

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35348

CSX TRANSPORTATION, INC. & DELAWARE AND HUDSON
RAILWAY COMPANY, INC - JOINT USE AGREEMENT



APPLICANTS' RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS
AND REBUTTAL IN SUPPORT OF APPLICATION

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Terence M. Hynes
Jeffrey S. Berlin
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
202-736-8000

*Attorneys for Delaware and Hudson
Railway Company, Inc.*

Peter J. Shultz
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street J-150
Jacksonville, Florida 32202
904-359-1229

Louis E. Gitomer, Esq.
Melanie B. Yasbin, Esq.
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, Maryland 21204
410-296-2250
Lou_Gitomer@verizon.net

Attorneys for CSX Transportation, Inc.

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VERIFIED STATEMENTS:

Jim Stauch
Peter J. Deering
Steven A. Potter

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Pursuant to Decision No. 2 in this proceeding, CSX Transportation, Inc. ("CSXT") and Delaware and Hudson Railway Company, Inc. ("D&H") (referred to collectively hereinafter as "Applicants") respectfully submit this Response and Rebuttal in support of their Application for approval from the Surface Transportation Board (the "Board") for the parties' Joint Use Agreement. This Response and Rebuttal is accompanied by the Rebuttal Verified Statements of D&H witnesses Peter Deering and Jim Stauch, and CSXT witness Steven A. Potter.

CSXT and D&H have entered into a Joint Use Agreement that will enhance competition and increase efficiency. No evidence has been presented in this proceeding demonstrating that the proposed transaction is anticompetitive or that it would not enhance the efficiency of rail service in the New York City- Rouses Point corridor. Accordingly, pursuant to the governing statute and precedent, the Board must approve the Application.

In this proceeding, Applicants seek authority pursuant to 49 U.S.C. § 11323(a)(6) for CSXT and D&H to commence operations pursuant to that certain New York Joint Use Agreement dated as of December 1, 2009 (the "Joint Use Agreement"). Several parties submitted comments supporting or opposing the transaction and in some cases requesting that the Board impose particular conditions. Those comments and requested conditions are addressed

below. At the outset, however, it is worth noting what has not been filed. No current shipper opposes the proposed transaction. No governmental entity opposes the proposed transaction – to the contrary the New York City Economic Development Corporation (“NYCEDC”) wholeheartedly endorses it, and the New York State Department of Transportation (“NYDOT”) recommends approval of the proposed transaction subject only to a three-year monitoring condition and the Board’s customary labor protective conditions. Neither Amtrak nor Metro North Commuter Railroad (“MNCR”) has intervened as a party to this proceeding, nor have they expressed any concern that implementation of the proposed transaction would interfere with their passenger operations on lines involved in the proposed joint use arrangement. As demonstrated below, no party produced a shred of credible evidence that the transaction will have any anticompetitive effects.

The absence of opposition from shippers, and of any substantiated evidence of anticompetitive effects, is not surprising. Applicants have demonstrated that “[n]o shipper will lose a competitive option as a result of the proposed transaction.” Application at 7. The Joint Use Agreement does not affect D&H’s right – and common carrier obligation – to serve every customer in the New York metropolitan area that it can serve today, nor does it affect CSXT’s right and common carrier obligation to serve its customers, including local customers on the Massena Line. *Id.* Rather than harming competition, the Joint Use Agreement will enhance both intermodal and intramodal competition by improving D&H’s competitive capabilities for traffic moving to and from the New York City metropolitan area and CSXT’s efficiency for shipments to and from Eastern Canada.

Certain parties have asked the Board to impose conditions on its approval of the proposed transaction. The requested conditions have no nexus to any demonstrable impact (competitive or

otherwise) of the proposed Joint Use Agreement. The conditions requested by New York & Atlantic Railway Company (“NYA”) and Sills Road Materials, LLC (“Sills Road”), a hypothetical future receiver of crushed stone, are nothing more than naked attempts to exploit this proceeding to improve their commercial position vis-à-vis D&H. None of the requested conditions satisfies the Board’s well-established standards for imposing conditions on a Section 11324(d) transaction. For the reasons discussed below, no conditions other than standard employee protective conditions are warranted.

Section I of Applicants’ Response and Rebuttal addresses the Board’s standards for approving minor transactions like this one, and the reasons why the Joint Use Agreement should be approved. The Board has recognized that it must approve a transaction governed by 49 U.S.C. § 11324(d) unless the transaction would result in “likely” and “substantial” adverse competitive impacts that outweigh the benefits of the transaction and cannot be ameliorated through conditions. Here, the record evidence does not suggest that the proposed transaction would produce any anticompetitive effects, let alone effects that are both “likely” and “substantial.” Section II addresses the specific comments and condition requests submitted by various parties, and demonstrates that no conditions other than standard *Norfolk and Western* employee protective conditions are appropriate.¹

I. THE PROPOSED TRANSACTION SHOULD BE APPROVED

A. Standards For Approval Of This Transaction And Requests For Conditions

Because the proposed Joint Use Agreement does not involve the merger or control of two or more Class I railroads, the Board’s analysis in this proceeding is governed by 49 U.S.C.

¹ See *Norfolk and Western Ry. Co.—Trackage Rights—Burlington No.*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

§ 11324(d).² Under Section 11324(d), the Board must approve the transaction unless it finds both that: (1) the transaction is likely to 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 (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs. *See Canadian Pacific Ry. Co.—Dakota, Minn. & E. R.R. Corp.*, STB Fin. Docket No. 35081, Decision No. 11, at 8 (Sept. 30, 2008) (“CP/DM&E”), *aff’d sub nom. Commuter Rail Div. of Regional Transp. Auth. v. STB*, 2010 WL 2363214 (D.C. Cir. June 15, 2010). In a proceeding governed by Section 11324(d), the Board “must grant the application unless there will be adverse competitive impacts that are both ‘likely’ and ‘substantial.’” *Indiana R.R. Co. – Acquisition – Soo Line R.R. Co.*, STB Finance Docket No. 34783, Decision No. 4, at 4 (Apr. 6, 2006). Indeed, even if such “likely” and “substantial” anticompetitive effects are found to exist, the Board may not disapprove the transaction “unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions (which the Board has broad authority to impose under 49 U.S.C. 11324(c)).” *Canadian Nat’l Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co., and the Pittsburgh and Conneaut Dock Co.*, 7 S.T.B. 526, 538 (2004).³

The Board has long maintained a policy against burdening transactions with conditions unless they are necessary either to ameliorate anticompetitive impacts of a transaction or to

² The Board has already held that this is a minor transaction. *See* Decision No. 2 at 7.

³ *See also Fortress Inv. Group, LLC – Control – Fla. E. Coast Ry. LLC*, STB Finance Docket No. 35031, slip op. at 4 (Sept. 28, 2007) (“even if there will be likely and substantial anticompetitive impacts, we may not disapprove the transaction unless the anticompetitive impacts outweigh the benefits and cannot be mitigated through conditions”); *Kansas City Southern – Control – The Kansas City Southern Ry. Co., Gateway Eastern Ry. Co., and the Texas Mexican Ry. Co.*, 7 S.T.B. 933, 947 (2004); *Canadian Nat’l Ry. Co. – Control – Wis. Cent. Transp. Corp., et. al.*, 5 S.T.B. 890, 899 (2001).

protect essential services. *See Grainbelt Corp. v. STB*, 109 F.3d 794, 796 (D.C. Cir. 1997); *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 302 & n.8 (D.C. Cir. 1983). The Board will impose a condition only where: (1) a transaction threatens harm to the public interest, such as a significant reduction in competition, (2) the condition is related to, and would ameliorate or eliminate, that harm, (3) it is operationally feasible, and (4) the condition would result in greater benefit to the public than detriment to the transaction. *Grainbelt Corp.*, 109 F.3d at 796; *Union Pac. Corp. – Control – Mo. Pac. Corp.*, 366 I.C.C. 462, 562-65 (1982); *see also Wisc. Cent. Transp. Corp. – Continuance in Control – Fox Valley & W. Ltd.*, 9 I.C.C.2d 233, 239 (1992).

The Board's prior decisions make clear that it will not impose conditions "designed simply to put its proponent in a better position than it occupied before the consolidation." *Canadian Nat'l Ry. – Control – Ill. Cent. Corp* ("CN/IC"), 4 S.T.B. 122, 141 (1999). The Board has also declined to impose conditions where "parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales." *CSX Corp., Norfolk So. Corp. – Control & Operating Leases – Conrail, Inc.*, 3 S.T.B. 196, 297 (1998).

B. The Proposed Transaction Is Pro-Competitive.

Under the standards outlined above, the Board must approve the Application. The record in this case demonstrates that the proposed transaction will have no adverse competitive impacts – let alone "likely" or "substantial" ones. The Joint Use Agreement involves only the handling of overhead traffic within a single state (New York). *See* Application at 16. It does not affect D&H's right to serve all the customers in the New York City area that it currently has the right to serve under the trackage rights and switching arrangements that it obtained through the *Conrail*

proceeding.⁴ Likewise, if the agreement is approved, CSXT will continue to serve all shippers on the Massena Line and all shippers between Albany Port, NY and New York City, NY that it serves today. In short, the number of railroads serving any shipper will not be reduced, and no shipper will lose a competitive rail option, as a result of the proposed transaction.

Far from being anticompetitive, the proposed transaction will significantly enhance competition in the north-south rail corridor served by the Joint Use Lines by helping both D&H and CSXT to become more efficient and effective competitors with each other, with other rail carriers, and with ever-present truck and barge carriers. D&H has presented evidence that its low traffic volumes require it to operate low density trains in the Albany – New York City corridor, depriving D&H of economies of density and rendering its service less cost-competitive. *See* Application, V.S. Craig at 3, 4-5; Reb. V.S. Stauch at 7-9. Moreover, D&H's inability to offer daily service between Albany and New York City has seriously hampered its ability to compete successfully for traffic in that corridor. *See* Application, V.S. Craig at 3-5; Reb. V.S. Stauch at 9. The proposed Joint Use Agreement will eliminate those impediments and position D&H to compete more effectively for traffic moving between the New York City metropolitan area and points to the north. *See id.*

From CSXT's perspective, access to D&H's Albany – Saratoga Springs and Saratoga Springs – Rouses Point Segments will improve CSXT's competitive capabilities by eliminating the circuitry in CSXT's current interline route with CN for rail traffic moving between the Eastern United States and Eastern Canada. Each CSXT train will travel 142 fewer miles and its time on the road will be decreased by 13 hours between Selkirk Yard and Montreal. *See* Application, V.S. Potter at 2-4; Reb. V.S. Potter at 2. The faster transit time and lower costs

⁴ *See CSX Corp. et al. – Control – Conrail Inc., et al.*, 3 S.T.B. 196, 282-83 (1998).

made possible by the Joint Use Agreement will enhance CSXT's ability to compete for cross-border rail shipments. *See* Application, V.S. Potter at 5-6; Reb. V.S. Potter at 6-7.

The proposed transaction will generate significant environmental benefits as well. Applicants project that the more efficient operations made possible by the transaction will save more than 1,000,000 gallons of fuel annually. Transporting CSXT Joint Use Traffic via the Joint Use Lines will reduce the number of public and private at-grade crossings encountered by trains carrying that traffic from 486 (on the Massena Line) to 251 (on the Albany- Saratoga Springs and Saratoga Springs – Rouses Point Segments). Eliminating separate D&H train operations between Albany and Fresh Pond will produce a net reduction in the overall number of freight trains operated by Applicants in New York State, and reduce the potential for interference with passenger train operations in the busy Albany – New York City corridor. *See* CSXT/ D&H Environmental Comments at 5 (filed July 21, 2010).

Applicants are not the only parties to recognize that the Joint Use Agreement will enhance competition. NYCEDC, which historically has been a strong advocate for increasing the transportation options available to the New York City metropolitan area, agrees that the proposed transaction would “result in improved transportation alternatives for the shipping public in the City of New York.” NYCEDC Comments at 3. NYCEDC submitted an expert analysis of the transaction that found that the proposed joint use arrangement “has potentially positive outcomes for both Applicants as well as for the shippers and receivers in Queens and Brooklyn and on Long Island.” *Id.*, V.S. Harder at ¶ 4. NYCEDC's expert concluded that the Joint Use Agreement would reduce costs for both CSXT and D&H, and that “[t]hese benefits to the two carriers are expected to translate into benefits for the shipping/receiving public in the New York City market. The gains the Applicants will experience should lead to improved rail

service and increased cost-competitiveness vis-à-vis trucks as well as vis-à-vis other rail movements serving the same northern and eastern U.S. end points.” *Id.* at ¶ 7. The recognition of the pro-competitive benefits of the Joint Use Agreement by this public agency is compelling evidence that the proposed transaction will enhance competition and should be approved.

The New York State Department of Transportation (“NYDOT”) echoed NYCEDC’s sentiments in its comments supporting the transaction. NYDOT recognized that D&H’s proposed new rights on the Albany-Fresh Pond Segment “provide[] an opportunity for enhanced competition in the corridor and is consistent with the Board’s decision in *Conrail* granting Canadian Pacific Railway (of whom D&H is a wholly owned subsidiary) access to the ‘East-of-Hudson’ market.” NYDOT Comments at 3. While NYDOT asks the Board to monitor the possible impact of the Joint Use Agreement on Amtrak passenger service along the Saratoga Springs – Rouses Point Segment and freight service on CSXT’s Massena Line,⁵ it supports approval of the transaction and recognizes that it satisfies the standards for approval under § 11324(d). *See id.* at 7-8.

It bears repeating that no current shipper opposes the transaction or claims that it would have anticompetitive effects. *See Norfolk So. Ry. Co.—Consolidation of Operations—CSX Transp., Inc.*, ICC Finance Docket No. 32299, available at 1993 WL 484294 (Nov. 26, 1993) (“A significant indication that the transaction is unlikely to harm competition at common points served by applicants is that no customer has objected to applicants’ proposal.”). The only existing shipper to comment in this proceeding – Pallette Stone Corp. (“Pallette Stone”), a D&H-served shipper of crushed stone – supports the transaction.⁶

⁵ NYDOT’s requested monitoring condition is addressed below in Section II.C.

⁶ On June 18, 2010, Pallette Stone submitted a letter to the Board that posed certain questions

C. UTU-NY's Unsubstantiated Allegation That the Joint Use Agreement Would Be Anticompetitive Should Be Rejected.

Notwithstanding compelling record evidence that the proposed transaction will have no anticompetitive effects – evidence that led both governmental entities that have participated in this proceeding to support the transaction – the United Transportation Union-New York State Legislative Board (“UTU-NY”) argues that the Joint Use Agreement would harm competition. UTU-NY alleges that the Joint Use Agreement involves “anticompetitive activities,” but it provides no evidence whatsoever to support that assertion – indeed, UTU-NY does not even explain what it means by “anticompetitive activities.” UTU-NY Comments at 2. Instead, UTU-NY suggested that evidence of such “adverse effects” would be “illustrated by other parties.” *Id.* at 3. But no other party submitted evidence of any “anticompetitive activities” or argued that the proposed transaction would result in a substantial lessening of competition. To the contrary, the uncontroverted record evidence demonstrates that the proposed transaction will promote competition.

UTU-NY witness Nasca asserts that the Joint Use Agreement is “highly anticompetitive” simply because it would allow CSXT to use a “combined single route” (D&H’s Saratoga Springs – Rouses Point Segment) that is already used by D&H, NS and Canadian National Railway Company (“CN”). UTU-NY Comments, V.S. Nasca at 3. There is nothing at all “anticompetitive” about providing CSXT access to D&H’s efficient north-south line between upstate New York and Montreal. On the contrary, shared use of that efficient route “levels the

regarding the “logistical ramifications” of implementing the Joint Use Agreement. *See* Letter from J. Davidson, Vice President Pallette Stone Corp. (filed June 18, 2010). That letter did not raise any competitive concerns regarding the proposed transaction. In a subsequent letter filed on July 21, 2010, Pallette advised the Board that “our concerns have been addressed and resolved by the D&H” and that “[Pallette Stone] is in support of the application.” *See* Reb. V.S. Deering, Attachment 5.

playing field” among the carriers serving the corridor and promotes more vigorous competition based upon price and service. *See* Reb. V.S. Potter at 7. In short, UTU’s unsupported allegations are plainly insufficient to demonstrate “adverse competitive impacts that are both ‘likely’ and ‘substantial.’” *Indiana R.R. Co. – Acquisition – Soo Line R.R. Co.*, STB Finance Docket No. 34783, Decision No. 4, at 4 (Apr. 6, 2006).

* * * * *

In sum, the proposed transaction will not generate any anticompetitive effects. Under § 11324(d), therefore, the Board must approve the proposed transaction, subject to the statutorily-required labor protective conditions. As demonstrated below, none of the additional conditions requested by parties are warranted.

II. RESPONSE TO COMMENTS AND REQUESTS FOR CONDITIONS

A. NYA’s Request That The Board Impose A Condition Freezing Contract Rates and Revenue Divisions Should Be Rejected.

NYA asks the Board to impose an extraordinary condition on its approval of the proposed transaction: a “freeze” on the { } rate for certain aggregate (crushed stone) shipments handled by D&H and NYA on an interline basis, and an accompanying “freeze” of NYA’s current revenue division for those shipments, for a period of five years. *See* NYA Comments at 15-16. According to NYA, the Joint Use Agreement will “jeopardize” the future movement of crushed stone from D&H-served origins at Comstock and Saratoga Springs, NY to NYA-served destinations on Long Island. *See id.* at 12, 14. Specifically, NYA asserts that the proposed transaction may cause D&H to “lose interest” in that traffic and choose to “exit the market” by increasing rates to the point that D&H and NYA both lose the business. *See id.* at 13. NYA’s request is unsupported, and should be rejected for a host of reasons.

In the first place, NYA’s blatant attempt to gain a commercial advantage by locking in its existing favorable revenue divisions arrangement with D&H does not come close to satisfying the Board’s standards for imposing conditions. NYA’s proposed condition is not necessary to remedy any competitive harm likely to result from the proposed transaction or otherwise to protect the public interest. Indeed, NYA does not even attempt to demonstrate that the proposed transaction is anticompetitive – NYA itself acknowledges that multiple competitive options exist for crushed stone traffic moving to Long Island, and characterizes that traffic as “rate constrained.” (NYA Comments at 6-7.) Instead, NYA’s request is premised on the notion that “[t]his traffic flow is very important to NYA” and that “NYA can ill afford to lose this piece of business.” (NYA Comments at 7.)

The Board has made clear that it will not consider conditions like NYA’s that are designed solely to rewrite contractual arrangements or to place a party in a better position than it occupied before the transaction. Nor does the Board use its conditioning authority to guarantee a party a continued level of traffic or revenue (as NYA asks it to do here). NYA’s hypothesis that D&H may be planning to “walk away” from crushed stone traffic is not supported by the facts, and is not credible in light of D&H’s common carrier obligation. Finally, the traffic at issue is {

} Reb. V.S. Deering at 6-8. There is no justification for the Board to interfere with the parties’ market-based negotiations by “freezing” either the through rate for the subject crushed stone shipments, or the manner in which the carriers divide the revenues generated by that traffic.

1. NYA's Requested Condition Is Not Necessary to Remedy Any Anticompetitive Effect Of The Proposed Transaction.

NYA's Comments are devoid of any citation to STB or ICC authority supporting its requested condition. That is not surprising. The Board imposes conditions to ameliorate significant harm to the public interest, such as a substantial reduction in competition. *Grainbelt Corp.*, 109 F.3d at 796. NYA does not demonstrate – nor could it – that the proposed transaction would result in a lessening of competition for crushed stone traffic (or, for that matter, any other commodity moving to or from the New York City metropolitan area). Indeed, crushed stone shipments to Long Island destinations are subject to robust competition from barges, trucks and rail carriers other than Applicants.

The business of transporting crushed stone to points in New York City and Long Island is highly competitive – a fact that NYA itself acknowledges. NYA Comments at 7. Crushed stone is a low-value, fungible commodity that is available from a variety of sources throughout New York and Connecticut, and receivers of crushed stone in New York City and Long Island have many sourcing and transportation options. *See* Reb. V.S. Deering at 2. D&H and NYA face intense intermodal and intramodal competition for crushed stone shipments to Long Island and New York City – indeed, the D&H/NYA interline route accounts for only a small fraction of that traffic. *Id.*

As explained in the Verified Statement of Peter Deering, Account Manager – Mines, Metals & Aggregates for D&H, the { } cars of crushed stone (at about 100 tons per car) that D&H transported in conjunction with NYA during 2009 represents a very small percentage of total crushed stone deliveries to Long Island during that year. *See id.* at 2-3. Barge is by far the dominant mode of transportation for aggregate shipments to Long Island and New York City. *See id.* at 3. Tilcon Connecticut, Inc., a major producer of crushed stone, has its own fleet of 250

aggregate barges and 11 tugboats. *See id.* Tilcon delivers more than 6 million tons of crushed stone by water each year to Long Island and New York City. *See id.* These shipments dwarf the much smaller volumes of crushed stone that move to Long Island by rail. *See id.*

D&H faces competition for crushed stone shipments to Long Island not only from barge operators, but also from alternate rail routes involving NYA. Indeed, the majority of the crushed stone transported to Long Island via rail is not handled by D&H. *See id.* at 4-5. While the volume of crushed stone traffic moving via the D&H/NYA interline route has grown modestly in recent years, { } carloads in 2007 to { } carloads in 2008 and { } carloads in 2009, a significantly larger volume of crushed stone moves to Long Island by rail via the Providence and Worcester Railroad Company (“P&W”) in conjunction with the NYA. *Id.* at 4. The volume of P&W/NYA crushed stone traffic has grown from { } carloads in 2007 to { } carloads in 2008 and { } carloads in 2009. *See id.*; V.S. Potter at 8. {

} *See* Reb. V.S.

Deering at 4. NYA’s Comments, which give the impression that NYA is somehow dependent upon D&H for crushed stone traffic, conveniently ignore this direct rail competitive option.⁷

The potential rail transportation options for crushed stone do not stop there. NYA interchanges rail traffic daily with CSXT at Fresh Pond, NY, and has interchange connections with both CSXT and Norfolk Southern Railway Company (“NS”) at Bay Ridge in Brooklyn (via the cross harbor ferry service operated by New York New Jersey Rail, LLC between Greenville,

⁷ NYA’s assertion that “stone moving to Long Island, other than the Stone Traffic, is handled by truck or barge” is obviously not true. NYA Comments at 7.

NJ and Bay Ridge). *See id.* at 5. These interchange connections provide additional rail routing options for shippers desiring to deliver aggregate to points on Long Island. And of course truck service, either via transload facilities or direct from the quarry, is available to aggregate shippers in the region. *See id.* at 5.

In short, shippers and receivers of crushed stone enjoy a multitude of competitive options, including rail routings involving carriers other than D&H, for the transportation of crushed stone to points on Long Island and in New York City. The shipments handled by D&H in conjunction with NYA account for only a tiny fraction of the crushed stone that moves to Long Island annually. The proposed transaction plainly does not threaten any harm to this robust competitive environment – on the contrary, it will strengthen competition, and potentially enable D&H and NYA to secure a larger share of this business, by reducing D&H’s operating costs and increasing the frequency of D&H’s train service. Indeed, Pallette Stone, the sole shipper of crushed stone traffic that moves via the D&H/NYA route, states that “[w]e are confident that traffic service will improve” as a result of the proposed Joint Use Agreement, and that the transaction will “create efficiencies which are expected to create a win-win for both D&H as well as for [Pallette Stone].” *See* Reb. V.S. Deering at 9-11 and Attachment 5.

NYA’s failure to present proof of any anticompetitive effect is alone grounds for rejecting its request for a condition.

2. NYA’s Requested Condition Is Utterly Inconsistent With The Board’s Precedents.

The Board, like the ICC before it, has a longstanding policy against granting conditions like NYA’s proposed “freeze” of rates and divisions. NYA’s requested condition would violate at least four separate agency policies:

- The Board does not impose conditions designed solely to put the proponent in a better position than it occupied before the transaction.⁸
- The Board does not impose conditions designed to ensure a particular level of revenue for the proponent.⁹
- The Board does not impose conditions designed to alter preexisting agreements.¹⁰
- The Board will not entertain a request to modify revenue divisions in a Section 11323 proceeding.¹¹

NYA's request for a Board-imposed extension of its current contractual revenue divisions arrangement with D&H is reminiscent of similar attempts in prior consolidation cases to persuade the Board to impose conditions that would alter a preexisting contract for one party's benefit. For example, in *CP/DM&E, Kansas City Southern* ("KCS") requested conditions that would extend the term of certain preexisting agreements between KCS and the Iowa, Chicago and Eastern ("IC&E"). The Board held that:

We will not grant the relief sought by KCS. The Chicago Agreement and the Grain Agreement are pre-existing agreements that were voluntarily bargained for by KCS well before the proposed transaction; they were not

⁸ *CP/DM&E* at 12 ("We do not impose conditions designed to put the proponent in a better position than it occupied before the consolidation."); *see also Canadian Nat'l—Control—Illinois Central*, 4 S.T.B. 122, 141 (1999) ("[A] condition should . . . be tailored to remedy adverse effects of a transaction, and should not be designed simply to put its proponent in a better position than it occupied before the consolidation."); *Union Pacific—Merger—Southern Pacific*, 1 S.T.B. 233, 419 (1996) ("We will not ordinarily impose a condition that would put its proponent in a better position than it occupied before the consolidation.").

⁹ *CP/DM&E* at 15 n.25 ("It is not the Board's responsibility to ensure a particular level of revenue").

¹⁰ *CP/DM&E* at 12 (refusing to impose condition to extend "preexisting agreements . . . beyond [their] expiration date"); *id.* at 15 (refusing to impose conditions "seek[ing] material changes to (or extensions of) existing agreements"); *CSX Corp., Norfolk Southern Corp. — Control & Operating Leases—Conrail, Inc.*, 3 S.T.B. 196, 297 (1998) (Board has declined to impose conditions where "parties seek material changes to, or extensions of, existing contracts, or to compel new contractual commitments or property sales").

¹¹ *See CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Indus., Inc.*, 360 I.C.C. 610, 614 (1979).

imposed by the Board. . . . To enforce either agreement beyond its current expiration date would certainly benefit KCS by protecting its economic interests for longer than it has otherwise bargained for, but that is not our charge under 49 U.S.C. 11324. We do not impose conditions designed to put the proponent in a better position than it occupied before the consolidation.

Id. at 12 (emphasis added). Similarly, NYA’s request that the Board effectively extend the term of the current { } by mandating that the rates and divisions for that traffic remain in place for five years is a transparent attempt to obtain via administrative fiat more than NYA has bargained for. Indeed, in *CP/DM&E*, KCS at least argued (wrongly) that its requested condition was necessary to remedy a perceived anticompetitive effect of the transaction. Here, NYA does not even attempt to make such a showing – instead it claims that it should be afforded protection solely because crushed stone traffic is “very important to NYA” (NYA Comments at 14) and “NYA can ill afford to lose this piece of business” (*id.* at 7).¹² NYA’s mere desire to retain the crushed stone traffic that it handles in conjunction with D&H on economic terms that it views as favorable is not sufficient to justify the extraordinary and self-serving condition it seeks.

3. NYA’s Suggestion That The Joint Use Agreement Sets The Stage For D&H To Exit The New York City Market Is Nonsense.

The premise underlying NYA’s requested condition – that the proposed transaction would enable D&H to exit the Albany – New York City corridor “without a regulatory proceeding” – is nonsense. NYA Comments at 6. D&H has a common carrier obligation to serve the customers that D&H can access pursuant to the trackage rights it obtained in *Conrail*. See 49 U.S.C. § 11101(a). As a result of that obligation, D&H “may not refuse to provide

¹² Despite NYA’s claims regarding the “importance” of the stone traffic to NYA’s business, it admits that the stone traffic constitutes { } of its annual revenue. See NYA Comments at 7.

service merely because to do so would be inconvenient or unprofitable.” *Common Carrier Obligation of Railroads*, STB Ex Parte No. 677, at 1 (quoting *G.S. Roofing Prods. Co. v. STB*, 143 F.3d 387, 391 (8th Cir. 1998)). D&H is required by law to accept the crushed stone traffic that it currently handles in conjunction with NYA (and any other traffic tendered to it for movement in the corridor). NYA’s allegation that D&H might simply “walk away” from the Albany – New York City corridor is not credible – D&H cannot do so without obtaining prior STB authorization to discontinue its service. In fact, approval of the Joint Use Agreement will serve only to strengthen D&H’s obligation to provide service to the New York City area. If the Joint Use Agreement is approved, D&H could not “walk away” without obtaining authority to discontinue both its existing trackage rights and also the rights that it obtains under the Joint Use Agreement.

NYA’s suggestion that D&H might be able to “exit” the market by raising through rates for stone traffic is similarly misguided. D&H does not have unfettered discretion to raise rates. If a crushed stone shipper believes that the rates quoted by D&H for its traffic are unreasonably high, it can seek relief from the Board (or simply exercise one of the many competitive alternatives available to it).

NYA’s assertions that D&H is not “interested” in the New York metropolitan area, and that D&H has not aggressively tried to develop business in that corridor, are simply not true. (NYA Comments at 14.) The only evidence that NYA offers in support of this hypothesis is the fact that the volume of certain commodities interchanged between D&H and NYA have declined during the past several years. *Id.* at 7-8. But such a decline is certainly not a unique circumstance; on the contrary, the recent economic recession affected all rail carriers during 2008 and 2009. Furthermore, despite the recession, shipments of both crushed stone traffic and

chemicals (including plastics and liquefied petroleum gas) interchanged between D&H and NYA increased during that period. *See* Reb. V.S. Stauch at 4. Indeed, if all commodities are taken into account, the overall volume of traffic delivered by D&H to NYA at Fresh Pond grew by { }, from { } carloads in 2007 to { } carloads in 2009. *See id.*

NYA's further claim that "D&H has not marketed aggressively" its Albany – New York City service (NYA Comments at 14) is likewise demonstrably false. As discussed in the testimony of D&H witness Stauch, D&H has actively pursued marketing initiatives involving a wide range of commodities in an effort to attract additional rail traffic to its Albany – New York City service. *See* Reb. V.S. Stauch at 4-7. Those efforts have often been stymied by the unreasonable revenue divisions that NYA routinely insists upon to participate in interline movements with D&H. As the self-styled "exclusive provider of rail freight service in Nassau and Suffolk Counties, NY" (NYA Comments at 2), NYA exploits its position to extract very favorable divisions arrangements on rail traffic moving to and from Long Island.

For example, in 2009, D&H studied the potential for { }¹³ *See* Reb. V.S. Stauch at 5. D&H's study identified a total rail traffic potential of approximately { } per year, and D&H discussed with NYA { } to handle the traffic. However, this initiative stalled, in part because of NYA's disproportionately high revenue requirements. While CPR and D&H quoted a revenue requirement of { } per car, or { } per car-mile, for the 1,240.3-mile line haul movement from Chicago to Fresh Pond, NYA insisted upon a revenue division of { } per car, or { } per car-mile, to

¹³ D&H produced that study in discovery to NYCEDC. Interestingly, NYA's discovery requests did not seek any information regarding D&H's efforts to market its Albany – New York City rail service.

handle the traffic from Fresh Pond to { } a distance of 4 miles. *Id.* In response to a modified proposal that it handle cars on a haulage basis for D&H's account, NYA "reduced" its revenue demand to {

} *See id.* As witness Stauch explains, these disproportionately high revenue demands, and NYA's insistence upon {

} ultimately rendered the project impracticable.

This { } movement was not the only business opportunity D&H pursued but ultimately lost because of excessive revenue demands by NYA. D&H witness Stauch details several other instances in which NYA demanded revenue divisions that were wildly out of proportion to the relatively short movement for which NYA would be responsible. *See Reb. V.S. Stauch at 6-7.* As those examples show, D&H has not "lost interest" in the New York City metropolitan area, and D&H continues to work to develop traffic for its Albany – New York City service. As NYA well knows – or at least it should – its insistence on revenue divisions that are disproportionate in relation to its participation in the handling of prospective traffic movements has been a major contributing factor in D&H's failure to develop a larger, more diverse traffic base in the New York City metropolitan area.

D&H's relatively small share of the rail traffic moving to and from New York City is also attributable to longstanding "structural" problems that D&H faces in generating traffic. Of the 1,138 miles of rail lines comprising D&H's current network, 670.8 miles (or 59 percent) consist of overhead trackage rights over the lines of other carriers. *See Reb. V.S. Stauch at 7.* As a result, D&H does not have the right to offer service to shippers located along nearly 60 percent of the rail lines over which it operates. *Id.* at 7-8. While many of those shippers transport freight

to and from the New York metropolitan area, the terms of D&H's trackage rights make it ineligible to compete for their business. *Id.* This structural limitation reduces substantially the body of traffic potentially available for D&H to handle to and from New York City. Moreover, because D&H lacks direct commercial access to customer facilities in New York City and Long Island, it has few opportunities to secure loaded backhaul movements for its northbound trains to Albany. *See Id.* As a result, D&H operates with a virtual 100% empty return ratio in the Albany – New York City corridor, placing it at a further economic disadvantage vis-à-vis competitors.

Id.

As witness Stauch explains, these longstanding structural constraints have prevented D&H from building the critical mass of traffic required to support train service between Albany and New York City more than twice weekly. *See* Reb. V.S. Stauch at 8. D&H's inability to provide more frequent service has placed it at a severe competitive disadvantage, and the 5-7 days-per-week service capability that D&H will gain as a result of the proposed transaction will greatly improve its ability to compete for traffic in the New York City metropolitan area.

4. NYA's Claim That The Joint Use Agreement Would Adversely Impact D&H's Contribution From Crushed Stone Traffic Is Wrong.

NYA's further claim that the Joint Use Agreement will adversely affect D&H's contribution on crushed stone traffic, and thus supposedly lead D&H to "lose interest" in handling it, is predicated on an obvious flaw. The only support NYA presents for its theory is a purported analysis of D&H's revenue from that traffic. *See* NYA Comments at 8-10. But NYA's "analysis" of the impact of the Joint Use Agreement on D&H's profitability ignores entirely a critical factor in the equation – the cost of providing service. In order to understand the economic impact of the proposed transaction on D&H's Albany- Fresh Pond service, one must compare not only the revenues that D&H earns under its current trackage rights operations

and would earn under the joint use arrangement, but also the costs that D&H incurs in operating low-volume trackage rights trains today versus the cost of moving traffic to and from New York under the joint use arrangement. *See* Reb. V.S. Stauch at 10-13. As NYA itself has acknowledged, in operating over the Albany – Fresh Pond Segment today, “[D&H] has [to] pay for crews, locomotives and fuel for its operations, as well as the [trackage rights fees] it pays to CSXT and others.” (NYA Comments at 13-14 (emphasis added).) *See id.*

NYA had access to a detailed analysis of the impact of the Joint Use Agreement on D&H’s revenues and costs, but chose to ignore and not even contest that information in preparing its Comments. Specifically, during discovery D&H produced to NYA the internal analysis that D&H performed to compare the total cost of D&H’s existing trackage rights operations with the total cost of handling the same traffic under the Joint Use Agreement.¹⁴ That analysis – which formed the basis for D&H’s business decision to pursue the joint use arrangement with CSXT – flatly contradicts NYA’s assertions.

¹⁴ *See* D&H-5, Reply in Opposition to New York & Atlantic Railway Company’s Motion to Compel Responses to the First Set of Discovery Requests Directed to D&H, Attachment 2, Documents D&H-HC-000168-000169.

proposed transaction would generate total operating expense savings to D&H of { } annually. Based upon the 2007 traffic volume of { } loaded cars used in the analysis, this represents a reduction in D&H's operating costs of approximately { } per car.

Thus, contrary to NYA's assertions, implementing the joint use arrangement will improve the profitability of the crushed stone traffic for D&H by reducing substantially the operating expenses that D&H incurs in handling that traffic, thereby making it less likely that D&H would "lose interest" in it. Indeed, it is NYA's proposed condition – which by "freezing" both the rates and divisions on crushed stone shipments would make it impossible for D&H to earn greater revenues on that traffic – that would chill D&H's interest in pursuing that business.

5. NYA's Requested Condition Is A Transparent Attempt To Use This Proceeding To Obtain An Unfair Commercial Advantage.

As demonstrated above, NYA's request that the Board force D&H to handle interline shipments of crushed stone in conjunction with NYA at the same { } rates (subject to an annual RCAF-based adjustment), and with the same revenue divisions, as those that apply today for a period of five years is both unsupported and unnecessary. More than that, the condition requested by NYA represents a transparent attempt to obtain an unfair competitive advantage in future divisions negotiations with D&H.

The subject traffic originates at two D&H-served quarries, one located at Comstock, NY and the other at Saratoga Springs, NY, operated by Palette Stone. Palette Stone's crushed stone traffic moves under {

} Pursuant to {

} are set forth in the following table.

Table 2
D&H – NYA Stone Traffic Rates and Divisions

| | | | | | |
|---|---|---|---|---|---|
| { | } | { | } | { | } |
| { | } | { | } | { | } |
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| | | | | | } |
| | | | | | } |

Table 2 illustrates two critical flaws in NYA’s arguments. First, it belies NYA’s claim that “[

]

(NYA Comments at 13.) As Table 2 indicates, {

} Reb. V.S. Deering at 8. Based upon this { } history, there is no reason to believe that the parties will not be able to agree upon an appropriate rate in the future.

Significantly, Pallette Stone supports the proposed transaction and has not joined NYA in demanding a rate “freeze” as a condition upon the Board’s approval of the proposed transaction.

Moreover, Table 2 reveals that {

.} NYA receives { } per car, or { } of the revenue, for moving the

traffic from Fresh Pond to Holtsville, a distance of 47.4 miles, or 17 percent of the total route miles. But a comparison of the revenue divisions with the relative miles that the subject traffic moves over D&H and NYA tells only part of the story. In addition to performing 83% of the line haul movement, D&H must provide local service to two quarries three days per week and perform additional switching at Kenwood Yard in Albany to consolidate cars originating at the Comstock and Saratoga Springs quarries into a single train for movement to Fresh Pond. As D&H witness Deering testifies, D&H has sought to address this imbalance in the parties' divisions arrangement by asking NYA to cede a greater portion of the revenue to D&H (primarily by taking a lower percentage of the annual rate increase). *See* Rebuttal V.S. Deering at 9. To this date that effort has met with little success due to the significant negotiating leverage NYA enjoys as the sole freight rail service provider to Long Island. Indeed, as witness Stauch's testimony shows, NYA exercises similar leverage in negotiating revenue divisions for other commodities as well. *See* Rebuttal V.S. Stauch at 5-7. Table 3 summarizes the disproportionate divisions arrangements that NYA has insisted upon in connection with recent D&H marketing initiatives.

**Table 3
D&H – NYA Rates and Divisions Quotes**

| | | { } | | | | { } | | | |
|---|--|-----|--|--|--|-----|--|--|---|
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| { | | | | | | | | | } |
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| { | | | | | | | | | } |
| { | | | | | | | | | } |
| { | | | | | | | | | } |

As the last two columns of Table 3 graphically show, NYA needs no help from the Board in negotiating extremely favorable divisions arrangements with D&H. To the contrary, NYA routinely uses its status as the only rail carrier serving Long Island to extract generous divisions, and is now effectively asking the Board to “lock in” that commercial advantage on crushed stone traffic for the next five years. NYA certainly does not need (or deserve) additional assistance from the Board in negotiating future revenue divisions for crushed stone traffic. NYA’s requested condition should be denied.¹⁵

B. UTU-NY’s Comments And Requested Condition Should Be Rejected.

1. UTU-NY’s Claim That A Joint Use Agreement Must Involve Physical Operations By Both Parties Over The Entire Subject Lines Is Wrong.

In addition to its unsubstantiated claim that the Joint Use Agreement would be anticompetitive (which is addressed above), UTU-NY alleges that the proposed transaction is not a joint use agreement within the scope of 49 U.S.C. § 11323(a)(6). UTU-NY Comments at 1-2. According to UTU-NY, a transaction can qualify as “joint use” under Section 11323(a)(6) only if all of the lines involved in the transaction are “used operationally” by both carriers. *Id.* at 2-3. While UTU-NY does not define what it means by “used operationally,” it appears that UTU-NY takes the position that a line is not “used” by a carrier unless it conducts its own separate train operations over all portions of the line. *See id.*; V.S. Nasca at 2-3 (claiming that “[t]here will be no ‘joint use’ of a line from a physical standpoint”). UTU-NY argues that the proposed

¹⁵ NYA also asks the Board to “condition approval on five years of continuing oversight” of whether the transaction creates “increased competitiveness as reflected in increased traffic.” NYA Comments at 17. For the reasons discussed above, NYA has not demonstrated that the proposed transaction will cause an anticompetitive effect sufficient to justify imposing such a lengthy monitoring condition on this minor transaction.

operations on the Albany-Fresh Pond Segment and the Saratoga Springs-Rouses Point Segment fail its self-described “joint physical operations” test. *See* UTU-NY Comments at 3-4 & n.3.

UTU-NY’s claim should be rejected for multiple reasons. In the first place, UTU-NY’s attempt to restrict the scope of “joint use” is based upon a misreading of the statute and is directly contradicted by prior ICC decisions approving joint use agreements consisting of arrangements similar to the one at issue in this case. UTU-NY’s claim that “[t]he statute refers [only] to [physical] operations” (UTU Comments at 3) is not supported by the language of the statute. On its face, Section 11323(a)(6) refers to joint use, not joint physical operations: “Acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.” § 11323(a)(6) (emphasis added). The only reference to “operations” in Section 11323(a)(6) simply refers to the fact that a “joint use” arrangement involves the “use” by one carrier of rail lines that are “owned or operated by another rail carrier.” Nothing in the statute (or in prior agency precedent) indicates that “joint use” of another carrier’s facilities for purposes of Section 11323(a)(6) requires separate physical operations over all of the involved rail lines.

Indeed, well-established rules of statutory construction suggest that “joint use” of a line must mean more than physically operating trains over that line. If UTU-NY’s claim that “joint use” of a line requires the joint user to conduct its own separate train operations over the subject lines, there would be no difference between “joint use” of a line and “trackage rights” over that line. But Section 11326(a)(6) explicitly gives the Board authority over both transactions involving “trackage rights over . . . a railroad line” and transactions involving “joint use of a railroad line.” *Id.* If “joint use” means nothing more than “trackage rights,” then Congress would have had no need to include any reference to “joint use” in the statute. “It is a cardinal

principle of statutory construction that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). UTU-NY’s crabbed interpretation of “joint use” to mean nothing more than physical operations – *i.e.*, trackage rights – would make that statutory term superfluous, and therefore must be rejected.

UTU-NY’s attempt to restrict the meaning of “joint use” is also directly contrary to ICC precedent recognizing that arrangements like the one presented here constitute “joint use” under the statute. In *Soo Line Railroad Company—Joint Use of Lines—Chesapeake and Ohio Railway Co.*, Finance Docket No. 30703 (Aug. 23, 1986) (“*Soo/C&O*”), the ICC granted an exemption for a joint use agreement pursuant to which Soo traffic moving between Detroit and Chicago would be physically handled in trains operated by C&O with C&O crews over C&O-owned lines. The ICC treated the transaction as a joint use agreement notwithstanding the fact that Soo would not conduct its own physical train operations over the C&O line. *See id.*, slip op. at 6.¹⁶ The operations proposed by Applicants here closely mirror those authorized by the ICC as “joint use” in *Soo/C&O*.

Similarly, in *Norfolk So. Ry. Co.—Consolidation of Operations—CSX Transp., Inc.*, ICC Finance Docket No. 32299, available at 1993 WL 484294 (Nov. 26, 1993) (“*South Carolina Consolidation*”), the ICC approved “a series of trackage rights agreements, joint use agreements, and operating agreements” designed to consolidate certain NS and CSXT operations in South Carolina. *Id.*, 1993 WL 484294 at *1. The joint use agreements at issue in *South Carolina*

¹⁶ The ICC held in the alternative that the transaction qualified for an exemption as exempt trackage rights under 49 C.F.R. § 1180.2(d)(7). *See id.*, slip op. at 10.

Consolidation were strikingly similar to the one in the transaction under review. As the ICC summarized, “NS has agreed to handle cars in CSXT’s accounts in trains operated by NS crews between Columbia and Charleston” and “CSXT has agreed to handle cars in NS’s accounts in trains operated by CSXT crews between Columbia and Newbury.” *See id.*, 1993 WL 484294 at *2.¹⁷ The ICC’s approval of these arrangements as “joint use” demonstrates that agreements in which one carrier agrees to handle cars for the account of another qualify as joint use agreements under § 11323(a)(6).¹⁸

The premise of UTU-NY’s argument – that the statute contemplates only agreements that provide for both carriers to physically operate over the entire line at issue – is refuted by these agency precedents. Both *Soo/C&O* and *South Carolina Consolidation* approved as “joint use” transactions in which one carrier would physically handle cars (or entire trains) for another carrier. These holdings are plainly consistent with the statute. A railroad can “use” another carrier’s line through an agreement with that carrier to carry cars in the first railroad’s account just as it can “use” the line through physical operations over the line. *See Union Pacific R.R. Co. et al.—Trackage Rights Over Lines of Chicago & N.W. Transp. Co. Between Fremont, NE/Council Bluffs IA, and Chicago, IL*, 7 I.C.C.2d 177, 183 (1990) (“[T]he mere fact that a lessor railroad performs the physical operations as an agent for another railroad does not disqualify the operations as trackage rights.”); *Soo/C&O*, slip op. at 7. Indeed, *Webster’s New*

¹⁷ The Joint Operation Agreements in which NS and CSXT agreed to handle cars on their respective trains for the other carrier are attached as Exhibits 2b, 2f, 2g, and 2k to the Application in *South Carolina Consolidation*. *See* Railroad Consolidation Application, *Norfolk So. Ry. Co.—Consolidation of Operations—CSX Transp., Inc.*, ICC Finance Docket No. 32299, at Exs. 2b, 2f, 2g, and 2k (filed July 8, 1993).

¹⁸ UTU is unable to cite a single decision to support its attempt to limit the Board’s authority under § 11323(a)(6) only to agreements involving joint physical operations over the entirety of the jointly used lines.

Collegiate Dictionary defines “use” as “the act or practice of employing something.” Under the proposed Joint Use Agreement, CSXT would certainly employ D&H’s rail lines between Saratoga Springs and Rouses Point to forward interchange traffic to CN. D&H likewise would employ CSXT’s tracks between Albany and Fresh Pond to deliver traffic to and from the New York City metropolitan area.

The parties’ business decision to enter into a Joint Use Agreement should not lightly be second-guessed by UTU-NY or the Board. *See, e.g., South Carolina Cent. R.R. Co.—Purchase and Lease—CSX Transp., Inc. Lines in Ga. And Ala.*, ICC Finance Docket No. 31360 (Apr. 28, 1989) (“We presume that SCRF is the best judge of the business opportunities this transaction presents. . . . It is not for us to second guess SCRF’s business judgment.”).¹⁹ Indeed, the agency has held that applicants’ decision to structure a transaction as a joint use agreement, and to submit their agreement to the Board’s jurisdiction under Section 11323(a)(6), is itself a significant factor in determining that it is a joint use agreement. *See Soo/C&O*, slip op. at 6 (relying on fact that “applicants defined the transaction as one for the joint use of a rail line”).²⁰

The proposed transaction is structured to enable both D&H and CSXT to maximize the efficiency of their rail operations in the New York City – Montreal (Eastern Canada) corridor.

¹⁹ *See also Canadian Nat’l Ry. Co. and Grand Trunk Corp.—Control—Duluth, Missabe and Iron Range Ry. Co. et al.*, 7 S.T.B. 526, 541 (2004) (“The Board sees no reason to second-guess the business judgment” of parties who negotiated a trackage rights fee); *Greondyke Transport, Inc. et al.—Pooling Agreement*, STB Docket No. MC-F-20941 (June 7, 1999) (“[W]e see no reason to second-guess Applicants’ business judgments as to how they can operate efficiently.”); *Rio Grande Industries, Inc.—Purchase and Related Trackage Rights—Soo Line R.R. Co. Line Between Kansas City, MO and Chicago, IL*, 6 I.C.C. 2d 854, 886 (1990).

²⁰ *See also KNRECO, Inc. d/b/a Keokuk Junction Ry. Acquisition and Operation Exemption—The Atchison, Topeka & Santa Fe Ry. Co.*, ICC Finance Docket No. 30918, available at 1987 WL 99738, *3 (finding that car haulage agreement was not joint use agreement in part because “unlike the carriers in *Soo*, KNRECO and ATSF did not define the transaction as one for joint use of a line”).

CSXT moves thousands of cars annually between the New York City metropolitan area and Montreal, via its Massena Line and its existing interchange with CN at Huntingdon, PQ. CSXT handled { } cars over that route in 2006, { } cars in 2007, { } cars in 2008, and { } cars in 2009. *See* Reb. V.S. Potter at 2. The proposed transaction will enable CSXT to cut 142 miles off its existing route between New York and Montreal by utilizing available capacity on D&H's Saratoga Springs – Rouses Point Segment. At the same time, the Joint use Agreement will simplify operations and cross-border interchange by permitting D&H to control all train movements on the Saratoga Springs – Rouses Point Segment (as it does today in connection with the movement of NS and CN traffic over that line). *See* Application, V.S. Craig at 4. Likewise, the vast majority of non-stone traffic that currently moves in D&H's trackage rights trains between Albany and Fresh Pond traverses the entire joint use corridor between Montreal and New York.²¹ D&H's non-stone traffic on the route has declined from more than { } cars in 2007 to approximately { } cars in 2009. Reb. V.S. Stauch at 13. Applicants structured the Joint Use Agreement in a manner that allows D&H to eliminate its low-density, high-cost train operations, and increase the frequency of its service offering, by taking advantage of incremental capacity in CSXT trains operating in the Albany – New York City corridor. *Id.* In short, the proposed transaction was purposefully structured in a manner that will promote operating efficiency and maximize the benefits available to Applicants (and their customers). The parties also chose a Joint Use Agreement over other potential transaction structures in order to give their arrangement the permanence of a Board-approved transaction (which of course cannot be discontinued without Board approval).

²¹ The crushed stone traffic that is the subject of NYA's Comments originates on the D&H at Comstock and Saratoga Springs, NY.

In short, the parties had valid business reasons for choosing to enter into a Joint Use Agreement. The fact that some (but not all) of those business goals conceivably could have been achieved through a series of different agreements does not change the fact that the business arrangement chosen by the parties – a joint use agreement – is plainly within the scope of § 11323(a)(6).

2. The Board’s *N&W/Mendocino* Conditions Are The Appropriate Form of Labor Protection In This Case.

UTU-NY argues that *Oregon Short Line* conditions should be imposed in addition to *N&W/Mendocino* conditions, on the theory that D&H is effectively discontinuing service on the Albany-Fresh Pond Segment and therefore that *Oregon Short Line* conditions are appropriate. See UTU-NY Comments at 2-3. This suggestion can be rejected out of hand. D&H is not discontinuing its trackage rights. See Application at 18 n.6, 28. To the contrary, the Joint Use Agreement explicitly contemplates that D&H will retain its trackage rights between Albany and Fresh Pond, and may reinstitute service under those rights if D&H deems it advantageous to do so. In particular, D&H may elect to reinstitute its trackage rights if future traffic growth can support separate D&H train operations. Moreover, D&H’s residual trackage rights are an important public interest safeguard in the event that the Joint Use Agreement is ever terminated. See Joint Use Agreement at § 2.05.

In any event, there is certainly no need to impose additional labor protective conditions for the benefit of D&H employees on account of an alleged “discontinuance” of service by D&H. As Applicants have shown, the net effect of the proposed transaction on D&H employees will be positive. D&H anticipates that it will add a net of four positions as a result of the Joint Use Agreement. See Application at Appendix 1-B.

While UTU-NY does not claim that CSXT is abandoning or discontinuing service, it asks for *Oregon Short Line* conditions for the benefit of CSXT employees as well. That is plainly inappropriate. *N&W/Mendocino* conditions will fully protect any CSXT employees who are adversely affected by the proposed transaction.

3. The Board Appropriately Classified This Transaction.

UTU-NY also suggests that the application “should be subject to the Class I standards” because in its opinion “D&H is considered Canadian Pacific Railway in the mind of the public.” See UTU-NY Comments; V.S. Nasca at 2. This claim is both procedurally improper and substantively incorrect. In the first place, the Board has already accepted the Application for processing as a minor transaction. See Decision No. 2 at 7. If UTU-NY disagreed with the Board’s determination that the proposed transaction is a minor transaction, then UTU-NY’s remedy was to file a petition for reconsideration of that ruling within 20 days of the Board’s decision. See 49 C.F.R. § 1115.3. UTU-NY did not do so, and it is procedurally barred from collaterally attacking the Board’s decision now.

Moreover, the Board’s decision that this is a minor transaction was correct. The Board’s regulations limit the more extensive requirements for approval of major transactions to mergers or consolidations of Class I railroads. The Joint Use Agreement plainly does not involve the “control or merger” of D&H and CSXT. *Id.* (“A major transaction is a *control or merger* involving two or more class I railroads.” (emphasis added)); *cf. Norfolk So. Ry. Co.—Consolidation of Operations—CSX Transp., Inc.*, ICC Finance Docket No. 32299 (Nov. 26, 1993) (treating application for approval of joint use agreements between NS and CSXT as a minor transaction).

C. NYDOT's Requested Condition Is Not Necessary.

NYDOT supports the proposed transaction. However, NYDOT expresses concern that the introduction of additional trains carrying joint use traffic could potentially impact Amtrak passenger service between Albany and Rouses Point. NYDOT also raises the question whether shifting trains carrying CSXT's traffic to the Saratoga Springs – Rouses Point Segment might adversely affect local service for shippers on CSXT's Massena Line between Syracuse and Fort Covington. *See* NYDOT Comments at 4-5. NYDOT proposes that the Board impose a three-year monitoring condition for “oversight of the applicants’ adherence to the various representations they have made during the course of this proceeding . . . with specific attention to: (1) effects on Amtrak services in the Albany – Rouses Point corridor; and (2) level of service and rates for shippers (including those served by short line connections) in both the Albany-Fresh Pond Segment and the Syracuse-Fort Covington Segment.” NYDOT Comments at 8.

Applicants submit that the condition proposed by NYDOT is not necessary. In the first place, it should be noted that Amtrak itself has not appeared as a party in this proceeding, has not registered any concern regarding the possible impact of the proposed transaction on its passenger services, and has not requested that the Board impose any conditions on its approval of the transaction. Furthermore, the proposed transaction is not likely to have a material impact on Amtrak service. Applicants propose to add only one train per day in each direction over the Saratoga – Rouses Point Segment and the Albany – Saratoga Springs Segment. As explained in Applicants’ May 11, 2010 letter to the Board, the resulting total train volumes will be only 12 trains per day between Saratoga and Whitehall (8 freight trains and 4 Amtrak trains), and only 8 trains per day between Whitehall and Rouses Point (6 freight trains and 2 Amtrak trains). *See* Environmental Notice served July 1, 2010, Attachment 2. D&H has in the past operated at least

that many daily freight trains on those lines without causing substantial interference with Amtrak. Regardless, any congestion will impact freight trains – not passenger trains. D&H is both legally and contractually bound to accord priority to Amtrak trains.

Moreover, a condition that would require the Board to monitor the effect of the Joint Use Agreement on Amtrak services would be redundant. Pursuant to the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (Oct. 16, 2008), the Board already has authority to oversee passenger train performance. This authority includes jurisdiction to investigate instances of substandard performance on its own initiative or upon filing of a complaint, and to take action and award damages in the event that a host rail carrier fails to provide preference to Amtrak trains over freight trains. *See id.* at § 213, 122 Stat. 4925. Given that the Board is already monitoring passenger train performance pursuant to that statute, there is no reason for the Board to duplicate that effort by imposing a monitoring condition relating to Amtrak service in this proceeding.

NYDOT also expresses concern about potential “adverse effects on shippers” on the Massena Line and “impacts to the carriers’ own employees” on that line. No monitoring condition with respect to those matters is necessary. There will be no reduction in service to local industries served by CSXT on the Massena Line. Application at 19; Reb. V.S. Potter at 6. As CSXT witness Potter testifies, CSXT will continue to serve all customers on the Massena Line, with service levels in accordance with existing volumes. *Id.* Local service on the line will not be reduced as a result of the Joint Use Agreement; on the contrary, “[l]ocal trains that currently serve customers along the Massena Line will continue to operate as they do today.” Application at 19. *See* Reb. V.S. Potter at 5-6. Indeed, in addition to the local trains that currently operate over the line, CSXT anticipates that it will add more local trains to bridge

traffic from the Massena Line to Syracuse. *See id.* at 6. This will afford local customers a level of service to and from Syracuse comparable to that available today. *See id.* at 6.

Nor is NYDOT's proposed monitoring condition necessary to address potential labor impacts of the proposed transaction. Affected CSXT employees will be covered by the employee protective conditions imposed by the Board in connection with its approval of the proposed transaction. The *N&W/Mendocino* conditions provide appropriate procedures for addressing such employee impacts; a separate condition providing for monitoring of such impacts by the Board is not necessary.

Finally, there is certainly no need for the Board to impose a condition to monitor the impact of the transaction on rates and services in the Albany-Fresh Pond corridor. D&H's current traffic volume over this segment constitutes a tiny fraction of the rail traffic moving to and from New York City, so the transaction cannot have a material adverse impact on shippers. As Applicants have shown, the proposed transaction can only improve D&H's competitive position in that corridor, by reducing its operating costs and allowing it to offer more frequent service. Indeed, it is worth noting that no D&H shipper has requested that the Board condition its approval of the proposed transaction.

D. Sills Road's Requested Condition is Inappropriate, Untimely, And Should Be Rejected.

Well after the Board's July 2, 2010 deadline for submitting comments and requests for conditions, Sills Road Materials LLC ("Sills Road") submitted a letter to the Board on July 15, 2010, seeking an extraordinary condition upon approval of the proposed transaction. Sills Road is neither a shipper nor a receiver of any rail traffic handled by Applicants. Nevertheless, Sills Road's letter asserts that it is "committed to purchase" 500,000 tons of aggregate for shipment to the proposed Brookhaven Rail Terminal on Long Island – a facility that the Board has not

authorized. *See* Letter from Sills Road, filed July 15, 2010. Neither Sills Road nor Palette Stone, the supposed source of this new traffic, has entered into any such commitment with D&H. Based on this alleged traffic “commitment” and its purported concern that the proposed transaction might cause “rate and/or service instability,”²² Sills Road asks the Board to impose a condition that would require D&H, CSXT and NYA – but not Sills Road – to negotiate “a five year agreement using cost based pricing based on the use of CSXT merchandise trains running in the Rouses Point – Selkirk – Oak Point corridor for stone moving from Comstock or Saratoga Springs and its environs to Long Island.” *Id.* at 2. Sills Roads’ request must be rejected for a host of reasons.

First, Sills Road’s request is plainly untimely, and Sills Road offers no excuse for its untimely filing. Second, Sills Road has no standing to request a condition relating to rates for crushed stone traffic. Sills Road is not, and has never been, a shipper of D&H (or CSXT, for that matter), and therefore could not possibly suffer any rate-related competitive injury as a result of the proposed transaction. Third, it is, at best, uncertain whether the predicate for Sills Roads’ requested condition – construction of the Brookhaven Rail Terminal – will ever come to pass. Given the convoluted procedural history of that proposed facility, which has stretched for nearly three years and has featured multiple Board decisions admonishing the facility’s proponents not to attempt to construct it without proper Board authorization, the fate of the Brookhaven Rail Terminal is a matter of sheer speculation.²³ Fourth, and most importantly, Sills Road utterly fails

²² Since Sills Road has never purchased rail service from D&H nor made a firm proposal for a transportation contract with D&H, it is not at all clear what it means by “rate and/or service instability.”

²³ *See U.S. Rail Corp.—Construction & Operation Exemption—Brookhaven Rail Terminal*, Fin. Docket No. 35141, slip op. at 1-3 (June 7, 2010) (recounting procedural history); *Suffolk & Southern Rail Road LLC—Lease & Operation Exemption—Sills Road Realty, LLC*, Fin. Docket

to justify its extraordinary request for this condition. Other than a passing reference to NYA's Comments, Sills Road does not even attempt to establish a basis for imposing any condition (let alone the extraordinary condition it seeks).²⁴ In any event, the requested condition is an unvarnished attempt to place Sills Road in a better position than it occupies today by forcing Applicants to enter a five year contract to establish "cost-based" rates (instead of market-based rates) for shipments to its nonexistent facility.

Moreover, Sills Road's condition would require substantial operational and commercial access changes to Applicants' Joint Use Agreement – from having "CSXT merchandise trains" (rather than D&H trains) provide local service to the quarries at Comstock and Saratoga Springs, to requiring CSXT to move its interchange point with NYA from Fresh Pond to Oak Point. This plainly infeasible and unwarranted condition should be rejected.

E. Pallette Stone's Operational Questions Have Been Resolved, And It Supports the Proposed Transaction.

On June 18, 2010, Pallette Stone submitted a letter to the Board expressing concern regarding certain "logistical ramifications" of the proposed joint use arrangement between D&H and CSXT. That letter did not suggest that the proposed transaction is in any way anticompetitive, or that the purported concerns underlying NYA's proposed condition were shared by Pallette Stone – to the contrary, Pallette Stone did not request that any conditions be placed on the Board's approval of the transaction. Rather, the letter presented a list of questions relating to the operational impact D&H's shift from trackage rights operations to joint use in the Albany- New York City corridor on the handling of Pallette Stone's traffic.

No. 35036 (Oct. 12, 2007).

²⁴ Sills Road's apparent reliance on NYA's Comments is not surprising. During discovery Sills Road served on D&H a set of discovery requests that were a verbatim copy of the discovery requests served on D&H by NYA.

As D&H witness Deering reports, D&H subsequently met with Palette Stone to discuss its service questions, and the parties succeeded in resolving those issues to Palette Stone's satisfaction. *See* Reb. V.S. Deering at 10-11. As a result of those successful discussions, Palette Stone filed a second letter on July 21, 2010, in which it asked the Board to "consider all of our prior submissions as having been addressed and satisfied." *See* Reb. V.S. Deering, Attachment 5. Palette Stone advised the Board that "[w]e are confident that traffic service will improve as well as create efficiencies which are expected to create a win-win for both D&H as well as for [Palette Stone]." *Id.* As a result, Palette Stone "is [now] in support of the application." *Id.*

Palette Stone's July 21, 2010 letter, and its unconditional support for the proposed transaction, effectively resolve the issues raised in its prior correspondence. In addition, that letter provides further compelling proof that the self-serving condition requested by NYA is not warranted.

CONCLUSION

For the reasons set forth in this Response and Rebuttal, and in the Application, Applicants respectfully request that the Board enter an order approving the proposed transaction pursuant to 49 U.S.C. § 11323(a)(6), subject only to the employee protective conditions

contained in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc. — Lease and Operate*, 360 I.C.C. 653 (1980).

Respectfully submitted,



Terence M. Hynes
Jeffrey S. Berlin
Matthew J. Warren
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
202-736-8000

*Attorneys for Delaware and Hudson
Railway Company, Inc.*



Peter J. Shudtz
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street J-150
Jacksonville, Florida 32202
904-359-1229

Louis E. Gitomer, Esq.
Melanie B. Yasbin, Esq.
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue, Suite 301
Towson, Maryland 21204
410-296-2250
Lou_Gitomer@verizon.net

Attorneys for CSX Transportation, Inc.

Dated: July 23, 2010

STAUCH

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35348

**CSX TRANSPORTATION, INC. & DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – JOINT USE AGREEMENT**

REBUTTAL VERIFIED STATEMENT OF JIM STAUCH

My name is Jim Stauch. I am Director of Network Strategy – Northeast U.S. for Canadian Pacific Railway Company (“CPR”). My business address is 200 Clifton Corporate Parkway, P.O. Box 8002, Clifton Park, NY 12065. I assumed my current position in March 2010. As Director of Network Strategy, I provide expertise and leadership in evaluating potential growth opportunities, joint ventures, commercial alliances, co-production projects and railroad line sales for CPR and the Delaware and Hudson Railway Company, Inc. (“D&H”). I also have responsibility in connection with the assessment of capacity-related issues and implementation of transactions involving CPR’s U.S. Northeast network. I participated in D&H’s analysis of, and the negotiations that resulted in, the proposed Joint Use Agreement that is the subject of this proceeding.

I began my career with D&H in 1976 as a Trainman. Since that time, I have held a variety of positions of increasing responsibility with D&H and CPR relating to Field Operations and Transportation. Prior to assuming my current position, I was Director – Interline from 2000 to 2010, where I was responsible for managing interline relationships and agreements with connecting railroads in the Northeastern United States. During my career, I have also held positions as Manager – Interline and Service Design, Manager – Transportation Planning, Assistant Chief of Transportation – Intermodal Freight System, D&H’s Chief of Transportation and D&H’s Chief Train Dispatcher.

The purpose of this Rebuttal Verified Statement is to respond to NYA's claim that the proposed joint use arrangement will result in D&H "walking away" from the rail business in the New York City metropolitan area, thereby jeopardizing the crushed stone traffic that D&H handles in conjunction with NYA to points on Long Island. NYA argues that, in order to prevent that result, Board should impose a condition "freezing" both the current rates and revenue divisions on D&H/NYA crushed stone traffic.

Part I of this Rebuttal Verified Statement addresses NYA's claim that D&H has exhibited "a general lack of interest" in traffic moving to and from New York City and Long Island (NYA Comments, V.S. Victor at 3), and has "effectively withdrawn" from the transportation of commodities other than crushed stone in the Albany – New York City corridor (NYA Comments at 8.) As my testimony shows, the low volume of traffic that D&H handles between Albany and Fresh Pond today does not reflect of a lack of desire on D&H's part to build a stronger competitive presence in the New York metropolitan area. Rather, D&H's inability to compete more successfully for rail traffic to and from New York is attributable to the many structural obstacles that we face – including the lack of competitive access to customer facilities along more than half of our network (over which D&H holds only "overhead" trackage rights); a virtual 100% empty return ratio on cars delivered to the New York metropolitan area (due to the lack of direct access to shippers of outbound traffic); the increased rail competition to and from New York created by the acquisition of Conrail by CSXT and Norfolk Southern; and a lack of traffic volumes sufficient to support daily train service. Despite these longstanding impediments, D&H has continued to market aggressively its service offering in the Albany – New York City corridor. Indeed, the failure of D&H marketing initiatives involving potential movements to Long Island can be attributed in large part to the disproportionately high revenue divisions that

NYA routinely demands for its participation in such traffic. As my testimony will show, the proposed transaction will help to mitigate the structural competitive disadvantages that D&H faces today, by enabling it to increase its service offering from twice weekly to 5-7 days per week, and by reducing substantially the expenses that D&H incurs today in operating low-volume trackage rights trains between Albany and Fresh Pond, NY.

Part II of this Rebuttal Verified Statement responds to NYA's claim that the proposed joint use agreement between D&H and CSXT will actually reduce the profitability of D&H's operations between Albany and the New York City area (*see* NYA Comments at 6), and provide an incentive for D&H to "walk away" from that corridor altogether. As my testimony will show, prior to entering into the proposed transaction, D&H carefully analyzed the comparative costs of its existing trackage rights operations and the costs that it would incur under the proposed joint use agreement with CSXT. That analysis – which was provided to NYA in discovery but which NYA chose to ignore in its Comments – shows that the joint use arrangement will enable D&H to reduce its operating expenses in the Albany – Fresh Pond corridor by approximately { } annually. D&H is confident that this substantial cost reduction, in tandem with the ability to offer prospective customers more frequent service, will enable us to secure business that is beyond our reach today, thereby improving the profitability of D&H's operations in the Albany – New York City corridor.

I. NYA's Claim That The Proposed Transaction Sets The Stage For D&H To "Walk Away" From The Albany – New York City Corridor Is Nonsense.

NYA asserts that "[t]he Application, if approved by the Board without conditions, would allow D&H to walk away from the New York market without cost, without a regulatory proceeding and perhaps without regret." (NYA Comments at 6.) The only evidence that NYA offers for this assertion is the fact that the volume of commodities other than crushed stone

interchanged between D&H and NYA at Fresh Pond, NY has declined over the past several years. (See NYA Comments, V.S. Victor at 3.) NYA witness Victor contends that this recent decline in traffic “reflects a general lack of interest on the part of D&H in the NY metropolitan area market.” *Id.* Indeed, NYA goes so far as to suggest that “D&H has effectively withdrawn from the New York metropolitan area market for all traffic other than Stone Traffic.” (NYA Comments at 8.)¹

NYA’s claim that D&H “lacks interest” in traffic to and from the New York City metropolitan area, and its suggestion that D&H’s objective in pursuing this Application may be to set the stage for a complete withdrawal from the Albany – New York City corridor, are utter nonsense. The decline in the volume of certain commodity movements during the past several years is certainly not a circumstance unique to D&H and NYA – the economic downturn in 2008-2009 has had a similar impact on rail carriers across North America. Even during the recent recessionary period, shipments of both crushed stone and chemicals (including plastics and liquefied petroleum gas) interchanged between D&H and NYA have increased. Indeed, if all commodities are taken into account, the overall volume of traffic delivered by D&H to NYA at Fresh Pond grew by { }, from { } carloads in 2007 to { } carloads in 2009, despite the recent recession. In any event, as NYA knows, D&H has a common carrier obligation to provide service in the Albany – New York City corridor and could not simply “walk away” from that obligation without obtaining prior Board authorization to do so.

NYA’s further assertion that “D&H has not marketed aggressively” its Albany – New York City service (NYA Comments at 14) is simply not true. In fact, D&H has actively pursued

¹ NYA’s suggestion that D&H (or any railroad) would pursue a strategy of seeking out crushed stone traffic – one of the lowest-rated commodities that moves by rail – while “withdrawing” from the transportation of more profitable commodities strains credulity.

marketing initiatives involving a wide range of commodities in an effort to attract additional rail traffic to the D&H/NYA route serving Long Island. For example, in 2009, D&H conducted an extensive study to determine the potential for {

}² That study indicated that {

} D&H developed rates (in conjunction with CPR) for shipments of { } to Long Island, and discussed with NYA { }

Several { } shippers expressed interest in such a new transportation option.

However, NYA insisted upon a revenue division of { } per car, or { } per car-mile, to handle the traffic from Fresh Pond to { } a distance of 4 miles. By comparison, CPR and D&H had quoted a revenue requirement of { } per car, or { } per car-mile, for the 1,240.3-mile line haul movement from Chicago to Fresh Pond. In response to a modified proposal that it handle cars on a haulage basis for D&H’s account, NYA “reduced” its revenue demand to {

} In addition to these disproportionately high revenue requirements, NYA insisted upon {

} NYA’s requirements rendered the project infeasible for D&H. D&H’s “anchor” customer eventually elected to pursue a rail-barge transportation option, and this potential opportunity was lost.

² D&H produced that study in discovery to the New York City Economic Development Commission. Interestingly, NYA’s discovery requests did not seek any information regarding D&H’s efforts to market its Albany – New York City rail service.

This was, by no means, an isolated incident. In May 2009, NYA approached D&H with a potential movement of wheat flour to a proposed new transload facility at Hicksville on Long Island. In response to this opportunity, CPR/D&H offered to transport the subject traffic from St. Paul to Fresh Pond (a distance of 1,450.9 miles) for { } per car, or { } per car-mile. For its part, NYA quoted a revenue requirement of { } per car, or { } per car-mile, for the 20.6-mile movement from Fresh Pond to Hicksville. In other words, NYA insisted upon a revenue division of { } of the through rate to transport the traffic over 1.4% of the route miles. The resulting through rate of { } per car was deemed unacceptable by the prospective shipper, and we did not obtain the business.

More recently, in January 2010, CPR/D&H was asked by two shippers to quote rates for shipments of { } from Chicago to Long Island City, NY. NYA gave D&H a revenue requirement of { } per car, or { } per car mile, for the four-mile movement on its line from Fresh Pond to Long Island City. CPR/D&H's revenue requirement for the 1,240.3-mile movement from Chicago to Fresh Pond was { } per car, or { } per car-mile. Based upon those combined quotes, CPR/D&H published a through rate of { } per car in { }. To date, one of the shippers that requested this rate quote has shipped { } cars pursuant to { }, while the other has not tendered any traffic for movement to Long Island City.

Finally, in an attempt to broaden its geographic reach in the New York metropolitan area, D&H negotiated an agreement with NYA pursuant to which { } Under that agreement, NYA demanded a haulage fee of { } per car, or { } per car-mile, for the 11-mile movement between Fresh Pond and Bay Ridge. (By comparison, the "D&H Service Fee" that CSXT will

charge D&H to move its cars 146.31 miles between Albany and Fresh Pond – a fee that NYA claims would “provide D&H with { } on that traffic” (NYA Comments at 12) – is { } per car, or { } per car-mile.) Not surprisingly, the { } assessed by NYA under the { } rendered D&H unable to develop a sustained volume of profitable traffic to that location.

As these examples graphically demonstrate, NYA exploits its self-proclaimed status as “the exclusive provider of rail freight service in Nassau and Suffolk Counties, NY” (NYA Comments at 2) to extract very favorable divisions arrangements on rail traffic moving to and from Long Island. NYA’s consistent demands for revenue divisions that are clearly disproportionate in relation to its participation in the handling of prospective traffic movements has been a major contributing factor in D&H’s failure to develop a larger, more diverse traffic base in the New York City metropolitan area. Given NYA’s extraordinary success in negotiating “market-based” divisions with D&H, NYA’s contention that the Board ought to provide further assistance to it by “freezing” the current divisions on D&H/NYA crushed stone traffic is ludicrous.

NYA’s insistence upon disproportionate divisions exacerbates the longstanding “structural” problems that D&H faces in generating traffic. Of the 1,138 miles of rail lines comprising D&H’s current network, 670.8 miles (or 59 percent) consist of trackage rights over the lines of other carriers. D&H acquired most of those trackage rights in connection with the “Final System Plan” that created Conrail in 1976, and the Board’s 1998 decision authorizing the acquisition of Conrail by CSXT and Norfolk Southern Railway Company (“NS”).³ Both the Final System Plan and the *Conrail* decision restricted the trackage rights granted to D&H to

³ *CSX Corp. et al. – Control – Conrail Inc., et al.*, 3 S.T.B. 196, 282-283 (1998).

“overhead” service only. This means that D&H does not have the right to offer service to shippers located along nearly 60 percent of the rail lines over which it operates. Many of those shippers transport freight to and from the New York metropolitan area, but the terms of D&H’s trackage rights render it ineligible to compete for their business. This structural limitation reduces substantially the body of local traffic potentially available for D&H to handle to and from New York City.

By contrast, both NS and CSXT operate extensive rail networks that provide direct access to points at which many commodities that move to the New York metropolitan area originate, as well as locations to which rail shipments originating in New York are destined. This enables them to offer the single-line service that customers prefer on shipments to and from the New York metropolitan area. Even on traffic that moves to and from points beyond Chicago, both CSXT and NS enjoy the advantage of less circuitous routes to the New York area than D&H, which must utilize CPR’s Canadian lines to reach the Chicago gateway.

Because D&H lacks direct access to customer facilities in New York City and Long Island, we have few opportunities to secure loaded movements for our northbound trains to Albany. As a result, D&H operates with a virtual 100% empty return ratio in the Albany – New York City corridor, placing it at a further economic disadvantage vis-à-vis competitors such as CSXT and NS.

Given these longstanding structural constraints, D&H has not been able to build the critical mass of traffic required to support train service between Albany and New York City more than twice weekly. (Train cancellations resulting from locomotive failures and employee absences further reduce the frequency of D&H’s train service, which is supported by a limited pool of qualified train personnel and locomotive units with the cab signal equipment required for

operations in the Albany – Fresh Pond corridor.) Service frequency is a critical issue in competing for traffic, particularly the type of high-volume movements required to develop a consistent traffic base. D&H’s current inability to match the daily service offerings of CSXT, NS, motor carriers and barge operators to and from New York is, in my view, the primary obstacle to our success in the Albany – New York City corridor. The 5-7 days-per-week service capability that D&H will gain as a result of the proposed transaction will greatly benefit both D&H and the public, by helping D&H to become a more viable competitor in the New York City metropolitan area.

In summary, D&H’s low traffic volume in the Albany – New York City corridor is not the result of any “lack of interest” on D&H’s part. To the contrary, D&H has consistently pursued opportunities to develop new business – including movements of profitable commodities such as ethanol, plastics, flour and LPG – to augment the low-rated crushed stone that currently comprises the majority of D&H’s traffic in the corridor. The longstanding structural impediments that D&H faces – including a network comprised largely of “overhead” trackage rights, a 100% northbound empty return ratio, and the lack of a core traffic base to support more frequent train service – have prevented D&H from establishing a stronger position in the intensely competitive New York City transportation marketplace. These inherent disadvantages are exacerbated by NYA’s insistence upon disproportionately high revenue divisions on potential new business.

II. NYA’s Claim That The Proposed Joint Use Agreement Will Reduce The Profitability of D&H’s Operations Between Albany And New York City Is Wrong.

The central thesis of NYA’s Comments is that the proposed transaction will reduce D&H’s contribution on the crushed stone traffic that it currently handles in conjunction with NYA. According to NYA, “D&H’s share of the revenue from the traffic, after payments to

CSXT and third parties, may well be insufficient to keep D&H interested in the business” (NYA Comments at 6).

In support of this claim, NYA purports to calculate the impact of the joint use agreement on the revenues that D&H will earn on crushed stone shipments. Dividing what it states is the current through rate⁴ among NYA (based upon its current division), CSXT (based upon the D&H Service Fee set forth in the joint use agreement) and D&H (based upon D&H’s current division, minus the D&H Service Fee), NYA proclaims that D&H’s post-transaction revenue share { } would amount to {

} (NYA Comments at 9.) Based upon that analysis, NYA concludes that the joint use arrangement “will provide D&H with { } on that [crushed stone] traffic.” (NYA Comments at 12.)

NYA’s analysis, which treats the D&H Service Fee as a “CSXT division” and focuses solely on the “top line” revenue earned by each carrier in the movement, is meaningless. In order to understand the economic impact of the proposed transaction on D&H’s Albany- Fresh Pond service, one must compare not only the revenues that D&H earns under its current trackage rights operations and would earn under the joint use arrangement, but also the costs that D&H incurs in operating low-volume trackage rights trains today versus the cost of moving traffic to and from New York under the joint use arrangement. As NYA itself acknowledges, in operating over the Albany –Fresh Pond Segment today, “[D&H] has [to] pay for crews, locomotives and

⁴ As D&H witness Deering shows, the through rate and divisions upon which NYA’s “analysis” is based are wrong. In fact, the { } per carload, and the current D&H and NYA revenue divisions are { } and { }, respectively. See V.S. Deering at 7, n.7 and Attachment 3.)

fuel for its operations, as well as the [trackage rights fees] it pays to CSXT and others.” (NYA Comments at 13-14 (emphasis added).)

In response to NYA’s discovery requests, D&H produced the study that D&H performed comparing the total cost of D&H’s current trackage rights operations with the total costs that D&H would incur under the proposed joint use arrangement.⁵ That analysis formed the basis for D&H’s business decision to pursue the joint use arrangement with CSXT. Table 1 summarizes the study’s conclusions regarding the effect of the proposed Joint Use Agreement on D&H’s operating expenses in the Albany – New York City corridor.

Table 1
Comparison of D&H Operating Expenses
Trackage Rights vs. CSXT Joint Use Agreement*

| Cost Component | Current D&H Trackage Rights | CSXT Joint Use Agreement |
|--|--------------------------------|-----------------------------|
| Crews (including taxi/lodging) | { | |
| Fuel | | { |
| Roadway | | |
| Locomotive Maintenance & Servicing | | |
| Locomotive Ownership | | |
| Third Party Payments: | | |
| -Amtrak | | |
| -CSXT trackage rights including delivery to/from Fresh Pond | | |
| -CSXT/Amtrak charge (track 2) | | |
| -CSXT Oak Point Switching and Inspection | | |
| -Metro North trackage rights | | |
| D&H Service Fee (Joint Use) | | |
| Sub-Total: | | |
| Annual Overall Reduction in D&H Costs: | } | } |

*Based upon 2007 traffic volume and long run variable costs.

⁵ See D&H-5, Reply in Opposition to New York & Atlantic Railway Company’s Motion to Compel Responses to the First Set of Discovery Requests Directed to D&H, Attachment 2, Documents D&H-HC-000168-000169.

As Table 1 shows, based upon D&H's 2007 traffic volume of { } carloads, D&H would pay CSXT a total of { } in D&H Service Fees ({ }) to move its traffic pursuant to the Joint Use Agreement.⁶ However, the { } in D&H Service Fees would be offset by eliminating trackage rights charges that D&H pays to CSXT ({ } in 2007) and to Amtrak ({ } in 2007).⁷ (D&H would continue to pay MNCR for the use of its lines, and would also continue to compensate CSXT separately to switch D&H cars to and from shippers in The Bronx and Queens via Oak Point Yard.) In addition, D&H would avoid the direct cost of the crews, fuel and locomotives that it uses in conducting its trackage rights operations, which totaled { } in 2007. In total, the Joint Use Agreement would enable D&H to eliminate { } in operating expenses associated with its trackage rights operations. Subtracting the { } in D&H Service Fees from that total, the Joint Use Agreement would generate total operating expense savings to D&H of { } annually. Based upon the 2007 traffic volume of { } loaded cars, this represents a reduction in D&H's operating costs of approximately { } per car. In other words, contrary to NYA's claim, the proposed transaction will significantly increase the contribution that D&H earns on traffic (including crushed stone shipments in conjunction with NYA) moving under the joint use agreement. These data – which were provided to NYA before it filed its Comments, but which NYA simply ignored – demonstrate that the proposed joint use

⁶ Under Section 9.03 of the Joint Use Agreement, D&H would { }.

⁷ The avoidance of payments to Amtrak is made possible by the elimination of 52 miles of circuitry in D&H's current route between Albany and Fresh Pond (which includes a 36.2-mile segment over Amtrak-maintained lines between Schenectady and Stuyvesant, NY). D&H's current route requires trains to move northwest from Albany to Schenectady, NY; then over CSXT's line between Schenectady and Poughkeepsie, NY; lines owned by Metro North Commuter Railroad between Poughkeepsie and MP 7 near High Bridge, NY; and CSXT and Amtrak lines between Harlem River Yard, Oak Point Yard and Fresh Pond Junction, NY.

arrangement will strengthen D&H's competitive position in the Albany – New York City corridor by eliminating the high cost of operating low-density trains pursuant to D&H's existing trackage rights.

Indeed, the proposed transaction is designed to enable both D&H and CSXT to maximize the efficiency of their rail service in the broader New York City – Montreal (Eastern Canada) corridor. As CSXT witness Potter testifies, CSXT moves thousands of cars annually between the New York City metropolitan area and Montreal, via its Massena Line and its existing interchange with CN at Huntingdon, PQ. Likewise, the vast majority of non-stone traffic that currently moves in D&H's trackage rights trains between Albany and Fresh Pond actually traverses the entire joint use corridor between Montreal and New York.⁸ D&H's non-stone traffic on the route has declined from more than { } cars in 2007 to approximately { } cars in 2009. Applicants structured the Joint Use Agreement to enable D&H to eliminate its low-density train operations, and increase the frequency of its service offering, by taking advantage of incremental capacity in CSXT trains operating in the Albany – New York City corridor. Likewise, the proposed transaction will enable CSXT to cut 142 miles off its existing route between New York and Montreal by utilizing available capacity on D&H's Saratoga Springs – Rouses Point Segment. At the same time, the agreement will simplify operations and cross-border interchange by permitting D&H to control all train movements on the Saratoga Springs – Rouses Point Segment (as it does in connection with the movement of NS and CN traffic over that line today). In short, Applicants have structured their Joint Use Agreement in a manner that maximizes operating efficiency and the benefits achievable by both parties.

⁸ The crushed stone traffic that is the subject of NYA's Comments originates on the D&H at Comstock and Saratoga Springs, NY.

One additional aspect of NYA’s flawed analysis warrants a brief response. Specifically, NYA claims that, under the Joint Use Agreement, D&H would assume liability “that would not exist in the normal case of interchanged traffic.” (NYA Comments at 11.) NYA’s observation that D&H would not incur any liability for damages caused by train operations over the Albany – Fresh Pond Segment “in the case of interchanged traffic” is both accurate and utterly irrelevant. The traffic that will move under the Joint Use Agreement is not “interchanged” by D&H to CSXT today – to the contrary, D&H itself transports that traffic over the line in D&H trackage rights trains. Under its existing East of the Hudson trackage rights agreement with CSXT,

{

} Under the proposed joint use agreement, D&H cars moving between Albany and Fresh Pond will be carried with CSXT’s cars in trains operated by CSXT. D&H’s liability for incidents involving those trains will be based upon the proportion of the number of D&H cars and CSXT cars, respectively, moving in the train. *See* Application, Exhibit 2, Joint Use Agreement, § 13. Under those provisions, D&H’s exposure to liability resulting from train operations in the Albany – Fresh Pond corridor will be {

} Thus, NYA’s suggestion that the Joint Use Agreement imposes greater liability risk on D&H, or “adds cost for D&H” (NYA Comments at 11), is incorrect.

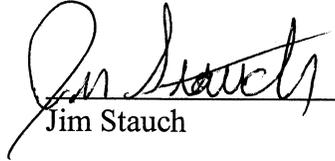
* * * * *

As the foregoing testimony shows, contrary to NYA’s assertions, implementing the joint use arrangement will improve the profitability of D&H’s traffic in the Albany- New York City corridor, by reducing substantially the operating expenses that D&H incurs in handling that traffic. This will make it less, not more, likely that D&H might “lose interest” in that business in the future. By contrast, the condition proposed by NYA would make it impossible for D&H to increase its revenues on crushed stone traffic handled in conjunction with NYA, by “freezing” both the rate and D&H’s revenue division on that traffic. Thus, it is NYA’s proposed condition – not D&H’s joint use arrangement with CSXT – that would create a disincentive for D&H to pursue future growth in crushed stone shipments to NYA-served destinations.

VERIFICATION

I, Jim Stauch, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.


Jim Stauch

Executed on July 19, 2010

DEERING

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35348

**CSX TRANSPORTATION, INC. & DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – JOINT USE AGREEMENT**

REBUTTAL VERIFIED STATEMENT OF PETER J. DEERING

My name is Peter J. Deering. I am Account Manager – Mines, Metals & Aggregates for Delaware and Hudson Railway Company, Inc. (“D&H”). My business address is 200 Clifton Corporate Parkway, P.O. Box 8002, Clifton Park, NY 12065. I have held my current position since 1994. As Account Manager – Mines, Metals & Aggregates, I am responsible for D&H’s marketing to, and customer relationships with, shippers of those commodities. Among the accounts for which I am responsible is Palette Stone Corporation (“Palette Stone”), which ships crushed stone to points on Long Island via an interline route involving D&H and New York & Atlantic Railway Company (“NYA”).

The purpose of this Rebuttal Verified Statement is to respond to the Comments filed by NYA on July 2, 2010. In those Comments, NYA complains that the proposed joint use agreement between D&H and CSXT will “jeopardize” the future movement of aggregate (crushed stone) traffic from D&H-served origins at Comstock and Saratoga Springs, NY to NYA-served destinations on Long Island. Specifically, NYA suggests that D&H may choose to “walk away” from that traffic by increasing rates to the point that D&H and NYA both lose the business. In order to prevent such a result, NYA asks the Board to impose a condition on its approval of the proposed transaction that would “freeze” both the rate for the subject crushed stone shipments and NYA’s current revenue division for a period of five years.

The proposed joint use of rail lines between Rouses Point Junction, NY and Fresh Pond, NY by CSXT and D&H is a pro-competitive, efficient transaction. Applicants and their customers will benefit from more efficient operations, operating cost savings and reduced emissions made possible by the Joint Use Agreement. No shipper will experience competitive harm as a result of the proposed transaction.

As my testimony demonstrates, the condition that NYA asks the Board to impose is unrelated to any competitive harm caused by the proposed transaction, and is not otherwise necessary to protect the public interest. D&H faces intense competition for crushed stone business to Long Island from both other rail carriers (including NYA) and alternate modes of transportation. The proposed transaction will enhance the ability of D&H (and its customers) to compete for shipments of crushed stone to Long Island consumers by reducing D&H's cost of operating in the Albany – Fresh Pond corridor and enabling D&H – for the first time – to offer service five to seven days per week. Moreover, the subject traffic moves {
}. The parties have been able to agree on a mutually acceptable rate, without resort to the regulatory process, in every year since {
} NYA offers no valid justification for the Board to interfere with the parties' market-based negotiations by “freezing” either the through rate for the subject crushed stone shipments, or the manner in which the carriers divide the revenues generated by that traffic. NYA's proposal represents a self-serving attempt to gain a commercial advantage by perpetuating a divisions arrangement that NYA perceives as especially advantageous to it.

I. D&H Faces Intense Competition For Crushed Stone Traffic To Long Island.

As NYA itself acknowledges (NYA Comments at 7), the business of transporting crushed stone to points in New York City and Long Island is highly competitive. Crushed stone is a low-

value, relatively fungible commodity that is available from a variety of sources throughout New York and Connecticut. The { } cars of crushed stone that D&H transported in conjunction with NYA during 2009 represents a very small percentage of total crushed stone deliveries to Long Island during that year.

Barge is by far the dominant mode of transportation for aggregate shipments to Long Island and New York City. Long Island aggregate consumers have efficient access to quarries in Connecticut via water terminals located on Long Island Sound. Moreover, barges enjoy the twin advantages of low operating costs and the ability to handle up to 2,500 tons – the equivalent of 25-30 rail cars – in a single barge.

Tilcon Connecticut, Inc., a major producer of crushed stone, operates a network of quarries and crushed stone terminals throughout the State of Connecticut.¹ A division of Tilcon, Buchanan Marine, operates a fleet of 250 aggregate barges and 11 tugboats. Buchanan Marine has terminal facilities along the north shore of Long Island Sound at New Haven, Norwich and Juniper Point (Branford), CT, and operates crushed stone transloading facilities at Port Jefferson and Port Washington on the north shore of Long Island.² Through its Buchanan Marine division, Tilcon delivers more than 6 million tons of crushed stone by water each year to Long Island and New York City.³ These shipments dwarf the much smaller volumes of crushed stone that move to Long Island by rail.

¹ Attachment 1 is a map depicting the locations of Tilcon's crushed stone facilities in Connecticut. Source: <http://www.tilconct.com/locaation4.htm>.

² Buchanan Marine's terminal facilities are described in Attachment 2. Source: <http://www.buchananmarinelp.com/locations.htm>.

³ Source: www.tilconct.com/barge.htm.

In recent years, D&H and other railroads have succeeded in capturing a small portion of the overall volume of crushed stone traffic moving to Long Island. As described in Part II below, in 2004, D&H began carrying crushed stone from quarries located at Comstock and Saratoga Springs, NY to Holtsville, NY. Cars originating at the two facilities (both of which are operated by Palette Stone) are consolidated at D&H's Kenwood Yard in Albany, and currently move in D&H trackage rights service from Albany to Fresh Pond, NY, where they are interchanged to NYA for delivery to Holtsville, NY. While the volume of those crushed stone shipments has grown from { } carloads in 2007 to { } carloads in 2008 and { } carloads in 2009, the D&H/NYA interline route remains, at best, a minor participant in the transportation of crushed stone to Long Island.

NYA also participates in crushed stone shipments to Long Island destinations in conjunction with the Providence and Worcester Railroad Company ("P&W"). In 1996, P&W obtained trackage rights and freight easements over various rail lines owned and/or operated by Conrail, Amtrak, the Metropolitan Transit Authority and the Connecticut Department of Transportation between New Haven, CT and Fresh Pond Junction, NY. Those rights, which are restricted to the handling of stone and sand traffic, were intended to enable P&W to interchange those commodities directly with NYA at Fresh Pond.⁴ As CSXT witness Potter testifies, CSXT's trackage rights payment records indicate that the volume of crushed stone cars moved by P&W in conjunction with NYA has grown from { } carloads in 2007 to { } carloads in 2008 and { } carloads in 2009. In a telephone conversation on July 7, 2010, {

⁴ See Finance Docket No. 33132, *Providence and Worcester R. Co. – Acquisition and Operation Exemption – Certain Rights of Consolidated Rail Corporation* (1996 W.L. 580335 S.T.B.).

} While relatively modest in relation to the total volume of crushed stone moving to Long Island by all modes, the shipments handled via P&W/NYA interline rail service exceed by a considerable margin the volumes that NYA is handling in conjunction with D&H.

NYA also has the ability to interchange rail traffic with CSXT at Fresh Pond, NY and with both CSXT and Norfolk Southern Railway Company (“NS”) at Bay Ridge in Brooklyn (via the cross harbor ferry service operated by New York New Jersey Rail, LLC between Greenville, NJ and Bay Ridge). These interchange connections provide additional rail options for shippers desiring to ship aggregate traffic to points on Long Island. Truck service, either via transload facilities or direct from the quarry, provides yet another modal choice for aggregate shippers in the region.

In short, shippers and receivers of crushed stone enjoy a multitude of competitive options, including rail routings involving carriers other than D&H, for the transportation of crushed stone to points on Long Island and in New York City. The shipments handled by D&H in conjunction with NYA account for a tiny fraction of the crushed stone that moves to Long Island annually. For that reason, the proposed joint use agreement between D&H and CSXT will not adversely affect competition for that commodity. To the contrary, the cost savings and increased service frequency made possible by the joint use arrangement will enhance the attractiveness of D&H service to and from the New York City metropolitan area, thereby improving the ability of D&H (and crushed stone shippers that it serves) to participate in shipments to that large consuming market.

II. NYA's Proposed Condition Is Not Warranted.

NYA's purported concern regarding the proposed transaction is that the D&H/CSXT joint use agreement will "jeopardize the one remaining important block of traffic – Stone Traffic – that D&H handles to the New York market and interchanges with NYA." (NYA Comments at 6.) This concern is premised on NYA's assumption that the economic terms of the proposed transaction will reduce the profitability (to D&H) of the crushed stone traffic that moves via the D&H/NYA route, and that D&H will "lose interest" in that business. *Id.*⁵ NYA's proposed "solution" to this problem is to force D&H to continue to handle interline shipments of crushed stone in conjunction with NYA at the same { } rates (subject to an annual RCAF-based adjustment), and with the same revenue divisions, as those that apply today for a period of five years.

A brief history of the D&H/NYA crushed stone movement will demonstrate why the condition requested by NYA is not only unwarranted, but in fact represents a transparent attempt by NYA to obtain an unfair advantage in future divisions negotiations with D&H:

The D&H/NYA interline crushed stone traffic originates at two D&H-served quarries, one located at Comstock, NY and the other at Saratoga Springs, NY, operated by Palette Stone. As NYA's Comments (at 9) indicate, nearly { } percent of the cars originate at Comstock (81.52 miles north of Albany), with the remaining cars originating at Saratoga Springs (42.52 miles north of Albany). D&H transports cuts of cars from each of those locations to its Kenwood Yard in Albany, where the cars are switched into a single train for movement to NYA

⁵ The Rebuttal Verified Statement of D&H witness Jim Stauch explains why NYA's assumptions regarding the impact of the joint use arrangement on D&H's profitability are incorrect.

at Fresh Pond, NY. NYA handles the cars from Fresh Pond to their ultimate destination at Holtsville, NY. (NYA Comments, V.S. Victor at 4.)

Palette Stone's crushed stone traffic moves under {
 }⁶ Pursuant to {

} are set forth in Table 1.

Table 1
D&H – NYA Crushed Stone Traffic Rates and Divisions

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| { | } | { | } | { | } | { | } |
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| { | } | { | } | { | } | { | } |
| | | | | | | | } |

⁶ See Attachment 3.

⁷ NYA incorrectly identifies the { }, and the current D&H and NYA revenue divisions as { } and { }, respectively. (NYA Comments at 8.) In fact, the { } per carload, and the current D&H and NYA revenue divisions are { } and { }, respectively. See Attachment 3. NYA's figures appear to include the applicable fuel surcharge, which fluctuates monthly in response to changes in fuel costs.

At the outset of the { }, D&H agreed, for a variety of reasons, to transport Pallette Stone's crushed stone traffic at what amounted to a "below market" rate. We made a commercial decision to assist Pallette Stone in its effort to establish a commercial presence on Long Island, an area that depends on stone from outside sources to support local construction activity. Based upon conversations with the shipper at that time, D&H anticipated that the volume of crushed stone shipped by Pallette Stone to Long Island would grow to a level that enabled D&H to institute more efficient unit-train service. While Pallette Stone's traffic has increased somewhat over the years, the large unit train shipments envisioned at the outset of the contract have not materialized, due (among other reasons) to the recent economic recession and delays experienced by an affiliate of Pallette Stone in developing a transload facility for stone traffic on Long Island.⁸ Finally, while the low rates offered to Pallette Stone rendered the business only marginally profitable for D&H, D&H was anxious to secure a consistent source of traffic to augment the very low volumes moving in D&H train service from Albany to the New York City area.

NYA contends that it "{

} (NYA Comments at 13.) This assertion is belied by the rate history set forth in Table 1 above. As that table shows, {

} Those annual adjustments have averaged approximately { }

Thus, D&H, NYA and Pallette Stone have been able to agree on a mutually acceptable through

⁸ Pallette Stone's parent, D.A. Collins, is a participant with Sills Road Materials, LLC in the development of the proposed Brookhaven Rail Terminal in the vicinity of Yaphank, NY. I understand that the project is awaiting final STB authorization.

rate in every year in which { }, and I am confident that we will be able to do so going forward. It is noteworthy that Pallette Stone has not joined NYA in demanding a rate “freeze” as a condition upon the Board’s approval of the proposed transaction.

From D&H’s perspective, the annual negotiations between D&H and NYA with respect to revenue divisions on Pallette Stone’s traffic have been more problematic. As Table 1 shows, NYA enjoys a very favorable divisions arrangement with respect to that business. For example, on shipments from Comstock, NY to Holtsville, D&H’s portion of the movement accounts for 83% of total route miles. In addition to providing local service to the quarry and 83% of the line haul service to Fresh Pond, D&H is required to perform additional switching at Kenwood Yard in Albany in order to consolidate cars originating at Comstock with those originating at Pallette Stone’s Saratoga Springs quarry. Yet, D&H currently receives only { } per car, or { } of the revenue from the traffic. By contrast, NYA receives { } per car, or { } of the revenue, for moving the traffic from Fresh Pond to Holtsville, a distance of 47.4 miles, or 17 percent of the total route miles.

Over the past several years, D&H has sought to address this imbalance in the parties’ divisions arrangement by asking NYA to cede a greater portion of the revenue to D&H (primarily by taking a lower percentage of the annual rate increase). As Table 1 indicates, that effort has met with little success. NYA’s division, which accounted for { } of the through rate in 2005, remains at { } today. NYA’s status as the sole freight rail service provider to Long Island, and the availability of crushed stone from alternate sources served by P&W, gives NYA leverage to extract a disproportionate share of the revenue on crushed stone traffic that it handles in conjunction with D&H. (As D&H witness Stauch shows, NYA exercises similar leverage in negotiating revenue divisions for other commodities as well.) As a result of that

negotiating advantage, the Palette Stone traffic is clearly more lucrative for NYA than it is for D&H. NYA certainly does not need (or deserve) additional assistance from the Board in negotiating future revenue divisions for crushed stone traffic.

III. Palette Stone's Logistical Concerns Regarding The Proposed Joint Use Agreement Have Been Resolved and It Supports The Proposed Transaction.

On June 18, 2010, Palette Stone submitted a letter to the Board expressing concern regarding certain "logistical ramifications" of the proposed joint use arrangement between D&H and CSXT.⁹ That letter did not suggest that the proposed transaction is in any way anticompetitive, or that the purported concerns underlying NYA's proposed rate and divisions "freeze" condition are shared by Palette Stone. Rather, the letter presented a list of questions regarding the manner in which D&H's shift from trackage rights operations to joint use in the Albany – New York City corridor might affect the day-to-day handling of Palette Stone's traffic. (*See* Attachment 4 at 1.)

Representatives of D&H (including me) subsequently met with Palette Stone to discuss their concerns and to explain how the proposed transaction would benefit them. We confirmed that CPR/D&H's shipment tracking tools will continue to be available to enable Palette Stone to track its shipments, even though their cars will move from Albany to Fresh Pond in CSXT trains under the Joint Use Agreement. (I understand that Palette Stone, and other D&H customers, will be able to track their shipments using CSXT's customer tools as well.) We explained how Palette Stone's traffic will be physically handled following implementation of the joint use arrangement, and pointed out that the increased frequency of D&H service between

⁹ A copy of Palette Stone's letter is set forth in Attachment 4.

Albany and Fresh Pond made possible by the transaction should prove beneficial to Palette Stone.

At the conclusion of our meeting, Palette Stone's representatives advised us that they had a better understanding of the proposed Joint Use Agreement and its impact on their shipments, and that the meeting had resolved their concerns. On July 21, 2010, Palette Stone filed a second letter with the Board in which it confirmed that "our concerns have been addressed and resolved by the D&H." *See* Attachment 5. Based upon the successful resolution of its logistical concerns, Palette Stone states that "[w]e are confident that traffic service will improve as well as create efficiencies which are expected to create a win-win for both D&H as well as for [Palette Stone]." *Id.* Palette Stone's letter further indicates that it supports our Application for approval of the Joint Use Agreement. *Id.* Palette Stone's July 21, 2010 letter is further compelling proof that the self-serving condition requested by NYA is not warranted.

VERIFICATION

I, Peter Deering, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.


Pete Deering

Executed on July 15, 2010

ATTACHMENT 1

REBUTTAL VERIFIED STATEMENT OF PETER DEERING



Tilcon Connecticut Inc.

Serving Connecticut's Communities Since 1923

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Stone Locations

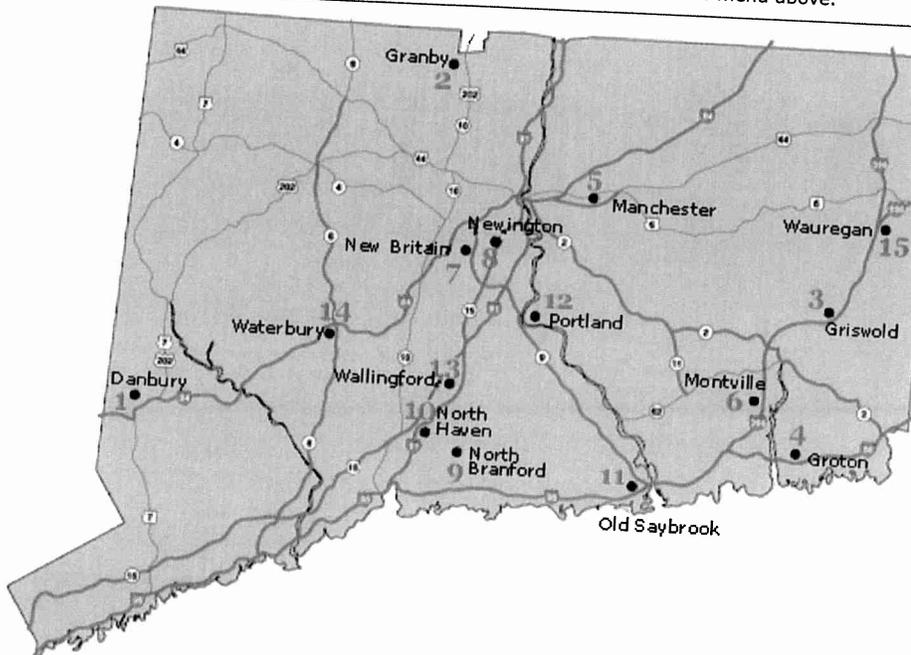
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--- Select a Location --- Or --- Select a Product ---

Tilcon has conveniently located Crushed Stone facilities across Connecticut. Click on the map for more information or select a city from the menu above.



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 Main Phone: 860-224-6005 | Main Fax: 860-225-1865
 Sales Direct Phone: 860-612-3161 | Sales Direct Fax: 860-229-2029

ATTACHMENT 2

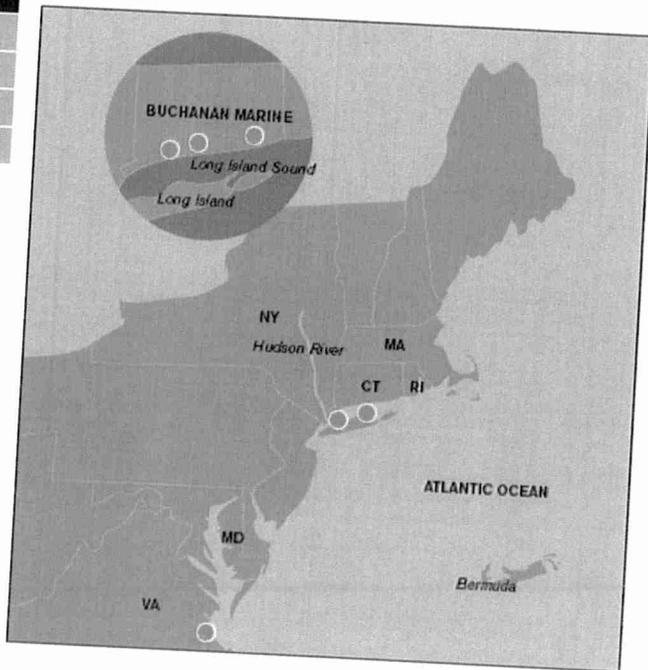
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Buchanan Marine
39 Ferry Street
New Haven, CT 06519

P (203) 466-0484
F (203) 466-3802
E info@buchananmarinelp.com

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PORT JEFFERSON, NEW YORK

Located across Long Island Sound from Bridgeport, CT on the North Shore of Long Island. Cargo can be unloaded from one of our barges, transloaded onto trucks and delivered the same day to eastern Long Island destinations. Using this facility will save time and money by avoiding metro New York City traffic and bridge tolls.

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Port Jefferson Marine Terminal

Port Jefferson, New York

Complete barge, truck and storage facility. Buchanan Port Jefferson Marine Terminal is located on the north shore of Long Island approximately half way between New York City and the eastern tip of the Long Island. The terminal is centrally located to service all of central and eastern Long Island.

Services:

- Barge to Truck
- Truck to Barge
- Welding Services
- Metal cutting, bonding and fabricating services
- Open and closed storage
- Truck scale services

Equipment:

- All types of equipment available including extended reach excavator with hydraulic clamshell, loaders and forklifts.

Barge:

- Loading and unloading barges to and from trucks. Facility will accommodate barges up to 300 feet with up to 12' draft. Direct material delivery by Buchanan owned barges to company operated docks located in Bridgeport Connecticut, Claremont New Jersey, (Bayonne, Newark and all of New Jersey) Norwich, Connecticut (Eastern Connecticut, RI and rail services to all points north), Seaford, Delaware (Delmarva Peninsula) Norfolk, Virginia and to all other ports on the Eastern Seaboard including Block Island, Martha's Vineyard and Nantucket.

Warehousing:

- Three acres open storage and 5,000 square feet indoor storage.

Truck:

- Easy access to Route 495 (Long Island Expressway).

Products Handled:

- Lumber, wood chips and mulch
- Treated lumber
- Logs
- Pipe
- Structural steel, plate and coils
- Aggregate (Sand & Stone)
- Riprap stone and large cut granite blocks for jetties, piers and bank erosion control
- Pilings and sheet pile
- Precast concrete
- All types of construction material and other non-hazardous cargo
- Large dimensional cargo not easily handled by truck

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Buchanan Marine
39 Ferry Street
New Haven, CT 06519

P (203) 466-0484
F (203) 466-3802
E info@buchananmarinelp.com

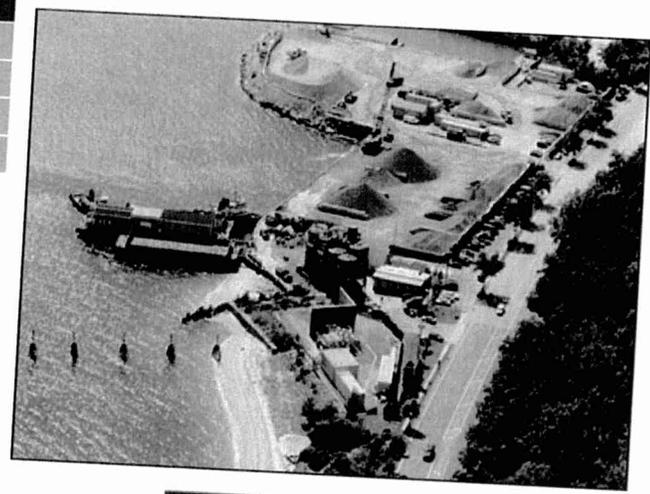
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Located on the north shore of Long Island, this terminal is minutes from the Northern States Parkway and Long Island Expressway. Cargo can be unloaded from one of our barges, transloaded onto trucks and delivered the same day to Nassau and Queens Counties. Outside storage capabilities allow you flexibility in scheduling just-in-time deliveries to your customers. Trucks avoid the bridges and cross-borough traffic.

Port Washington Marine Terminal

Port Washington, New York

Complete barge, truck and storage facility. Buchanan Port Washington Marine Terminal is located on the north shore of Long Island just ten miles east of New York City. The terminal is perfectly located to service all of western Long Island and New York City.

Services:

- Barge to Truck
- Truck to Barge
- Welding Services
- Metal cutting, bonding and fabricating services
- Open and closed storage
- Truck scale services

Equipment:

- All types of equipment available including extended reach excavator with hydraulic clamshell, loaders and forklifts.

Barge:

- Loading and unloading barges to and from trucks. Facility will accommodate barges up to 300' length with up to 12' draft. Direct material delivery by Buchanan owned barges to company operated docks located in Bridgeport, CT, Claremont, NJ (Bayonne, Newark and all of New Jersey), Norwich, CT (Eastern Connecticut, Rhode Island and rail services to all points North), Seaford, DE (Delmarva Peninsula), Norfolk, VA and to all other ports on the Eastern Seaboard including Block Island, Martha's Vineyard and Nantucket.

Warehousing:

- Three acres open storage and 5,000 square feet indoor storage.

Truck:

- Easy access to Route 495 (Long Island Expressway) and other New York City routes.

Products Handled:

- Lumber, wood chips and mulch
- Treated lumber
- Logs
- Pipe
- Structural steel, plate and coils
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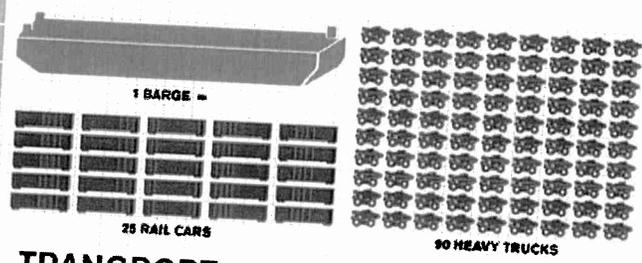
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F (203) 466-3802
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TRANSPORT CAPABILITIES

Waterways transportation is the most economical, environmentally-friendly form of commercial freight transportation. The greater fuel efficiency of tugboats results in cleaner air while moving goods off already congested roads and away from crowded population centers.

Buchanan Marine's barges can go anywhere there's enough water. We are not restricted by highway regulations, traffic jams or tolls. Most of our barges were built with narrow waterway access in mind, hence the 44-foot beam.

The power to fit every barge business need is here in one place. Buchanan Marine owns and operates three different kinds of workboats. They are all compact, powerful tugs that push, pull or otherwise tow barges along the desired course or into position for loading and unloading.

Our push-boat is used on broad inland waterways, where shallow draft and large horsepower are an advantage. With the ability to push an array of 16 barges at once, this push-boat has the capacity to move 32,000 tons in a single tow.

Our standard tugs are used to tow smaller barge arrays in deeper, more active water, while small, super-maneuverable shuttle tugs move barges short distances quickly to keep the docks organized and provide maximum utility.

Buchanan's dedicated fleet of tugboats and barges can move your cargo to convenient dock locations in most major northeastern seaboard and riverside commercial centers. We have the personnel available to evaluate new dock locations at any time.

PRODUCTS

Buchanan Marine offers you the hauling power to ship huge volumes in a single operation. It's an option that offers a big cash advantage over road or rail transportation. Buchanan's dedicated fleet of tugboats and barges can move your cargo to convenient dock locations in most major northeastern seaboard and riverside commercial centers.

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Buchanan Marine
39 Ferry Street
New Haven, CT 06519
P (203) 466-0484
F (203) 466-3802
E info@buchananmarinelp.com

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SITE DESIGN: FIBRA DESIGN

ATTACHMENT 3
REDACTED

REBUTTAL VERIFIED STATEMENT OF PETER DEERING

ATTACHMENT 4

REBUTTAL VERIFIED STATEMENT OF PETER DEERING

JOINTA GALUSHA L.L.C.

PO Box 302 - 203 Warren St.
Glens Falls, NY 12801
518-792-5029 Phone
518-792-5230 Fax



Proud Members of the
D.A. COLLINS COMPANIES

PALLETTE STONE CORP.

PO Box 4550 - 373 Washington St.
Saratoga Springs, NY 12866
518-584-3877 Phone
518-584-4382 Fax

227304

June 18, 2010

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

ENTERED
Office of Proceedings

JUN 18 2010

Part of
Public Record

VIA ELECTRONIC FILING

RE: STB Finance Docket No. 35348
CSX Transportation, Inc and Delaware & Hudson Railway Company, Inc.-

Dear Ms. Brown:

We are respectfully submitting this letter regarding STB Finance Docket No. 35348 in hopes that before a decision is reached regarding the proposed joint use agreement between CSX Transportation, Inc and Delaware & Hudson Railway Company Inc. that there may be discussion regarding the logistical ramifications of such an agreement. We are a major producer and shipper of New York State aggregate and currently use CP Rail to ship our product from our facilities in Upstate New York down to Long Island NY. An attempt was made to communicate our questions and concerns directly to CP Rail but in light of the case currently before the STB, they felt the most appropriate course of action would be to present this communication directly through an STB filing.

Currently, the rail operation that we have, in conjunction with CP Rail and New York and Atlantic, runs quite smoothly and the operational end is highly predictable. Based on the three day a week service that we receive with CP Rail and their train schedule from Albany to Fresh Pond, we can usually predict, fairly accurately when our cars are going to land at their destination. With a few exceptions, they also travel in blocks of approximately 40 cars and this grouping, for the most part stays intact. Many of our customers order our stone based on DOT projects and the timing of the deliveries is of utmost importance. With the proposed Joint agreement with CSX, we have concerns as to how this is going to continue. The following is a list of questions that we would like to have addressed so that we know what to expect if and when this merger occurs. Our plans are to expand our operation and we may have to make some serious modifications as to how we administer the logistics based on the answers to the following questions. I think having this in place prior to shipment would be beneficial to all parties involved.

Billing and Tracking

1) Currently CP Rail has a tracking system based on car tags. On a daily basis, we have access to an online report which enables us to effectively track our cars along the entire line from Comstock and Saratoga Springs down to their final destination in Holtsville. Before reaching Holtsville, our cars are switched to the New York and Atlantic Railway in Fresh Pond, NY and the CP Rail tracking system includes the cars on the NY & A Railway as well. This tool is extremely important to our logistics personnel and we would like to know if this report will still be available to us if and when the joint use agreement is approved. If it is, will it include the cars that are switched to the CSX line in Selkirk?

2) CP Rail has an online service which we use to bill out our cars for shipment. Currently, we bill them to their final destination in Holtsville. If CP Rail switches to CSX in Selkirk NY, will the original CP Billing stay intact or will this switch have to be billed separately through CSX or CP Rail?

Selkirk Switch

1) I understand that the Selkirk siding is a fairly large facility. When the switch occurs from CP to CSX, will my block of cars stay intact? Is there any policy going to be put in place to ensure that the aggregate cars from our two sidings stay in the blocks in which they were shipped?

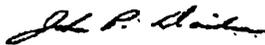
2) Will CSX have the option to pull a couple of our cars in order to fill a train, thus breaking up the shipping block? Our concern here is that with such a large siding, if the blocks do not stay intact, there is ample opportunity for cars to "mishandled" or switched incorrectly. If this occurs, it compromises our ability to deliver the appropriate quantity of stone to our customers in an acceptable time parameter. It can also lead to cars returning to our sidings in groups that would be impossible to place in time to avoid potential demurrage charges from CP Rail.

Fresh Pond (NY&A)

1) The questions above lead to another question regarding the switch to the NY&A in Fresh Pond. It is understood that the New York and Atlantic Railway has to accommodate the Long Island RR and adjust their shipment schedules accordingly. As it stands right now, it is relatively simple because they receive their loads from CSX separately from the CP Rail loads which primarily contain aggregate. If the trains from the CSX siding in Selkirk get combined, will NY&A be able to handle the switches and deliver our stone in an efficient manner?

I appreciate any assistance you can give in addressing these questions and concerns.

Sincerely



John P. Davidson
Vice President
Jointa Galusha LLC
Pallette Stone Corp.

ATTACHMENT 5

REBUTTAL VERIFIED STATEMENT OF PETER DEERING

JOINTA GALUSHA L.L.C.

PO Box 302 - 203 Warren St.
Glens Falls, NY 12801
518-792-5029 Phone
518-792-5230 Fax



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PALLETTE STONE CORP.

PO Box 4550 - 373 Washington St.
Saratoga Springs, NY 12866
518-584-3877 Phone
518-584-4382 Fax

July 21, 2010

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

VIA ELECTRONIC FILING

RE: STB Finance Docket No. 35348
CSX Transportation, Inc and Delaware & Hudson Railway Company, Inc.-

Dear Ms. Brown:

Jointa Galusha, LLC and Pallette Stone Corp. (JG/Pal) have submitted documents to the STB regarding Finance Docket #35348 between CSX Transportation, Inc. (CSX) and the Delaware and Hudson Railway Company, Inc. (D&H).

Subsequent to those submissions, our concerns have been addressed and resolved by the D&H. We are confident that traffic service will improve as well as create efficiencies which are expected to create a win-win for both the D&H as well as for JG/Pal. JG/Pal is also in agreement with the statements pertaining to the Albany-Fresh Pond Segment and Conclusions of the New York State Department of Transportation's comments submitted to the STB dated July 2, 2010.

Therefore, please consider all of our prior submissions as having been addressed and satisfied. JG/Pal is in support of the application of the Joint Use Agreement between CSX and the D&H. Thank you for the opportunity to submit our comments.

Sincerely

John P. Davidson
Vice President
Jointa Galusha LLC
Pallette Stone Corp.

POTTER

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35348

**CSX TRANSPORTATION, INC. & DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – JOINT USE AGREEMENT**

REBUTTAL VERIFIED STATEMENT OF STEVEN A. POTTER

My name is Steven A. Potter. I am the same Steven A. Potter who filed a verified statement in support the Application filed by CSX Transportation, Inc. (“CSXT”) and the Delaware and Hudson Railway Company, Inc. (“D&H”) seeking authority from the Surface Transportation Board (the “Board”) to enter into a joint use arrangement pursuant to which the carriers would jointly use certain rail lines in New York State consisting of segments owned by both CSXT and D&H (the “Transaction”). In this Rebuttal Verified Statement I am responding to the comments filed in response to the Application on July 2, 2010 by (i) the New York City Economic Development Corporation (“NYCEDC”) in support of the proposed transaction; (ii) the New York State Department of Transportation (“NYSDOT”) in support of the proposed Transaction subject to the imposition of certain proposed conditions; (iii) Samuel J. Nasca on behalf of the United Transportation Union-New York State Legislative Board (“UTU-NY”) in opposition to the proposed Transaction; and (iv) the New York & Atlantic Railway Company (“NYAR”) in opposition to the proposed Transaction. A letter was filed supporting the proposed Transaction by Jointa Galusha L.L.C. and Palette Stone Corp. (“JG/PS”). Sills Road Materials LLC (“Sills Road”) late-filed on July 15, 2010, a request for conditions. But first, in view of these various comments, I will provide some additional background to the proposed Transaction.

BACKGROUND

The proposed joint use arrangement includes D&H's rail line between Saratoga Springs, NY and Rouses Point Junction, NY (the "Saratoga Springs – Rouses Point Segment"), D&H's rail line between Albany, NY and Saratoga Springs, NY (the "Albany – Saratoga Springs Segment") and CSXT's rail line between Albany, NY and Fresh Pond Junction, NY (the "Albany – Fresh Pond Segment") (collectively, the "Joint Use Lines"). The proposed Transaction supports CSXT's effort to drive operational excellence, improve network efficiency and create greater capacity and improved service to meet current and future customer expectations. In addition, CSXT expects the proposed Transaction to attract additional freight to rail that currently moves via other modes of transportation.

CSXT expects to reduce gross ton miles by 442,000,000 annually and to save about \$280,000 annually. CSXT expects to reduce the running time between Albany and Montreal by 13 hours and the proposed Transaction will reduce the distance each train has to travel by about 142 miles in each direction.

CSXT currently uses the Albany – Fresh Pond Segment for traffic moving between Fresh Pond Yard in New York City and Montreal via Albany, Syracuse, and Huntingdon, PQ. On this route, CSXT handled { } cars in 2006, { } cars in 2007, { } cars in 2008, and { } cars in 2009 between Fresh Pond and Montreal via the Albany – Fresh Pond Segment, CSXT's Selkirk to Syracuse line, and the Syracuse to Huntingdon line. Under the Joint Use Agreement, CSXT will use the direct Joint Use Lines instead of the more circuitous route via Syracuse, saving 142 miles per train.

D&H currently operates between Albany and Fresh Pond via trackage rights over CSXT. Under existing agreements between CSXT and D&H, D&H has the right to request CSXT to

handle D&H's traffic between Oak Point Yard and Fresh Pond. D&H has elected to handle the freight itself and physically interchanges with the NYAR at Fresh Pond today.

The average length of train delivered to Fresh Pond Yard by CSXT for interchange to NYAR is about 3,000 feet, with deliveries to NYAR on Mondays averaging about 5,600 feet and the other days averaging about 2,400 feet.¹ The trains delivered to Fresh Pond are built at CSXT's Selkirk Yard. From Selkirk, the trains are taken to Oak Point Yard and then to Fresh Pond Yard. CSXT delivers trains to a 5,800-foot long track owned by NYAR at Fresh Pond Yard. CSXT picks up trains for interchange from NYAR at Fresh Pond Yard on a 5,300-foot track that is two-thirds owned by CSXT and one-third owned by NYAR. CSXT uses its best effort to restrict the length of trains delivered to NYAR at Fresh Pond Yard to no more than 5,700 feet so that there is some additional space on the NYAR's 5,800-foot delivery track for moving locomotives and cars as necessary.

It is CSXT's general experience that Monday is a heavy traffic day from Selkirk to Fresh Pond. Train length on Mondays may and does often exceed 5,700 feet because the parties do not interchange traffic on Sundays, thus Monday's deliveries include the slack that occurs as a result of there being no service on Sunday. When CSXT has enough traffic to build a train that is greater than 5,700 feet in length, CSXT either holds cars in Selkirk and adds them to the next day's train or builds the long train in Selkirk, delivers it to Oak Point and holds the extra cars in Oak Point.

If the train to Fresh Pond Yard is too long to handle all of the available traffic, CSXT will add traffic on the next available regularly scheduled southbound train at Selkirk or Oak Point

¹ Based on activity between January 1, 2009 and October 31, 2009.

that has space. As it does today, CSXT will limit the length of trains delivered to NYAR at Fresh Pond to 5,700 feet.

Based upon current traffic levels, trains exceeding 5,700 feet in length should not be a frequent occurrence. CSXT anticipates that D&H's traffic will average about ten to fifteen cars per day, which adds between 700 and 1,100 feet to the inbound train. On days other than Monday, CSXT's existing trains, which average only 2,400 feet in length, can easily accommodate all of D&H's traffic while staying within the 5,700-foot limit observed by CSXT for deliveries to NYAR. On Mondays, the average length of trains carrying CSXT's and D&H's combined traffic would be about 6,700 feet (assuming that D&H tenders 15 cars for movement on that day). In that event, based upon the historic length of the trains, CSXT would move the excess traffic from Monday in Tuesday's train, which would increase the overall length of that train to an average of about 4,400 feet. As such, D&H's volumes will not create any new operating issues, as Monday will remain – on average – the only day where train length will exceed 5,800 feet. Tuesday's delivery can handle any overage that may result from trains longer than 5,800 feet on Monday. In the future, CSXT will employ the same operations as it and the NYAR do today to handle the overage – hold traffic at either Selkirk or Oak Point until the next available day.

At this time, CSXT does not have any plans to extend the length of the sidings at Fresh Pond and does not intend to increase the frequency of service because it is not justified by the current traffic volume. If traffic grows to the point where it warrants an additional train, CSXT will consider adding service to maintain the fluidity of its interchange with the NYAR. D&H also has the right to reactivate its trackage rights if its volume of traffic grows to where it becomes efficient to operate its own trains again.

RESPONSE TO COMMENTS

In this section of my statement, I will specifically respond to the comments.

New York City Economic Development Corporation.

CSXT appreciates the support for the proposed Transaction provided by NYCEDC. NYCEDC is correct when it states that the proposed Transaction will result in D&H becoming a more efficient carrier through reduced costs and increased frequency of service.

New York State Department of Transportation.

NYSDOT supports the proposed Transaction subject to the imposition of two conditions: (i) Board retention of jurisdiction and oversight for three years after consummation of the proposed Transaction to monitor the impact of the proposed Transaction on Amtrak service over the Albany – Rouses Point Junction Segment and the level of service and rates for shippers on both the Albany- Fresh Pond Segment and the Syracuse to Fort Covington, NY segment currently used by CSXT to route traffic between Albany and Montreal; and (ii) the labor protective conditions offered and agreed to by Applicants in the Application consisting of *Norfolk and Western Ry. Co.–Trackage Rights–BN*, 354 I.C.C. 605 (1978) (“*N&W*”), as modified in *Mendocino Coast Ry., Inc. –Lease and Operate*, 360 I.C.C. 653 (1980)(“*Mendocino*”) (jointly referred to as the “Labor Protective Conditions”).

In the Application, CSXT and D&H requested the imposition of the Labor Protective Conditions. Therefore, CSXT does not oppose the labor protection condition sought by NYSDOT.

However, CSXT does object to the proposed monitoring condition of the level of service and rates for shippers on both the Albany – Fresh Pond Segment and the Syracuse to Fort Covington, NY segment (the “Massena Line”) currently used by CSXT to route traffic between

Albany and Montreal. Once CSXT's two trains per day are shifted from the Massena Line, CSXT expects to add an additional local train two to three times per week (in each direction), in addition to the number of other trains running on the Massena Line. These new local trains will transfer freight between Dewitt Yard, located in Syracuse, NY and Massena, NY, feeding the local jobs responsible for serving the Massena Line's local industries. Contrary to the NYSDOT analysis, local service on the Massena Line will not be reduced to two to three days per week as a result of the proposed Transaction. CSXT will continue to serve all customers as it does today, with service being in accordance with existing volumes. As was stated in the Application at 19, "Local trains that currently serve customers along the Massena Line will continue to operate as they do today." There will be additional local trains that will bridge traffic from the Massena Line to Syracuse, which will afford local customers a comparable level of service to that received today in reaching CSXT's trunk line at Syracuse, NY.

NYSDOT correctly concludes that the proposed Transaction will enhance competition, provide environmental benefits, and reduce costs for shippers. These benefits warrant approval of the proposed Transaction without the condition for monitoring service and rates on the Massena Line.

Samuel J. Nasca on behalf of the United Transportation Union-New York State Legislative Board.

UTU-NY contends that the Proposed Transaction is not joint use and if it is joint use, that it will reduce competition. In the alternative, UTU-NY asks that the *Oregon Short Line* and *Norfolk & Western* employee protective conditions be imposed.

CSXT and D&H have negotiated the proposed Transaction pursuant to which they would share their rail lines between Fresh Pond Junction and Rouses Point Junction in the most efficient manner possible. In doing so, both parties expect to realize economic benefits, while

improving the competitiveness of the other party. The proposed Transaction is based on the agreement to jointly use the Joint Use Lines and grant certain competitive enhancements to the other party – D&H being able to provide more frequent and less costly service to Fresh Pond and CSXT being able to provide more efficient service between Albany and Montreal. Neither the competitive enhancement occasioned by CSXT’s agreement to permit D&H to move its traffic in CSXT’s trains between Albany and Fresh Pond, nor D&H’s reciprocal agreement to make the Albany – Saratoga Springs Segment and the Saratoga Springs – Rouses Point Segment available to CSXT’s traffic, would have occurred in isolation. Rather, they are integrated elements of a single transaction involving the shared use of all of the Joint Use Lines.

UTU-NY offers no analysis to support its argument that the use of the Albany to Rouses Point Junction line by CSXT, D&H, Norfolk Southern Railway Company and Canadian National Railroad is anticompetitive. Indeed, these four carriers will be operating on the same physical plant. They will be able to compete head-to-head in his market based on service and price. The shared use by four railroads of the most efficient route to and from Eastern Canada creates a highly competitive atmosphere, not a cartel as alleged by UTU-NY.

UTU-NY also alleges that the rerouting of two trains per day from the Massena Line to the Joint Use Lines will adversely affect some employees and the Board should impose both the *Norfolk & Western* and *Oregon Short Line* conditions. However, CSXT will continue to serve the Massena Line. Any employees on the Massena Line who are adversely affected by the proposed Transaction, and in the Application CSXT admitted a net employee reduction of 10, will be protected under the Labor Protective Conditions. UTU-NY has not even claimed that CSXT is abandoning or discontinuing service on the Massena Line, and CSXT is not. UTU-NY

does not explain why the *Norfolk & Western* conditions are not adequate to protect any adversely affected employees. Thus, there is no basis for imposition of the *Oregon Short Line* conditions.

New York & Atlantic Railway Company.

NYAR is seeking denial of the proposed Transaction or imposition of a condition that would freeze rates and revenue divisions between NYAR and D&H with regard to stone traffic. CSXT will leave the response to NYAR largely to D&H. However, CSXT would like to make two points.

First, CSXT provides trackage rights to the Providence and Worcester Railroad Company (“P&W”) into Fresh Pond Yard to move aggregate commodities. Based on CSXT’s billings to P&W for trackage rights, P&W appears to be a strong competitor with D&H for the movement of stone into Fresh Pond Yard. P&W moved the following volumes of stone in the following years into Fresh Pond Yard: { } carloads in 2006, { } carloads in 2007, { } carloads in 2008, and { } carloads in 2009.

Second, NYAR complains that under the proposed Transaction D&H will no longer have a physical presence in Fresh Pond Yard. While D&H currently operates between Oak Point and Fresh Pond (via trackage rights over CSXT), D&H does not own, lease, or otherwise control any physical infrastructure at Fresh Pond. The proposed Transaction allows D&H to maintain its commercial access – via a more competitive framework – without having to physically operate into and out of Fresh Pond. In addition, the proposed Transaction does nothing to extinguish the D&H’s ability to utilize its rights under an existing trackage rights agreement to physically connect with the NYAR at Fresh Pond. D&H’s decision to recommence the exercise of its trackage rights, and hence its physical operation to/from Fresh Pond, will be predicated on

developing long-term, sustainable traffic volumes and economics. The proposed Transaction provides D&H a more competitive service for which to grow rail volumes.

Jointa Galusha L.L.C. and Palette Stone Corp.

JG/PS filed a letter with the Board seeking certain information. I am told that JG/PS subsequently met with representatives of D&H, and that the logistical issues described in the JG/PS letter have been resolved. In addition, I would like to point out that, as a result of the proposed Transaction, JG/PS will be able to track and monitor its shipments on CSXT's customer service website, ShipCSX.com.

As D&H witness Deering testifies, CPR/D&H's car tracking and other customer service tools will also continue to be available to JG/PS.

Sills Road Materials LLC.

Sills Road contends that the future of a proposed facility on Long Island, the Brookhaven Rail Terminal, may be "severely and adversely affected" by proposed Transaction. To alleviate the alleged harm, Sills Road requests two conditions: (i) a five year cost based agreement among CSXT, D&H, and NYAR to determine rates for stone moving from Comstock or Saratoga Springs, NY to the BRT; and (ii) Board oversight on the Albany – Fresh Ponds Segment. There is no justification for either condition.

The transportation of stone traffic into Long Island is highly competitive. The D&H and P&W both handle stone by rail. In addition, there is truck and barge competition. Moreover, the BRT is merely a proposal; the construction is yet to be approved by the Board. The BRT facility will not be captive to CSXT or D&H. Rail service to the BRT will be provided only by NYAR. Since there is existing competition in the delivery of stone to Fresh Pond between D&H and

P&W, Sills Road should not be concerned about the rates of the competitive D&H, but about the rates of the sole railroad that will be able to serve BRT, the NYAR.

Sills Road uses the phrase that it “is committed to purchase annually up to 500,000 tons of aggregate.” Sills Road does not say that it has entered a contract to purchase 500,000 tons of aggregate or indicate in any verifiable manner that it must buy aggregate. Moreover, Sills Road does not quantify the “substantial investment” in the BRT, especially since the Board has not authorized the construction of the BRT. Sills Road has not provided any evidence of even potential harm, much less harm that would be caused by D&H becoming more competitive.

Sills Road asks for oversight of service over the Albany – Fresh Pond Segment. No justification is provided in the unverified late letter. Sills Road is not even receiving service at the proposed unapproved BRT.

CONCLUSION

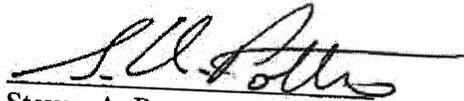
None of the parties commenting have shown that the proposed Transaction will reduce competition. NYCEDC supports the proposed Transaction without reservation and NYSDOT supports the proposed Transaction with minor concerns that I have shown to be unwarranted. The employees of CSXT adversely affected by the proposed Transaction will receive appropriate protection through the Labor Protective Conditions. There is competition for traffic to Fresh Pond Yard that will only be enhanced by the proposed Transaction.

The proposed Transaction provides a significantly more reliable and efficient freight rail route for CSXT for traffic moving between Eastern Canada and the Eastern United States. CSXT believes the public will benefit from the proposed Transaction. The proposed Transaction will enhance competition, not only between CSXT and D&H, but also with other transportation providers serving the freight lanes between Canada and the United States.

VERIFICATION

I, Steven C. Potter, 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 the file this Verified Statement.

Executed on July 23, 2010.

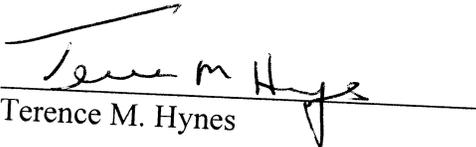

Steven A. Potter

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Applicants' Response to Comments and Requests for Conditions and Rebuttal in Support of Application to be served by first class mail, postage prepaid, this 23rd day of July 2010, to all Parties of Record and to the following:

Secretary of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division, Room 3109
Department of Justice
Washington, D.C. 20530


Terence M. Hynes