts, Section B above, as a result of the termination of the joint marketing and haulage arrangements between NS and CP related to the Southern Tier, traffic and the competitive options for the GWI Subsidiaries and their customers will be negatively affected. One result of the transactions is that the portion of the movements being commercially handled by CP today will be split between NS and CP, likely raising the rates and giving NS the opportunity to favor its longer haul route to the detriment of the competing routes in which the GWI Subsidiaries participate.

NS asserts that CP will be terminating its trackage rights agreements because they are "not economically justified." App. at 27. NS argues that CP's withdrawal from the region will strengthen CP and make it better able to compete. No such claims are made in the Application with respect to the proposed termination of the joint marketing and haulage arrangements over the Southern Tier. Indeed, it is hard to see how CP's economics will be improved by the cancellation of the joint marketing and haulage arrangements over the Southern Tier, and the possible loss of the over 2400 carloads identified by the GWI Subsidiaries as being at risk. With haulage, CP is only paying a fixed amount per car when a car is handled for it, and CP has presumably been able to cover the cost in the rate charged to the customer.

In the split of Conrail, the acknowledged adverse effects of splitting what had been a Conrail single line route into one shared between two carriers CSX and NS was largely addressed in the settlement between the parties and the NIT League. However, the Board went beyond the terms of the proposed settlement, and made the provisions of the NITL League settlement applicable to Class III short line connections as well. *CSX/NS/Conrail* at 53, 56.

NS can be expected to argue that the termination of the haulage and joint marketing agreements do not require Board approval, and that the Board acknowledged as much in *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights – In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie and Genesee Counties, NY*, STB Docket No. AB-156 (Sub-No. 25X) (served January 19, 2005) ("*D&H Discontinuance*"). While the termination of haulage rights may not require Board approval, as discussed above, the proposed termination should be considered in the Board's analysis of the competitive impacts of the transactions as the termination is clearly an essential element of the overall transactions and is covered by the APA. As such, the Board can certainly consider the adverse effects of all elements of the transactions under its broad conditioning powers. NS has acknowledged as much by having its expert address the competitive issues related to these changes. App. at 17 fn. 11; Verified Statement of Curtis M. Grimm ("Grimm VS"), Appendix Vol. I. However, Mr. Grimm's analysis did not address all of the potential movements in which the GWI Subsidiaries participate with CP. Moreover, NS's conclusion that there will be no substantial lessening of competitions conspicuously relates only to the acquisition of the D&H South Lines and D&H's discontinuance of trackage rights over NS lines (App. at 16)[12], and does not address the lessening of competitive options for traffic moving over the Southern Tier that will result from the termination of the marketing and haulage agreements for operations east of Buffalo. In fact, NS acknowledges that to the extent there are any competitive effects, they result from the termination of such marketing and haulage agreements. App. at 41.

NS argues that the Board previously found there is substantial competition in this part of the country (App. at 12, 17), and there will still be viable competition in the Northeast after the transactions. Friedmann VS, App. at 71. While this may be true generally, and in particular with respect to traffic moving to and from New England over the D&H South Lines, it is not true with respect to the cancellation of CP's haulage over the Southern Tier which as demonstrated above will have anticompetitive effects on the GWI Subsidiaries and their customers.

[12] NS's claim that there will be no reduction in competitive rail options applies only to shippers on the D&H South Lines. App. at 34.

D. Proposed Conditions

The proposed conditions are set forth in detail at pages 3-4 above. The conditions are similar to the voluntary protections offered by NS to address the loss of competitive options by shippers on the D&H South Lines and by short lines that connect to the D&H South Lines, and the proposed conditions directly address the loss of competitive routings currently available (and used) by shippers on the GWI Subsidiaries. The proposed conditions would merely retain the commercial access to CP that exists today either by having NS and CP, at their option, continue the existing haulage arrangements, or by requiring NS to provide haulage to the GWI Subsidiaries at a reasonable cost and on reasonable conditions to reach CP at Buffalo and Schenectady.[13]

Even if the public benefits outweigh the competitive impacts so that proposed transactions should be approved, that does not mean that the Board should not mitigate anticompctitivc impacts if it can do so without reducing public benefits. In *Decision No. 1,* p. 11, the Board acknowledged that even though it preliminarily found that the public benefits may outweigh the anticompetitive effects of the transactions, it could still condition the transaction to mitigate or eliminate any deleterious effects on regional or national transportation.

NS argues that the competitive effects of significant elements of the transaction (termination of haulage and marketing agreements) are not actionable because they do not require authorization by the Board. While the Board's decision in *D&H Discontinuance* acknowledged that haulage agreements are not subject to Board authorization, it does not say that the haulage is not relevant. Indeed, the Board noted that the haulage arrangements being

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[13] If CP were to retain its haulage rights, it would also need a rate for haulage over the D&H South Lines from Binghamton to Schenectady to supplement the rates in the Direct Short Line Access Agreement.

entered into between NS and CP were part of the mitigation of potential adverse competitive effects of the discontinuance of the trackage rights. *D&H Discontinuance* at 11.[14] Haulage rights over the Southern Tier continue to be necessary to mitigate the anti-competitive effects of the proposed termination of CP's rights to interchange with the GWI Subsidiaries and to handle traffic for their customers.

E. Feasibility of Proposed Conditions

Applying the Transitional Divisions and Routing Agreement to protect shippers served by the GWI Subsidiaries via the Southern Tier that will be losing CP commercial access should not be any more difficult that applying that Agreement to shippers losing CP commercial access on the D&H South Lines.

The implementation of the requested haulage conditions would not require any changes in, or impose any operating burdens on, NS. NS is currently handling the traffic of the GWI Subsidiaries in haulage for CP.[15] With the imposition of the conditions, NS would continue to handle the traffic in haulage service – for either CP, or for the GWI Subsidiary – just as it has been for the past 10 years.[16] Further, NS is currently the only carrier operating over the Southern Tier, and after the transactions, even with the conditions, it would continue to be the only carrier

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14 When CP discontinued its trackage rights, RSR faced not only the loss of its commercial connection with CP, but also the haulage CP had been providing for RSR for traffic moving between Silver Springs and its affiliate BPRR in Buffalo. The haulage that NS has been providing for CP mitigated the loss of the commercial connection. NS also entered into a haulage agreement with RSR (the "2006 Haulage Agreement") under which NS hauls traffic for RSR between Silver Springs and BPRR and Buffalo.

15 With respect to RSR, NS is already providing haulage for RSR between Silver Springs and Buffalo. For that segment, the 2006 Haulage Agreement could be amended to cover haulage to CP as well as to BPRR, and to extend the term to preserve the haulage for a 10-year term as is being offered for short line access on the D&H South Lines.

16 NS's Operating Plan (Application, Vol. I, Ex 15) does not suggest that there will be any changes in operations over the Southern Tier as a result of the termination of the joint marketing and haulage agreements between NS and CP.

operating over the Southern Tier. Thus the conditions would not require any additional scheduling or create any operating inefficiencies.

F. Public Benefits of Proposed Conditions

The requested conditions would preserve the current competitive options for shippers of the GWI Subsidiaries connected to the Southern Tier. At the same time, the conditions would not diminish any of the public benefits of the transactions claimed by NS, all of which all relatc only to the acquisition and operation of the D&H South Lines. *See* App. 19-23, 32-35.

CONCLUSION

For all of the foregoing reasons, the GWI Subsidiaries request that the Board find that BPRR, RSR and WCOR and the shippers that they serve will each be adversely affected by the proposed transactions, and that any order approving the proposed transactions impose the conditions requested by the GWI Subsidiaries as a reasonable means of addressing these adverse cffccts.

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Dated: January 21, 2015

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CERTIFICATE OF SERVICE

I certify that on this 21st day of January, 2015, a copy of the foregoing Comments and Requests for Conditions of "GWI Subsidiaries" was served by first-class mail, postage prepaid, upon each Party of Record designated by the Board in Decision No. 3 as shown in the following list:

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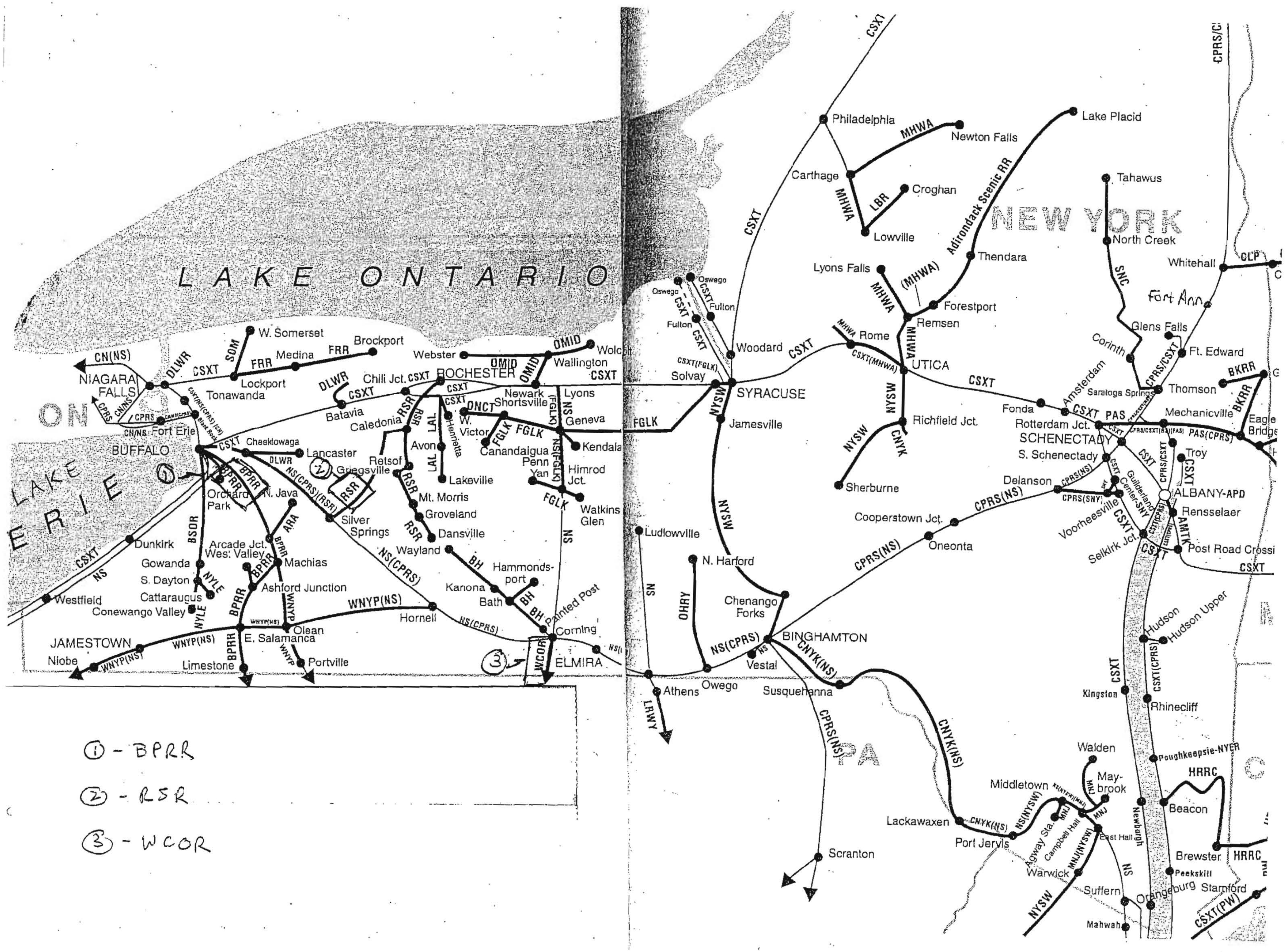
EXHIBIT A

MAP



① - BPRR

② - RSR

③ - WCOR

EXHIBIT B

VERIFIED STATEMENT OF

DAVE EBBRECHT

Before the

SURFACE TRANSPORTATION BOARD

STB Docket No. FD 35873

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

COMMENTS AND REQUESTS FOR CONDITIONS OF "GWI SUBSIDIARIES"

VERIFIED STATEMENT OF DAVE EBBRECHT

My name is Dave Ebbrecht. I am the President of the nine subsidiaries (including seven railroads) owned by Genesee & Wyoming Inc. ("GWI") in the Northeast Region, including Buffalo & Pittsburgh Railroad, Inc. ("BPRR"), Rochester & Southern Railroad, Inc. ("RSR"), and Wellsboro & Corning Railroad, LLC ("WCOR"). I am providing this statement in support of the Comments and Requests for Conditions being submitted on behalf of BPRR, RSR and WCOR (each a "GWI Subsidiary," and collectively, the "GWI Subsidiaries") in this proceeding.

My staff and I have reviewed the transactions proposed in the Application filed by Norfolk Southern Railway Company ("NS") in this proceeding and have concerns that a portion of the transaction will have an adverse competitive effect on each of the GWI Subsidiaries. In particular, the proposed termination by NS and Canadian Pacific Railway Company ("CP")[1] of their joint marketing and haulage agreements for traffic moving over the Southern Tier[2] will affect the competitive options available (i) for traffic moving between CP at Buffalo, NY, and the interchanges with RSR at Silver Springs, NY, and with WCOR at Corning, NY, (ii) for traffic interchanged between RSR and CP at Silver Springs, NY and moving east over Binghamton for further movement over the D&H South Line to Schenectady, and then to destination, and (iii) for traffic interchanged between BPRR and CP in Buffalo and moving between Buffalo and Binghamton for further movement over the D&H South Line to Schenectady, and then to destination. Currently, each of the GWI Subsidiaries interchanges traffic (commercially) with both NS and CP. With respect to WCOR, whose sole connection to the interstate network is at Corning, NY, the termination of the NS-CP haulage will result in the reduction of interchange options from two carriers to one carrier. With respect to all of the GWI Subsidiaries, the termination of the NS-CP haulage, and the substitution of NS for CP in the route, will result in the addition of another carrier to the route, splitting CP's current long haul – likely increasing the cost to the customer making the traffic less competitive.

Attached to this Verified Statement are four exhibits which, as described in more detail below, describe the traffic currently being handled by each GWI Subsidiary in joint commercial service with CP, and which describe the added negative effect on WCOR of a shift of traffic from CP to NS. The exhibits show the origin-destination ("O-D") pairs and commodities for the CP traffic, and the number of carloads handled in 2014. As the origins or destinations served by

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1 References to "CP" include Canadian Pacific Railway Company and its affiliates and subsidiaries, including Delaware and Hudson Railway Company. Inc. ("D&H") which operates commercially, and does business as "Canadian Pacific."

2 The "Southern Tier" refers to the line of railroad of NS between Buffalo, NY and Binghamton, NY.

CP, as the case may be, can change, the exhibits also show O-D pairs for like traffic interchanged with CP during the period 2011 to 2013 for BPRR and RSR, and during 2012 and 2013 for WCOR.

1. BPRR – CP Traffic.

BPRR can physically interchange traffic in Buffalo, NY, with NS, CP and CSX Transportation Inc. ("CSXT").[3] As we understand it, if the Application were approved by the Board, there would be no change in BPRR's physical ability to interchange with CP. However, due to the termination of the joint marketing and haulage agreements relating to traffic moving east of Buffalo, BPRR's ability to commercially interchange traffic with CP will be significantly diminished.

In 2014, BPRR interchanged approximately 1,555 cars with CP. Of those cars, the vast majority moved west from Buffalo, and will not be affected by the proposed transactions. Attached as Exhibit 1, is a table showing the 2014 traffic interchanged between BPRR and CP that moves east of Buffalo through Binghamton.

There is one significant move of almost [redacted] cars in 2014[4] – between Buffalo and Glens Falls, NY – that is currently handled jointly between BPRR and CP that will be adversely affected and likely lost if, as proposed, NS stops providing haulage for CP between Buffalo and Binghamton. This coal move originates on BPRR, is commercially interchanged to CP in Buffalo, and remains in CP's account through delivery to the customer. CP is the only rail carrier that serves the customer at the Glens Falls termination. BPRR physically interchanges

[3] BPRR can also interchange with Canadian National Railway in Buffalo; however, its routes with CN do not offer alternatives to the CP service between Buffalo and Binghamton that will be lost as a result of the proposed transactions.

[4] In prior years the traffic has been as high as [redacted] cars.

this traffic to NS, who handles the traffic in haulage for CP to Binghamton. At Binghamton, NS physically interchanges the traffic to CP who handles the traffic through delivery to the customer in Glens Falls.

BPRR believes that termination of the CP's haulage would cause BPRR to lose the traffic. The traffic could theoretically move either BPRR-Buffalo-NS-Schenectady-CP-Glens Falls (with NS substituting for CP), or BPRR-Buffalo-CSXT-Albany–CP-Glens Falls. Both alternatives involve splitting the existing CP single line route into a joint route.[5] Adding an additional carrier to the commercial or physical route is generally less efficient and drives up the cost to the customer as each carrier will want a return on its service. Moreover, the amount that NS is receiving for haulage is likely to be less than the amount a carrier would charge for participating commercially in the move, as such charges generally include a higher rate of return on the services. Adding an additional carrier to the commercial arrangements of a short-haul move that is only 560 miles long, will likely drive rates too high to compete for the traffic.

Additionally, the primary competitor for this business is NS itself. NS has alternative origins for the coal and could move coal from its origins to Schenectady for interchange to CP for delivery to the customer. NS has the ability to handle the traffic this way today, but the BPRR-CP route / pricing has successfully obtained the business for the almost all of the years since the Conrail split. Post-approval of the transactions, BPRR expects that NS will cause the overall BPRR-NS-CP rate to rise, and that NS will make its longer haul the lower priced option. Losing the traffic would cost BPRR approximately $[redacted] per year based on 2014's traffic volume (and significantly higher if traffic returns to earlier levels). Without the BPRR route, the customer's routing/originations and pricing options will be reduced.

[5] Or if BPRR is considered, making a two-carrier move into a three-carrier move.

BPRR believes that its route could remain competitive if NS were to continue to perform haulage for CP between Buffalo and Binghamton (and over the D&H South Lines between Binghamton and Schenectady), or if NS were required to perform haulage for BPRR between Buffalo and Schenectady (via Binghamton).

2. RSR – CP Traffic.

At Silver Springs, NY, RSR currently interchanges with NS (physically and commercially), and with CP (commercially). RSR also is able to interchange with CSXT at the other end of its lines in Rochester, NY. In 2014, RSR interchanged over [redacted] cars with NS at Silver Springs relating to jointly handled traffic. Notwithstanding the competing routes NS can provide, during 2014, RSR handled over 3,000 cars in joint commercial service with CP. *See* Exhibit 2. Just under one-half of those cars were moved in CP commercial service from the Silver Springs interchange east to Binghamton, and then south over the D&H South Lines to destinations in Pennsylvania. *See* Exhibit 2, "Shipments that will be NS Direct Post-Transaction." If the transactions were approved, CP would no longer be able to serve the destination, and NS would be able to provide single carrier service from Silver Springs to destination. There is no practical opportunity for CP to continue to handle this traffic.

Of the other half of the traffic, over 900 cars originate in Canada or the upper Midwest (almost all on CP), and are handled by CP through Buffalo to RSR in Silver Springs. *See* Exhibit 2, "Shipments moving between Buffalo & Silver Springs." As discussed above, splitting CP's long haul by adding NS to the commercial route will likely raise the prices to the customers and make the routing and traffic less competitive. An alternative route using CSXT as the intermediate carrier between CP in Buffalo and RSR in Rochester would have the same problem of an additional carrier in the route. If these moves were lost, RSR would suffer a loss of revenue of almost $[redacted] based on 2014 traffic, and the customers will have their competitive routing options reduced.

There are also approximately 600 cars that move via CP over Binghamton to other locations served by CP. *See* Exhibit 2, "Shipments moving between Silver Springs and Binghamton." The largest move (almost 600 cars) is a salt move to Fort Ann, NY that CP currently handles commercially all the way from Silver Springs to Fort Ann. CP is the only carrier that has the authority to serve the customer in Fort Ann. The traffic could theoretically move either RSR-Silver Springs-NS-Schenectady-CP-Fort Ann, or RSR-Rochester-CSX-Albany–CP-Fort Ann. Both alternatives involve splitting the CP single line route into a joint route (or a two-carrier to three-carrier move if RSR is considered). As discussed above with respect to BPRR's coal move to Glens Falls, Adding an additional carrier to the commercial or physical route is generally less efficient and drives up the cost to the customer as each carrier will want a return on its service. Moreover, the amount that NS is receiving for haulage is likely to be less than the amount a carrier would charge for participating commercially in the move, as such charges generally include a higher rate of return on the services. Adding an additional carrier to the commercial arrangements of a short-haul move that is only 380 miles long, will likely drive rates too high to compete for the traffic. Based on 2014 volumes, RSR would lose almost $[redacted] in revenue if the move were lost, and the customer's competitive routing options would be reduced.

RSR believes that its route could remain competitive if NS were to continue to perform haulage for CP between Buffalo and Silver Springs, and between Silver Springs and Binghamton (and over the D&H South Lines between Binghamton and Schenectady), or if NS were required to perform haulage for RSR between Silver Springs and Buffalo and between Silver Springs and Schenectady (via Binghamton).

NS already provides haulage for RSR between Silver Springs and Buffalo pursuant to a 2006 Haulage Agreement; however, the haulage is limited to traffic moving between RSR and BPRR's Buffalo Creek Yard, and while the term [redacted], NS (or RSR) can terminate at the end of any term by [redacted].[6] Haulage under the 2006 Haulage Agreement would be a reasonable substitute for the current CP haulage between Silver Springs and Buffalo, if the agreement were amended to cover cars moving to CP in Buffalo, and if the term were extended for a significant period like the 10 year term of the Direct Short Line Access Agreement proposed by NS and CP.

3. WCOR- CP Traffic.

WCOR's only connection to the interstate rail network is at Corning, NY. At Corning, WCOR interchanges physically and commercially with NS. Because of the CP haulage rights over the Southern Tier, WCOR also has commercial access to CP at Corning. Upon the termination of the CP haulage rights, WCOR and its customers will go from having connections with two long-haul carriers to just one.

WCOR moved over 500 cars with CP in 2014, all of it being handled over Buffalo. *See* Exhibit 3. Of these, the large majority of the moves were frac sand. (WCOR also moved frac sand with NS.) Having both CP and NS routes available provides competitive alternatives to

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[6] The 2006 Haulage Agreement was entered into following the CP termination of its trackage rights over the Southern Tier. Prior to the termination, CP and RSR interchanged joint traffic in Silver Springs, and CP also hauled cars between RSR and BPRR in Buffalo. After the termination, NS entered into haulage arrangements with CP for handling the RSR-CP joint traffic, and NS entered into the 2006 Haulage Agreement with RSR for the handling of the RSR-BPRR traffic.

WCOR's customers in terms of origins and pricing. WCOR believes that if NS were substituted for the CP, NS would have the ability to make the CP routes less competitive reducing the available options for WCOR's customers. WCOR has also been handling with CP carloads of nepheline syenite and soybean meal originating in Canada and the upper Midwest. While the traffic may not be lost, it is likely to become more expensive for the customer if CP's long haul route is split, and NS is added to the commercial route.

Another concern for WCOR arises from the different relationships that WCOR has with NS ad CP. WCOR a "handling line carrier" with NS meaning it gets a fixed division depending on the commodity as set forth in its handling line agreement with NS. With CP, WCOR has negotiated switching rates depending on the commodity. *See* Exhibit 4. WCOR is concerned 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. The reduction would be over $[redacted] on the frac sand moves alone.

WCOR believes that its routes with CP could remain competitive if NS were to continue to perform haulage for CP between Corning and Buffalo, or if NS were required to perform haulage for WCOR between Corning and Buffalo.

VERIFICATION

I, Dave Ebbrecht, verify under penalty of perjury that that the information included in the foregoing Statement is true and correct to the best of my knowledge and belief. Further, I am qualified and authorized to make this verification on behalf of Buffalo & Pittsburgh Railroad, Inc., Rochester & Southern Railroad, Inc. and Wellsboro & Corning Railroad, LLC.

Executed on: January 21, 2015

Dave Ebbrecht
President, Buffalo & Pittsburgh Railroad, Inc., Rochester & Southern Railroad, Inc. and Wellsboro & Corning Railroad, LLC

EXHIBIT 1

BPRR-CP TRAFFIC

Northeast Region

"Public Version"

Buffalo & Pittsburgh Railroad, Inc.

2014 Carloads with CPRS Between Buffalo & Binghamton

Route	Origin City, St/Prov	Destination City, St/ Prov	STCC Description	2014 Road Carload Count
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Shipments moving between Buffalo & "Binghamton"				[redacted]

EXHIBIT 2

RSR-CP TRAFFIC

Northeast Region

"Public Version"

Rochester & Southern Railroad

2014 Carloads / Revenue with CPRS

				2014
Route	Origin City, St/Prov	Destination City, St/ Prov	STCC Description	Road Carload Count
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

Shipments moving between Buffalo & Silver Springs [redacted]

[redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
		[redacted]	[redacted]	[redacted]
		[redacted]	[redacted]	[redacted]
Shipments moving between Silver Springs & "Binghamton"				[redacted]

[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Shipments that will be NS Direct Post-Transaction				[redacted]

EXHIBIT 3

WCOR-CP TRAFFIC

Northeast Region

Wellsboro & Corning Railroad

" Public Version"

2014 Carloads / Revenue with CPRS

					2014
Route	Customer Name	Origin City, St/Prov	Destination City, St/ Prov	STCC Description	Road Carload Count
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

[redacted]

Shipments moving between Buffalo & Corning [redacted]

EXHIBIT 4

COMPARISON OF CP AND NS FEES PAID TO WCOR

WCOR Rate Profile
2014 Comparison of Revenue per car

"Public Version"

Commodity	CPRS Rate	NS Rate
Sand	[redacted]	[redacted]
All Other Commodities	[redacted]	[redacted]
Soybean Meal	[redacted]	[redacted]
Soybean Meal	[redacted]	[redacted]
Nepheline Syenite	[redacted]	[redacted]
Fertilizer	[redacted]	[redacted]
Clay	[redacted]	[redacted]
Logs	[redacted]	[redacted]
Pipe	[redacted]	[redacted]
Grain	[redacted]	[redacted]
Soda Ash	[redacted]	[redacted]
Plastic Resin	[redacted]	[redacted]
Limestone	[redacted]	[redacted]
Brine Water	[redacted]	[redacted]
Waste Soil	[redacted]	[redacted]
Cement	[redacted]	[redacted]